

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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RIVERKEEPER, INC., WATERKEEPER ALLIANCE, INC.
ENVIRONMENTAL ADVOCATES OF NEW YORK, INC.,
and PAUL GALLAY,

Petitioners/Plaintiffs,

for a judgment pursuant to Article 7-A of the State Finance Law and
Article 78 and Section 3001 of the Civil Practice Law and Rules,

-against-

JOSEPH MARTENS, acting in his capacity as Commissioner of the
New York State Department of Environmental Conservation and as
Chair and a voting Member of the Board of Directors of the New York
State Environmental Facilities Corporation, HOWARD ZUCKER,
CESAR A. PERALES, FRANCIS T. CORCORAN, VITA DEMARCHI,
and CHARLES J. KRUZANSKY, each acting in their capacities as
voting Members of the Board of Directors of the New York State
Environmental Facilities Corporation, MATTHEW J. DRISCOLL,
acting in his capacity as President and Chief Executive Officer of the
New York State Environmental Facilities Corporation, HOWARD P.
MILLSTEIN, DONNA J. LUH, E. VIRGIL CONWAY, RICHARD N.
SIMBERG, BRANDON R. SALL, J. DONALD RICE JR., and JOSÉ
HOLGUÍN-VERAS, each acting in their capacities as voting Members
of the Board of Directors of the New York State Thruway Authority,
THOMAS J. MADISON, acting in his capacity as Executive Director of
the New York State Thruway Authority, SHELDON SILVER, JOHN A.
DeFRANCISCO, and ROBERT L. MEGNA, each acting in their
capacities as voting Members of the New York State Public Authorities
Control Board, the NEW YORK STATE ENVIRONMENTAL
FACILITIES CORPORATION, the NEW YORK STATE THRUWAY
AUTHORITY, the NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, and the NEW YORK STATE
PUBLIC AUTHORITIES CONTROL BOARD,

Respondents/Defendants.

Index No. 5463-14

**NOTICE OF
VERIFIED PETITION
AND COMPLAINT**

Oral Argument
Requested

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PLEASE TAKE NOTICE that, upon the annexed verified petition and complaint of

Petitioners/Plaintiffs Riverkeeper, Inc., Waterkeeper Alliance, Inc., Environmental Advocates of

New York, Inc., and Paul Gallay (collectively "Plaintiffs"), verified on the twenty-fourth (24th)

day of October, 2014, the accompanying Affirmation of Daniel E. Estrin, dated October 25, 2014, with all of the exhibits annexed thereto, and all of the additional papers to be served and filed by Plaintiffs in support thereof, an application will be made to the Supreme Court of the State of New York, County of Albany, at the Courthouse located at 16 Eagle Street, Albany, New York 12207, on the ninth (9th) day of January, 2015, at 9:30 a.m., or as soon thereafter as counsel may be heard, for a judgment pursuant to Article 7-A of the State Finance Law (Citizen-Taxpayer Actions) and Article 78 and Section 3001 of the New York Civil Practice Law and Rules ("CPLR"), granting all of the relief sought in the annexed verified petition and complaint, awarding Plaintiffs their reasonable legal fees and actual costs and disbursements associated with this proceeding, and providing such other and further relief as the Court may deem just, proper, and equitable under the circumstances; and

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR § 7804(c), Respondents/Defendants Joseph Martens, as Commissioner of the New York State Department of Environmental Conservation and as Chair of the Board of Directors of the New York State Environmental Facilities Corporation, Howard Zucker, Cesar A. Perales, Francis T. Corcoran, Vita Demarchi, and Charles J. Kruzansky, as voting Members of the Board of Directors of the New York State Environmental Facilities Corporation, Matthew J. Driscoll, as President and CEO of the New York State Environmental Facilities Corporation, Howard P. Millstein, Donna J. Luh, E. Virgil Conway, Richard N. Simberg, Brandon R. Sall, J. Donald Rice Jr., and José Holguín-Veras, as voting Members of the Board of Directors of the New York State Thruway Authority, Sheldon Silver, John A. DeFrancisco, and Robert L. Megna, as voting Members of the New York State Public Authorities Control Board, New York State Environmental Facilities Corporation, New York State Thruway Authority, New York State Department of Environmental

Conservation and New York State Public Authorities Control Board (collectively, “Defendants”), are required to serve their verified answers and supporting affidavits, if any, upon Plaintiffs at least five days prior to the above-referenced return date; and

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR § 7804(e), Defendants New York State Environmental Facilities Corporation, New York State Thruway Authority, New York State Department of Environmental Conservation and New York State Public Authorities Control Board, are required to serve and file with the Clerk of Court, together with their verified answers and answering affidavits, if any, a certified transcript of the record of the proceedings under consideration herein, along with the entire official files concerning the subject matter of the verified petition and complaint held by such Defendants and referred to in said proceedings as being part of the official records kept by such Defendants herein.

Respectfully submitted,

PACE ENVIRONMENTAL LITIGATION CLINIC, INC.

By: 

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Counsel for Petitioners/Plaintiffs

Dated October 26, 2014
White Plains, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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RIVERKEEPER, INC., WATERKEEPER ALLIANCE, INC.
ENVIRONMENTAL ADVOCATES OF NEW YORK, INC.,
and PAUL GALLAY,

Petitioners/Plaintiffs,

for a judgment pursuant to Article 7-A of the State Finance Law and
Article 78 and Section 3001 of the Civil Practice Law and Rules,

-against-

JOSEPH MARTENS, acting in his capacity as Commissioner of the
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Control Board, the NEW YORK STATE ENVIRONMENTAL
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AUTHORITY, the NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, and the NEW YORK STATE
PUBLIC AUTHORITIES CONTROL BOARD,

Respondents/Defendants.
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Index No. 5463-14

**VERIFIED PETITION
AND COMPLAINT**

Oral Argument
Requested

Petitioners/Plaintiffs Riverkeeper, Inc., Waterkeeper Alliance, Inc., Environmental
Advocates of New York, Inc., and Paul Gallay (hereinafter, "Plaintiffs"), by their attorneys, Pace
Environmental Litigation Clinic, Inc., as and for their Verified Petition and Complaint

(“Complaint”) against Respondents/Defendants Joseph Martens, Howard Zucker, Cesar A. Perales, Francis T. Corcoran, Vita Demarchi, Charles J. Kruzansky, Matthew J. Driscoll, Howard P. Millstein, Donna J. Luh, E. Virgil Conway, Richard N. Simberg, Brandon R. Sall, J. Donald Rice Jr., José Holguín-Veras, Thomas J. Madison, Sheldon Silver, John A. Defrancisco, Robert L. Megna, the New York State Environmental Facilities Corporation, the New York State Thruway Authority, the New York State Department of Environmental Conservation, and the New York State Public Authorities Control Board (hereinafter, “Defendants”), respectfully allege as follows:

NATURE OF THE PROCEEDING

1. This is a hybrid proceeding and action for declaratory and equitable relief brought pursuant to Article 7-A (Citizen-Taxpayer Actions) of the State Finance Law, and Article 78 and Section 3001 of the Civil Practice Law and Rules (“CPLR”), challenging various illegal actions and determinations by Defendants to approve financing by Defendant New York State Environmental Facilities Corporation, to be drawn from New York State’s Clean Water State Revolving Fund (“CWSRF”), for certain aspects of Defendant New York State Thruway Authority’s New New York Bridge (“NNYB”) transportation infrastructure construction project.
2. On June 16, 2014, Governor Andrew Cuomo announced in a press release that Defendant New York State Environmental Facilities Corporation (“NYSEFC”) would provide up to \$511.5 million in CWSRF low- and no-interest financing to Defendant New York State Thruway Authority (“NYSTA”) for the purpose of financing certain components of the NNYB construction project, including the demolition of the existing Tappan Zee Bridge.

See Affirmation of Daniel E. Estrin dated October 25, 2014, filed herewith (“Estrin Affirmation”) Ex. 2.

3. This public announcement was made by the Governor as if the NNYB financing proposal was already a “done deal,” despite the fact that numerous legally required prerequisites to such financing had not been achieved, including without limitation: (1) formal votes by three purportedly independent bodies—the Board of Directors of NYSEFC, the Public Authorities Control Board and the Board of Directors of NYSTA; (2) review and approval of the unconventional and unprecedented financing proposal by the United States Environmental Protection Agency (“USEPA”); and (3) compliance with mandatory public notice and comment procedures and other procedural requirements of federal and State law.
4. Upon information and belief, CWSRF financing has never before been utilized or authorized in New York State, or any other state, for a transportation project such as components of the massive NNYB construction and demolition project, because such construction projects do not enhance or improve water quality, and thus have never been considered to be substantively eligible for such financing. However, fully consistent with the Governor’s press release, on June 26, 2014, the Board of Directors of Defendant NYSEFC unanimously approved the proposal for NYSEFC to provide NYSTA with approximately \$511.5 million from the New York State CWSRF to finance twelve separate components of the NNYB construction project. Then, on or about July 16, 2014, Defendant New York Public Authorities Control Board passed a resolution approving one half of the \$511.5 million, or approximately \$256 million, in no-interest financing. Finally, on or about August 6, 2014, the Board of Directors of Defendant NYSTA

approved the financing proposal. Plaintiffs challenge each of these determinations in this action.

5. NYSTA has publicly announced that it intends to return to the New York Public Authorities Control Board in the near future to request approval for the remaining, as of yet unapproved, \$256 million.
6. Notwithstanding the above-referenced State board approvals, USEPA has not approved Defendants' unconventional and unprecedented financing proposal, and in fact has expressly disallowed approximately \$482 million of the proposed \$511.5 million based upon its legally correct finding that seven of the twelve project components for which CWSRF financing was sought by NYSTA are substantively ineligible for such financing under federal law. *See* Estrin Affirmation Ex. 1 at 2 ("USEPA Ruling Letter").
7. The seven specific NNYB project components for which CWSRF financing was expressly disallowed by USEPA are: (1) Removal of the Existing Bridge; (2) Dredging for Construction Vessels; (3) Armoring the Hudson River Bottom; (4) Underwater Noise Attenuation System; (5) Shared Use Path; (6) Oyster Bed Restoration; and (7) Falcon Nest Box Relocation. Together, these seven project components comprise approximately \$482 million of the originally proposed \$511.5 million in CWSRF financing.
8. CWSRF financing for each of these project components was disallowed by USEPA based upon the Agency's express findings that each of these project components did not implement a specifically recommended activity in the New York-New Jersey Harbor Estuary Area Comprehensive Conservation and Management Plan ("HEP CCMP") as is required by federal law, and instead was only proposed for the intended purpose of

attempting to mitigate harms caused by a major new bridge construction project within the estuary. *See Estrin Affirmation Ex. 1 at 2-3.*

9. In addition to the substantive ineligibility of each of these seven NNYB project components totaling approximately \$482 million, the public was never provided with the legally required opportunity to comment upon the financing approvals that are the subject of this lawsuit. Defendants' failure to comply with these mandatory public notice and comment requirements constituted gross violations of both federal and New York State law. As such, Defendants' determinations to approve all twelve of the originally proposed NNYB project components—including those the USEPA found to be *substantively* eligible for CWSRF financing—should be annulled by this Court on the basis that Defendants deprived the public of legally guaranteed procedural rights when they failed to comply with their non-discretionary notice and comment obligations pursuant to federal and State law.
10. Notwithstanding USEPA's correct rulings that the seven above-referenced NNYB project components are *substantively* ineligible for CWSRF financing under federal law, Plaintiffs are compelled to file this lawsuit because: (1) Defendants have repeatedly and consistently maintained that USEPA approval is not required prior to the closing of the CWSRF loans, and have previously acted in the face of USEPA skepticism with disregard for USEPA's concerns, making it unclear to Plaintiffs whether Defendants intend to comply with USEPA's recent eligibility rulings; (2) USEPA only ruled with respect to the *substantive* eligibility of each of the twelve proposed NNYB project components, and did not address in its Ruling Letter the illegal process utilized by Defendants through which the public was blatantly deprived of its clear statutory and

regulatory public participation rights guaranteed under federal and New York State law;

(3) Defendants NYSEFC, NYSTA and New York State Department of Environmental Conservation (“NYSDEC”) recently announced their intention to administratively appeal USEPA’s substantive eligibility rulings, and Plaintiffs wish to protect their rights to challenge Defendant’s illegal determinations during the pendency of any such appeal;

and (4) USEPA appears to have only made its substantive eligibility rulings under federal law, and Plaintiffs assert herein that Defendants have violated both federal and New York State law. Plaintiffs’ lawsuit is thus proper and necessary to protect their interests, and the interests of their organizational members, from Defendants’ wrongful expenditure, misappropriation, misapplication and/or other illegal disbursements of New York State CWSRF monies in connection with the NNYB infrastructure project.

11. Moreover, not only are several of the components of the NNYB bridge construction project for which CWSRF financing has been approved by Respondents legally ineligible for such financing, but Defendants’ approval of the financing proposal—if it is not overturned—sets an extremely dangerous precedent. According to Defendant NYSDEC, New York State alone will have approximately \$36 billion in clean water infrastructure needs to be met over the next twenty years. *See* Estrin Affirmation Exs. 3, 4. Nationally, water infrastructure needs exceed \$630 billion to simply maintain the existing levels of service. *See* Estrin Affirmation Ex. 5.

12. The failure of Defendants to appropriately and sufficiently address existing and future genuine clean water infrastructure requirements—which is the actual purpose of the CWSRF program that defendants have attempted to raid to help finance their NNYB project—has already caused, and will continue to cause, actual and significant adverse

economic, human health, environmental, ecological, recreational, aesthetic, and other injuries to Plaintiffs and their organizational members.

13. If Defendants succeed in their ongoing efforts to draw over a half billion dollars from the New York State CWSRF to finance substantively ineligible components of the NNYB construction project, not only will those State funds not be available for many years to fund other necessary water infrastructure projects, but it will also set a damaging precedent that will invite New York State to divert its State CWSRF monies to other projects that lack or have a tenuous connection to the legal purposes of the fund. It would also provide other states with precedential support for their efforts to divert their CWSRF resources to projects that have little or nothing to do with water quality, water resources, clean water infrastructure, or any other intended purposes of the CWSRF program.
14. In this hybrid proceeding and action, Plaintiffs seek a judgment declaring that the Defendants, their agents and employees, have caused, are now causing, or are about to cause a wrongful expenditure, misappropriation, misapplication, or other illegal disbursement of state CWSRF monies, by expending such funds for projects that are legally ineligible for such financing under both federal and State law.
15. Plaintiffs further seek a declaration that Defendants' approvals of such expenditures were also invalid and illegal because Defendants failed to comply with mandatory federal and State public participation requirements, and other mandatory procedural requirements, prior to making their determinations to approve such unlawful expenditures.
16. Plaintiffs also seek a judgment pursuant to Section 7803(3) of the CPLR, annulling the Defendants' determinations complained of herein on the grounds that they were made in

violation of lawful procedure, were affected by errors of law, and were arbitrary, capricious, and an abuse of discretion.

17. Plaintiffs also seek, pursuant to State Finance Law Section 123-e, to permanently enjoin Defendants' wrongful expenditure, misappropriation, misapplication, or other illegal disbursement of State funds, and to require restitution to the New York State CWSRF of all funds wrongfully expended, misappropriated, misapplied, or illegally disbursed by Defendants.

18. Plaintiffs also seek from Defendants, pursuant to State Finance Law Section 123-g, Plaintiffs' reasonable attorneys' fees, costs and expenses of this action, and such other and further relief as this Court may deem just and proper under the circumstances.

JURISDICTION AND VENUE

19. This Court has jurisdiction over the subject matter of this action pursuant to Article 7-A of the State Finance Law and Sections 7803 and 3001 of the CPLR.

20. Venue is proper in the Court pursuant to Section 123-c of the State Finance Law, and Sections 505(a) and 506(b) of the CPLR.

THE PARTIES

Plaintiffs

21. Plaintiff Riverkeeper, Inc. ("Riverkeeper") is a 501(c)(3) not-for-profit corporation organized and existing under the laws of the State of New York; is a citizen-taxpayer of the State of New York; and has its principal place of business at 20 Secor Road, Ossining, New York 10562. Riverkeeper is a member-supported watchdog organization with approximately 4,000 active members, many of whom are also residents and citizen taxpayers of the State of New York. Riverkeeper is dedicated to defending the Hudson

River and its watershed and protecting the drinking water supply of nine million New York City and Hudson Valley residents. For more than forty-four years, Riverkeeper has stopped polluters, championed public access to the river, influenced land use decisions, and restored habitat, benefiting the natural and human communities of the Hudson River and its watershed. Riverkeeper brings this case on behalf of itself and its members, who would be injured if Defendants get away with utilizing CWSRF monies for transportation infrastructure projects, rendering those monies unavailable for their intended purpose—water quality improvements. Many Riverkeeper members reside in the Hudson Valley, including within Westchester and Rockland Counties, near the NNYB construction project and the existing Tappan Zee Bridge. Many other Riverkeeper members reside on or near, and often use and enjoy, other parts of the Hudson River and other water bodies around the State of New York. Many of the water bodies that Riverkeeper members currently use and enjoy, or wish to use and enjoy, exist in a state of violation of State water quality standards and/or are impaired for their best uses as a result of water quality problems resulting in large part from the lack of funding for clean water infrastructure development and improvement around the State.

22. Plaintiff Waterkeeper Alliance, Inc. (“Waterkeeper”) is a national 501(c)(3) not-for-profit membership corporation, organized and existing under the laws of the State of New York; is a citizen-taxpayer of the State of New York; and has its principal place of business at 17 Battery Place, Suite 1329, New York, New York 10004. Waterkeeper serves as an umbrella organization for Riverkeeper, Soundkeeper, Baykeeper, and other Waterkeeper member organizations throughout North America and in other countries. Waterkeeper brings this case on behalf of itself and its individual and organizational

members within the State of New York, many of whom are citizen taxpayers of the State of New York. Waterkeeper, its individual members, and the individual members of its member organizations who use and enjoy waters within New York State will be injured if Defendants get away with utilizing CWSRF monies for transportation infrastructure projects, rendering those monies unavailable for their intended purpose—water quality improvements. Waterkeeper provides support to its member organizations through scientific, legal, strategic planning and communications related outlets making each a more effective clean water advocate in their respective communities, the court room, and the media. Each of the more than 220 waterkeeper organizations are devoted to citizen action for the protection of various waterbodies from a range of harms. Waterkeeper aids in facilitating the protection of more than 1.5 million square miles of waterways spanning six continents.

23. Plaintiff Environmental Advocates of New York, Inc. (“EANY”), is a 501(c)(3) not-for-profit membership corporation, organized and existing under the laws of the State of New York; is a citizen-taxpayer of the State of New York; and has its principal place of business at 353 Hamilton Street, Albany, New York 12210. EANY brings this case on behalf of itself and its members, many of whom are also residents and citizen taxpayers of the State of New York. EANY and its members will be injured if Defendants get away with utilizing CWSRF monies for transportation infrastructure projects, rendering those monies unavailable for their intended purpose—water quality improvements. EANY’s mission is to protect air, land, *water*, and wildlife and the health of *all* New Yorkers. EANY *monitors state government*, evaluates proposed laws, and champion policies and practices that will ensure *the responsible stewardship* of our shared environment. EANY

has championed its cause as an environmental watchdog organization for forty-five years, and has been involved in many environmental battles centering around state protections for the environment and its wildlife as well as the provisioning of financial support for statewide conservation. EANY's lengthy resume of environmental accomplishments include its participation in passing the Hudson River Estuary Management Act, the 1996 Clean Water/Clean Air Bond Act and the Environmental Protection Fund, among other hallmark statutes that protect water quality and ensure that local communities have access to capital for water quality infrastructure improvements.

24. Plaintiff Paul Gallay is an individual New York State resident and citizen-taxpayer of the State of New York, residing at 9 Railroad Avenue, Cold Spring, New York 10516. Mr. Gallay is the President of Plaintiff Riverkeeper, Inc., and thus works full-time to protect the Hudson River watershed and the drinking water supplies for nine million New Yorkers. An attorney and educator, Mr. Gallay has dedicated himself to the environmental movement since 1987, when he left the private practice of law and went to work for the office of the New York State Attorney General. In 1990, Mr. Gallay began a ten-year stint working as an attorney at NYSDEC, where he brought hundreds of corporate and government polluters to justice. Mr. Gallay subsequently spent a decade in the land conservation movement before becoming Riverkeeper's President in 2010. Mr. Gallay is a graduate of Williams College and Columbia Law School, and has held a number of teaching positions, including his current teaching appointment at The Beacon Institute/Clarkson University. Mr. Gallay grew up next to the Kensico Reservoir in Westchester County, and often visits, uses, and enjoys the Hudson River, its tributaries, and other waters around the State for recreational and aesthetic enjoyment. Many of these

waters suffer from impaired water quality. Mr. Gallay is extremely concerned about the continuing problem of water quality and ecological degradation within the Hudson River watershed and around the entire State of New York, as well as about the enormous clean water infrastructure requirements the State currently faces and will continue to face, and the scarce financial resources that will be available to the State to meet these vital needs. Mr. Gallay would be injured if Defendants get away with utilizing CWSRF monies for transportation infrastructure projects, rendering those monies unavailable for their intended purpose—improvements to water quality in impaired water bodies that Mr. Gallay uses and enjoys.

Defendants

25. Defendant Joseph Martens was, at the time of the actions and omissions complained of herein, and upon information and belief remains as of the date of filing of this Petition and Complaint, the Commissioner of the NYSDEC, and the Chair and a voting member of the Board of Directors of NYSEFC.
26. Defendant Howard Zucker was, at the time of the actions and omissions complained of herein, and upon information and belief remains as of the date of filing of this Petition and Complaint, the Acting Commissioner of the New York State Department of Health, and a voting member of the Board of Directors of NYSEFC.
27. Defendant Cesar A. Perales was, at the time of the actions and omissions complained of herein, and upon information and belief remains as of the date of filing of this Petition and Complaint, the Secretary of State of the State of New York, and a voting member of the Board of Directors of NYSEFC.

28. Defendant Francis T. Corcoran was, at the time of the actions and omissions complained of herein, and upon information and belief remains as of the date of filing of this Petition and Complaint, a voting member of the Board of Directors of NYSEFC.
29. Defendant Vita Demarchi was, at the time of the actions and omissions complained of herein, and upon information and belief remains as of the date of filing of this Petition and Complaint, a voting member of the Board of Directors of NYSEFC.
30. Defendant Charles J. Kruzansky was, at the time of the actions and omissions complained of herein, and upon information and belief remains as of the date of filing of this Petition and Complaint, a voting member of the Board of Directors of NYSEFC.
31. Defendant Matthew J. Driscoll was, at the time of the actions and omissions complained of herein, and upon information and belief remains as of the date of filing of this Petition and Complaint, the President and Chief Executive Officer of NYSEFC.
32. Defendant Howard P. Milstein was, at the time of the actions and omissions complained of herein, and upon information and belief remains as of the date of filing of this Petition and Complaint, Chair and a voting member of the NYSTA Board of Directors.
33. Defendant Donna J. Luh was, at the time of the actions and omissions complained of herein, and upon information and belief remains as of the date of filing of this Petition and Complaint, Vice Chair and a voting member of the NYSTA Board of Directors.
34. Defendant E. Virgil Conway was, at the time of the actions and omissions complained of herein, and upon information and belief remains as of the date of filing of this Petition and Complaint, a voting member of the NYSTA Board of Directors.

35. Defendant Richard N. Simberg was, at the time of the actions and omissions complained of herein, and upon information and belief remains as of the date of filing of this Petition and Complaint, a voting member of the NYSTA Board of Directors.
36. Defendant Brandon R. Sall was, at the time of the actions and omissions complained of herein, and upon information and belief remains as of the date of filing of this Petition and Complaint, a voting member of the NYSTA Board of Directors.
37. Defendant J. Donald Rice, Jr. was, at the time of the actions and omissions complained of herein, and upon information and belief remains as of the date of filing of this Petition and Complaint, a voting member of the NYSTA Board of Directors.
38. Defendant José Holguín-Veras was, at the time of the actions and omissions complained of herein, and upon information and belief remains as of the date of filing of this Petition and Complaint, a voting member of the NYSTA Board of Directors.
39. Defendant Thomas J. Madison was, at the time of the actions and omissions complained of herein, and upon information and belief remains as of the date of filing of this Petition and Complaint, the Executive Director of NYSTA.
40. Defendant Sheldon Silver was, at the time of the actions and omissions complained of herein, and upon information and belief remains as of the date of filing of this Petition and Complaint, an elected member and the Speaker of the New York State Assembly, representing Assembly District 65. In his capacity as an elected public official, Defendant Silver was and is also one of three voting members of Defendant New York State Public Authorities Control Board.
41. Defendant John A. DeFrancisco was, at the time of his actions and omissions complained of herein, and upon information and belief remains as of the date of filing of this Petition

and Complaint, an elected member of the New York State Senate representing the 50th Senate District. In his capacity as an elected public official, Defendant DeFrancisco was and is also one of three voting members of Defendant New York State Public Authorities Control Board.

42. Defendant Robert Megna was, at the time of his actions and omissions complained of herein, and upon information and belief remains as of the date of filing of this Petition and Complaint, the New York State Budget Director, appointed by Governor Andrew M. Cuomo. In his capacity as an appointed public official, Defendant Megna was and is also one of three voting members of Defendant New York State Public Authorities Control Board.

43. Defendant New York State Environmental Facilities Corporation is a State-owned public benefit corporation created and empowered pursuant to Article 5, title 12 of the Public Authorities Law, consisting of seven directors: “the commissioner of environmental conservation who shall be chair, the commissioner of health, the secretary of state, and four directors appointed by the governor by and with the advice and consent of the senate.” N.Y. PUB. AUTH. LAW § 1282(1) (McKinney 2006). The purposes of NYSEFC shall be

the planning, financing, construction, maintenance and operation of sewage treatment works, sewage collecting systems, air pollution control facilities, water management facilities, storm water collecting systems, solid waste disposal facilities and state park infrastructure projects, the construction on behalf of municipalities and state agencies of sewage treatment works, sewage collecting systems, air pollution control facilities, water management facilities, storm water collecting systems and solid waste disposal facilities, the financing, for or on behalf of persons, of sewage treatment works, air pollution control facilities, water management facilities, and solid waste disposal facilities and the making of loans which may, but need not, be secured by mortgage, contracts and other instruments to persons for the planning and construction of sewage

treatment works, air pollution control facilities, water management facilities and solid waste disposal facilities and the assistance of municipalities, state agencies and the state in the planning, financing, construction, maintenance and operation of sewage treatment works, sewage collecting systems, air pollution control facilities, water management facilities, storm water collecting systems and solid waste disposal facilities, in accordance with the provisions of this title.

N.Y. PUB. AUTH. LAW § 1283(1).

44. Defendant New York State Thruway Authority is a State-owned public corporation created and empowered pursuant to Article 2, title 9 of the Public Authorities Law, consisting of seven members appointed by the governor by and with the advice and consent of the senate. N.Y. PUB. AUTH. LAW § 352(1). The purposes of NYSTA are to “finance, construct, reconstruct, improve, develop, maintain or operate a thruway system as provided by and subject to the provisions of this title together with facilities for the public incidental thereto.” N.Y. PUB. AUTH. LAW § 353.
45. Defendant Public Authorities Control Board (“PACB”) was created and empowered pursuant to Sections 50 and 51 of the New York State Public Authorities Law, which direct that eleven statewide public authorities—including NYSEFC—must receive a resolution of approval from PACB prior to entering into any project-related financings. The five members of PACB are appointed by the Governor to serve one-year terms, with one member representing the Governor and acting as the Chairperson. The Governor appoints the four remaining members based upon the recommendations of the Majority and Minority leaders of the Legislature. *See About the Public Authorities Control Board*, N.Y. ST. DIVISION OF THE BUDGET, <http://www.budget.ny.gov/agencyGuide/pacb/aboutPACB.html> (last visited Oct. 25, 2014).

46. Defendant New York State Department of Environmental Conservation is an executive agency of the State of New York with the powers and duties set forth in the New York State Environmental Conservation Law.

LEGAL BACKGROUND

Relevant Federal Law

47. The Federal Water Pollution Control Act, commonly referred to as the Clean Water Act, is the primary federal law in the United States governing water pollution. The Act was passed by Congress in 1972. The Act's bedrock "objective" is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012).

48. In the very first section of the Clean Water Act, Congress emphasized the importance of public participation in its implementation:

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the [USEPA] Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

33 U.S.C. § 1251(e).

49. The federal CWSRF Program was created by Congress as part of the 1987 amendments to the Clean Water Act. 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 nationally. *See Clean Water State Revolving Fund: 25 Years of Investment in Our Nation's Water Infrastructure*, U.S. ENVTL. PROT. AGENCY available at http://water.epa.gov/grants_funding/cwsrf/cwsrf_index.cfm (last visited Oct. 25, 2014).

50. Each year, Congress appropriates funding that the USEPA distributes to each of the fifty states, the District of Columbia, and Puerto Rico according to a funding formula. Upon information and belief, states are required to provide a twenty percent match to USEPA's annual capitalization grant. States sign a capitalization grant agreement with USEPA that describes in detail their responsibilities for administration of the CWSRF.
51. The Clean Water Act requires, as a prerequisite to a state receiving federal capitalization grants into a CWSRF, that the state first establish such a fund to be administered by an instrumentality of the state "with such powers and limitations as may be required to operate such fund in accordance with the requirements and objectives of [the Clean Water Act]." 33 U.S.C. § 1383(b); *see* 33 U.S.C. § 1383(a).
52. Pursuant to the above-referenced federal requirements, the instrumentalities that have been established by New York State to administer its CWSRF are NYSDEC and NYSEFC. The New York State CWSRF has been capitalized with a combination of federal and state dollars. NYSEFC began providing financing for CWSRF-eligible projects in 1990, and as of 2013 had financed 1,650 projects to the sum of \$13.6 billion. *See Estrin Affirmation Ex. 6 at 1.*

53. The Clean Water Act contains numerous substantive requirements relating to project eligibility for CWSRF financing, as well as nondiscretionary procedural requirements to ensure that the public is afforded a meaningful opportunity to review and comment upon project financing proposals and otherwise participate in the implementation of a state's CWSRF process.

54. With respect to project eligibility, the Act mandates that only specified categories of water quality projects are eligible for CWSRF financing:

The amounts of funds available to each State water pollution control revolving fund shall be used only for providing financial assistance -- (1) to any municipality, intermunicipal, interstate, or State agency for construction of publicly owned treatment works (as defined in section 1292 of this title); (2) for the implementation of a management program established under section 1329 of this title; (3) for development and implementation of a conservation and management plan under section 1330 of this title.

33 U.S.C. § 1383(c)(1)-(3); *see also* 40 C.F.R. § 35.3115 (2014) (“Eligible activities of the SRF.”).¹

55. Upon information and belief, the Defendants have only relied upon the eligibility category that permits financial assistance from a CWSRF “for development and implementation of a conservation and management plan under section 1330 of this title.”

33 U.S.C. § 1383(c)(3).

56. This section of the Clean Water Act is entitled “National Estuary Program,” and sets forth a process under which states may nominate, and USEPA may approve, nationally important estuaries for development of CCMPs, which recommend priority corrective

¹ On May 28, 2014, the Water Resources Reform and Development Act of 2014 was enacted thereby amending section 1383(c). H.R. Res. 3080, 113th Cong. (2014) (enacted). These amendments are applicable to fund projects starting in fiscal year 2015, which began on October 1, 2014. Although these amendments added more categories of projects eligible for assistance under the CWSRF, these additional categories are not relevant to the causes of action asserted in this proceeding.

actions and set compliance schedules in order to protect water quality and designated uses in the estuary. *See* 33 U.S.C. § 1330(b)(4).

57. The Hudson River estuary is part of a USEPA-approved final CCMP which was finalized in 1996, and is known as the New York-New Jersey Harbor Estuary Program Comprehensive Conservation and Management Plan (“HEP CCMP”).
58. Upon information and belief, Defendants have hinged their arguments in support of substantive eligibility on the misplaced belief that all of the NNYB project components they seek to finance from the New York State CWSRF “implement” the HEP CCMP for the New York-New Jersey Harbor-Estuary Area. Defendants are wrong with respect to the majority of the NNYB project components.
59. In its Ruling Letter, USEPA correctly articulated the clear, bright-line test mandated by federal law for determining if an estuary project is eligible for CWSRF financing for purposes of implementing a CCMP. The project must actually implement a specific recommendation made in the CCMP, and must not be intended to mitigate harms caused by major new construction projects within an estuary. As further explained below, each of the seven NNYB project components for which USEPA has disallowed CWSRF financing fails to satisfy these requirements.
60. USEPA’s eligibility test is consistent with the intended scope and focus of the Clean Water Act’s implementation of the Section 320 National Estuary Program, as well as USEPA’s its own guidance documents.
61. The Clean Water Act commands that a CCMP focus on “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the estuary, including restoration and maintenance of water quality, a balanced indigenous population of shellfish, fish and

wildlife, and recreational activities in the estuary, and assur[ing] that the designated uses of the estuary are protected.” 33 U.S.C. § 1330(b)(4).

62. USEPA provides guiding principles for states to utilize when making CWSRF disbursement decisions based on Section 320 of the Clean Water Act. These principles stress that “[a]ll section 320 projects implement a section 320 CCMP and must be sanctioned in the plan . . . [and] [p]rojects must have a direct benefit to the water quality of an estuary.” Estrin Affirmation Ex. 7 at 13-14. Water quality benefits include the “protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities, in and on water, and requires the control of point and nonpoint sources of pollution to supplement existing controls of pollution.” *Id.* at 14.

63. Clearly, the intended mitigation of water quality *injuries* to an estuary caused by a major transportation infrastructure project is not the kind of “benefit” intended for the implementation of the CCMP. As expressed by USEPA,

[t]he focus of corrective actions and compliance schedules in a conservation and management plan is . . . water quality-based and not for the mitigation of impacts directly caused by major construction projects - such as the replacement of the Tappan Zee Bridge - within an estuary . . . construction activities arising from transportation projects do not advance water quality, and CWSRF funding should not be used for these purposes.

Estrin Affirmation Ex. 1 at 1.

64. In order to ensure a fair and transparent public process and meaningful public participation, the federal Clean Water Act also requires States to annually prepare and finalize an “Intended Use Plan” “[a]fter providing for public comment and review.” The intended use plan (“IUP”) must identify the state’s

intended uses of the amounts available to its water pollution control revolving fund. Such intended use plan shall include, but not be limited to-

- (1) a list of those projects for construction of publicly owned treatment works on the State's priority list developed pursuant to section 1296 of this title and a list of activities eligible for assistance under sections 1329 and 1330 of this title;
- (2) a description of the short- and long-term goals and objectives of its water pollution control revolving fund;
- (3) information on the activities to be supported, including a description of project categories, discharge requirements under subchapters III and IV of this chapter, terms of financial assistance, and communities served;
- (4) assurances and specific proposals for meeting the requirements of paragraphs (3), (4), (5), and (6) of section 1382(b) of this title; and
- (5) the criteria and method established for the distribution of funds.

33 U.S.C. § 1386(c).

65. USEPA's Clean Water Act regulations are even more specific regarding the purposes and contents of an IUP, and the minimum participation rights that must be afforded the public. These federal regulations mandate, *inter alia*, that each state's annual IUP meet the following requirements:

(a) Purpose. The State must prepare a plan identifying the intended uses of the funds in the SRF and describing how those uses support the goals of the SRF. This Intended Use Plan (IUP) ***must be prepared annually and must be subjected to public comment and review*** before being submitted to [US]EPA. [US]EPA must receive the IUP prior to the award of the capitalization grant.

(b) Contents—

(1) List of projects.

(i) The IUP must contain a list of publicly owned treatment works projects on the State's project priority list developed pursuant to section 216 of the Act, to be constructed with SRF assistance. This list must include: the name of the community; permit number or

other applicable enforceable requirement, if available; the type of financial assistance; and the projected amount of eligible assistance.

(ii) ***The IUP must also contain a list of the nonpoint source and national estuary protection activities under sections 319 and 320 of the Act that the State expects to fund from its SRF.***

(iii) The IUP must provide information in a format and manner that is consistent with the needs of the Regional Offices.

(2) Short and long term goals. The IUP must describe the long and short term goals and objectives of the State's water pollution control revolving fund.

(3) Information on the SRF activities to be supported. The IUP must include information on the types of activities including eligible categories of costs to receive assistance, types of assistance to be provided, and SRF policies on setting the terms for the various types of assistance provided by the fund.

(4) Assurances and specific proposals. The IUP must provide assurances and specific proposals on the manner by which the State intends to meet the requirements of the following sections of this part: § 35.3135(c); § 35.3135(d); § 35.3135(e); § 35.3135(f); and § 35.3140.

(5) Criteria and method for distribution of funds.

(i) The IUP must describe the criteria and method established for the distribution of the SRF funds and the distribution of the funds available to the SRF among the various types of assistance the State will offer.

(ii) The IUP must describe the criteria and method the State will use to select section 212 treatment work project priority list and projects or programs to be funded as eligible activities for nonpoint sources and estuary protection management programs.

(c) Amending the IUP. The IUP project list may be changed during the year under provisions established in the IUP ***as long as the projects have been previously identified through the public participation process.***

40 C.F.R. § 35.3150 (emphases added).

66. As will be described in further detail below, Defendants' actions and omissions challenged herein violated the plain and unambiguous requirements of the Clean Water Act and its implementing federal regulations with respect to project eligibility, public participation, and other non-discretionary legal requirements.

Relevant State Law

67. As noted above, New York State's CWSRF program is implemented jointly by NYSEFC and NYSDEC. Statutory authority for such implementation is found in Article 5, title 12 of the Public Authorities Law and in Section 17-1909 of the Environmental Conservation Law.

68. Both NYSEFC and NYSDEC have promulgated regulations governing the implementation of New York State's CWSRF program, which are found at 21 New York Compilation of Codes, Rules, and Regulations ("NYCRR") Part 2602 and 6 NYCRR Part 649, respectively. These regulations expressly apply "to all recipients seeking or receiving financial assistance from the CWSRF *and to the activities of [NYSEFC and NYSDEC] in the discharge of [their] duties related to the CWSRF.*" 21 NYCRR § 2602.1(b); 6 NYCRR § 649.1(b) (2014) (emphasis added).

69. NYSEFC's and NYSDEC's governing regulations each expressly incorporate the project eligibility requirements of the federal Clean Water Act into their definitions of eligible "projects" under New York State law. *See* 21 NYCRR § 2602.2(53); 6 NYCRR § 649.2(51). Each of these definitions expressly conditions the eligibility of a project upon, *inter alia*, the project being "eligible for financing under the [Clean Water] [A]ct." 21 NYCRR § 2602.2(53); 6 NYCRR § 649.2(51). These state regulations confirm that a

project that is ineligible for CWSRF assistance under federal law is also ineligible under State law.

70. NYSEFC's and NYSDEC's governing regulations each also expressly require with respect to projects for which financing is purportedly eligible under 33 U.S.C. § 1383(c)(3) of the Clean Water Act (*i.e.*, "development and implementation of a conservation and management plan," which is also known as a Clean Water Act § 320 project), that the applicant demonstrate "how the project *implements a recommended activity* in the appropriate [US]EPA approved national estuary management plan." *See* 21 NYCRR § 2602(53); 6 NYCRR § 649.2(51) (emphasis added). This language confirms that a project's mere purported "consistency" with general clean water goals set forth in an estuary management plan will not suffice to render that project eligible for CWSRF financing unless the project also "implements" a specific "activity" that is expressly "recommended" in such plan.
71. NYSEFC's and NYSDEC's governing regulations each also expressly require that "all projects" (other than a "linked loan project," which is not relevant here) that have expressed an interest in CWSRF assistance *shall* be listed in the State's annual IUP and *shall* be ranked on the State's Project Priority List ("PPL"). *See* 21 NYCRR § 2602.3; 6 NYCRR § 649.3(a) (emphasis added).
72. NYSEFC's and NYSDEC's governing regulations each also expressly incorporate the mandatory public notice and public participation requirements of the federal Clean Water Act into their definitions of "Intended Use Plan." Each regulatory definition contains the following identical mandate: "The IUP *shall* be published in accordance with the [Clean Water] Act, and *shall* be subject to public review and comment." *See* 21 NYCRR §

2602.2(31); 6 NYCRR § 649.2(29) (emphasis added). *See also* 6 NYCRR § 649.3(h) (“In preparing the annual IUP and adopting the PPL the [NYSDEC] Commissioner ***shall provide for public comment and review in accordance with applicable law.***”) (emphasis added).

73. In light of the obvious importance of public notice and comment requirements reflected in both federal and New York State law with respect to the preparation of the State’s annual IUP and PPL, it is noteworthy that neither NYSEFC’s nor NYSDEC’s regulations purport to provide any exceptions to the clear and unambiguous requirement that all projects that the State proposes to fund from the CWSRF be included in the IUP and on the PPL, and be subject to the formal public notice and comment process.

74. NYSDEC’s regulations also specify that all projects “shall be listed according to their rank on the PPL and within project categories.” These project categories are titled Categories A through F, with “categories A through D relat[ing] solely to municipal projects,” and Categories A through C being determined “solely by the number of people who ***reside within the municipality’s jurisdiction*** based upon the latest census figures published by the United States Department of Commerce Bureau of the Census.” 6 NYCRR § 649.3(c) (emphasis added). “Category C” (the category in which the financing that is the subject of this lawsuit was placed by NYSEFC) is defined by NYSDEC’s regulations as municipal projects where such municipality has a population of more than 2,000,000 residents. *See* 6 NYCRR § 649.3(c)(3). Upon information and belief, according to the census, there is only one such municipality in New York State: The City of New York.

75. Defendants' actions and omissions challenged herein violated the plain and unambiguous requirements of New York State law with respect to substantive project eligibility, public participation, and other procedural mandates.

PERTINENT FACTS

The Construction of the NNYB to Replace the Existing Tappan Zee Bridge

76. Upon information and belief, the existing Tappan Zee Bridge opened to traffic in 1955 as part of the New York State Thruway extension between Suffern, New York and Yonkers, New York. In recent decades, traffic congestion has become an increasing problem and the aging bridge structure has reached the point where major reconstruction and extensive measures are needed to sustain the bridge. Thus, according to NYSTA:

The purpose of the project is to maintain a vital link in the regional and national transportation network by providing a Hudson River crossing between Rockland and Westchester Counties, New York that addresses the limitations and shortcomings of the existing Governor Malcolm Wilson Tappan Zee Bridge ("Tappan Zee Bridge"). The project would address the structural, operational, safety, security, and mobility needs of the Tappan Zee Hudson River crossing.

FED. HIGHWAY ADMIN., FINAL ENVTL. IMPACT STATEMENT ("FEIS") S-1, *available at* <http://www.newnybridge.com/documents/feis/vol1/00-executive-summary.pdf> (last visited Oct. 25, 2014).

77. Upon information and belief, since 2000, a number of alternatives have been considered for the replacement of the Tappan Zee Bridge and the enhancement of traffic capacity through the Interstate 87/287 corridor. After several years of study of various alternatives to address traffic capacity issues within the corridor (all of which included mass transit components), in 2011, NYSTA abruptly changed course and announced that it would fast-track an alternative proposal that would address only the structural replacement of

the Tappan Zee Bridge and would not include a mass transit component. *See* FEIS 1-1, 1-2, *available at* <http://www.newnybridge.com/documents/feis/vol1/01-purpose-and-need.pdf> (last visited Oct. 25, 2014).

78. In accordance with the National Environmental Policy Act (“NEPA”) and the State Environmental Quality Review Act (“SEQRA”), the expected environmental impacts from the bridge construction and demolition project were extensively studied by NYSTA and other federal and state agencies. These studies were documented in the FEIS, and in a “Joint NEPA Record of Decision and SEQRA Findings Statement” which, with respect to bridge construction- and demolition-related water quality impacts, determined that:

Construction activities for the Selected Alternative have the potential to affect water quality due to sediment resuspension. These activities include ***dredging and placement of armoring***, installation of cofferdams, driving of piles, vessel movement, and the ***demolition of the existing bridge***.

FED. HIGHWAY ADMIN. ET AL., TAPPAN ZEE HUDSON RIVER CROSSING PROJECT: JOINT RECORD OF DECISION AND STATE ENVIRONMENTAL QUALITY REVIEW ACT FINDINGS STATEMENT 15 (2012) (“NEPA ROD”), *available at* <http://www.newnybridge.com/documents/rod/00record-of-decision.pdf> (last visited Oct. 25, 2014) (emphasis added).

Thus, NYSTA unsurprisingly acknowledged in the NEPA ROD that the above-referenced components of the NNYB construction project could cause adverse water quality impacts, and did not conclude that these activities would result in improvements to water quality.

79. Upon information and belief, NNYB preconstruction activities commenced on or about October 2011, with formal construction beginning in earnest on or about October 16, 2013. *See* Estrin Affirmation Ex. 10.

Efforts by NYSEFC, NYSDEC and NYSTA to Finance the NNYB Project with New York State CWSRF Monies

80. Upon information and belief, on or about May 30, 2014, NYSTA submitted a “Project Listing Form” to NYSEFC. Upon information and belief, a project sponsor’s submittal of this form is the first step toward applying to NYSEFC for a CWSRF loan and toward having NYSEFC add a project to the IUP’s PPL.

81. On June 11, 2014, NYSDEC published a notice in its weekly on-line Environmental Notice Bulletin (“ENB”) “of a modification to the Annual Project Priority List in the Federal Fiscal Year (FFY) 2014 Clean Water State Revolving Fund Intended Use Plan (IUP).” Estrin Affirmation Ex. 11 at 2-3. The entirety of the pertinent information contained in this ENB notice was as follows:

Clean Water State Revolving Fund FFY 2014 Intended Use Plan Additional Annual List Projects

The New York State Environmental Facilities Corporation (NYS EFC) administers the Clean Water State Revolving Fund (CWSRF) on behalf of the New York State Department of Environmental Conservation (NYS DEC). This provides public notification of a modification to the Annual Project Priority List in the Federal Fiscal Year (FFY) 2014 Clean Water State Revolving Fund Intended Use Plan (IUP).

The following projects are added to or modified on the FFY 2014 Annual Project Priority List:

| Applicant Name | Project Number | Category | Score | New or Modified Project Amount | FFY 2014 Amount |
|-----------------------|----------------|----------|-------|--------------------------------|-----------------|
| NYCMWFA | 5223-03-00 | C | 127 | New | \$15,914,059 |
| NYCMWFA | 5223-04-00 | C | 127 | New | \$7,743,000 |
| NYCMWFA | 5218-04-00 | C | 124 | New | \$54,890,831 |
| NYS Thruway Authority | 7387-01-00 | C | 86 | New | \$511,450,000 |

| | | | | | |
|---------------------|------------|---|-----|-----|--------------|
| NYCMWFA | 5234-32-00 | C | 47 | New | \$2,877,000 |
| NYCMWFA | 5201-15-00 | C | 41 | New | \$11,471,982 |
| NYSERDA | 9171-02-00 | C | 22 | New | \$25,460,000 |
| Machias, Town of | 6619-02-00 | D | 113 | New | \$12,000,000 |

These projects were ready to proceed as of February 3, 2014 and are seeking subsidized financing in FFY 2014. Section 3.6 for the FFY 2014 IUP allows minor modifications to the IUP through the publication of a notice in the Environmental Notice Bulletin (ENB). NYS EFC has determined to maintain its offer of subsidized funding to any community ready to proceed with a project in its category on the IUP. Accordingly, the proposed modifications do not affect access to subsidized funding for any other projects in such funding categories pursuing financing in FFY 2014.

For additional information regarding the CWSRF program, please visit the NYS EFC website at: www.efc.ny.gov or call NYS EFC at 518-402-7396 or email to CWSRFinfo@efc.ny.gov.

Contact: Timothy P. Burns, NYS EFC - Division of Engineering and Program Management, 625 Broadway, Albany, NY 12207-2997, Phone: (518) 402-7396, Fax: (518) 402-7456, E-mail: iupcomments@efc.ny.gov.

Estrin Affirmation Ex. 11.

82. Thus, buried within the ENB notice's list of new projects added to NYSEFC's 2014 IUP PPL was one line in a table indicating an intention to provide financing to NYSTA in the amount of \$511,450,000. No other useful or meaningful information about the proposed financing could be discerned from the notice, and no reference was made to the fact that the proposed financing would be utilized for components of the NNYB construction project. Importantly, no informational hearing or opportunity for comment was offered to members of the public.

83. As shown above, the ENB notice also included the following statement: “Section 3.6 for the FFY 2014 IUP allows minor modifications to the IUP through the publication of a notice in the Environmental Notice Bulletin (ENB).” However, as previously noted, neither federal nor state statutes and/or regulations contain any exceptions to the unambiguous requirements that additions of new projects to the PPL after USEPA approval require public notice and comment. *See* 40 C.F.R. § 35.3150; 6 NYCRR §§ 649.2(29), 649.3(h); 21 NYCRR §§ 2602.2(31), 2602.3.
84. NYSEFC and NYSDEC obviously cannot avoid the plain, nondiscretionary public participation requirements of federal and State law by placing a disclaimer in their own IUP by which they purport to give themselves a “pass” from the need to comply with these mandatory legal requirements. Moreover, it is not discernible from the ENB notice whether NYSDEC or NYSEFC ever actually determined that an unprecedented modification of the 2014 IUP adding more than a half billion dollars in financing from the New York State CWSRF to finance NNYB transportation infrastructure construction work was, in fact, a “minor modification” to the IUP. Had any such determination actually been made by Defendants, it would plainly have been an error of law, arbitrary, capricious and an abuse of discretion.
85. Even if NYSEFC and NYSDEC could avoid the plain public participation requirements of federal and State law through a facially inconsistent provision that they have included in their own IUP (which they cannot), the IUP actually explains that “[m]inor modifications to the IUP are those that do not affect the overall funding levels or priorities, such as transferring market-rate projects to the Annual PPL or adding new market-rate projects to the IUP, may be made through publication of a notice in the

Environmental Notice Bulletin (ENB).” Estrin Affirmation Ex. 6 at 12. However, upon information and belief, the portion of the CWSRF financing approved by the PACB on July 16, 2014 is for zero percent interest, and is thus certainly not a “market-rate project.” Thus, neither example of a purported “minor modification” cited by NYSEFC in the IUP is even comparable to the financing package at issue in this matter.

86. Plaintiffs did not become aware of the NNYB CWSRF financing proposal challenged herein until on or around June 16, 2014, when Governor Cuomo issued his aforementioned press release. Estrin Affirmation Ex. 2. Upon information and belief, on or around this same date, members of the Cuomo administration began calling environmental leaders around the state in an unsuccessful preemptive effort to convince them not to oppose the State’s illegal and unprecedented NNYB CWSRF financing proposal. To say that the public reaction to the announcement was extremely swift and negative would be an understatement.

87. Shortly after learning of the unprecedented proposal to finance a bridge construction project with Clean Water Act funds, Plaintiffs and the general public became aware that the NYSEFC Board of Directors had already planned to vote on the proposal at NYSEFC’s board meeting scheduled for June 26, 2014, a mere fifteen days after the defective and under-the-radar ENB notice, and just ten days after the Governor’s press release.

88. An effort was then immediately undertaken by Plaintiffs and many members of the public to communicate to NYSEFC and NYSDEC that many of the subject NNYB project construction components were substantively ineligible for CWSRF financing, that voting to finance any of the projects would be illegal because of the utter failure to provide for

public participation, and that at a minimum, the NYSEFC Board of Directors' vote on the proposal should be delayed to allow USEPA and the public to be heard, as required by federal and New York State law. *See, e.g.*, Estrin Affirmation Exs. 12-18, 25-26.

89. Numerous newspapers across the State also took notice and published editorials that were extremely critical of the Defendants' plans to raid the New York State CWSRF. Among these newspapers were the New York Times, which stated in an editorial that:

The vote is unnecessarily rushed . . . There has been not enough public notice about this transaction. The American Society of Civil Engineers estimated in 2013 that New York will need many billions of dollars in new wastewater and sewage infrastructure over the next 20 years. The public has a right to know more about why the new Tappan Zee bridge has suddenly appeared at top of the list.

Estrin Affirmation Ex. 19; *see also* Estrin Affirmation Exs. 20-24, 28-29.

90. On June 25, 2014, the day before the NYSEFC Board of Directors was scheduled to vote to approve the financing proposal, USEPA formally weighed in for the first time with its own letter to Defendant Martens. Estrin Affirmation Ex. 25. USEPA made numerous critical observations and asked several pointed questions that made certain that the federal government was extremely skeptical with respect to the substantive eligibility of the proposal to finance NNYB construction project components with CWSRF funds. Among USEPA's observations and questions to Defendants Martens, NYSEFC and NYSDEC, were the following:

[C]ontrary to some media reports of which I am aware, I wish to clarify at the outset that the [US]EPA **has not approved the request of the EFC**, as set forth in the May 28th letter. Rather, the [US]EPA is carefully reviewing the request...

[W]e 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...

[I]t 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...

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...*

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...

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...*

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...*

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. *[US]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.

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, [US]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.***

Estrin Affirmation Ex. 25 (emphases added).

91. One additional letter to the NYSEFC Board of Directors bears mention. On June 25, 2014, the New York-New Jersey Harbor and Estuary program Citizens Advisory Committee ("HEP-CAC") wrote to the NYSEFC Board of Directors to state their objection to the NNYB financing proposal. In its letter, HEP-CAC objected strenuously to the Defendants' proposition that 33 U.S.C. § 1383(c)(3) would allow for CWSRF assistance on the purported grounds that the subject NNYB project components implement the USEPA-approved CCMP.
92. The purposes of the HEP-CAC are, *inter alia*, to "advocate for the HEP, a national estuary program," and to "assist the Management Committee in developing and implementing the Comprehensive Conservation and Management Plan (CCMP) as

required by Section 320 of the Water Quality Act of 1987.” As the HEP-CAC noted in its letter to NYSEFC:

The CAC is concerned that using [the] Clean Water Act State Revolving Fund (SRF) to pay for part of the new Tappan Zee Bridge project, including the removal of the existing bridge, dredging of the river bottom, and building a navigation channel for construction vessels, is inappropriate and sets a dangerous precedent that could place future SRF grants by the federal government in jeopardy. . . . New York State’s rationale for using SRFs to finance the Tappan Zee Bridge Construction Project is that the project will advance HEP’s CCMP (<http://www.harborestuary.org/about-planningdocs.htm>).

It is our understanding that New York State Thruway Authority (NYSTA) intends to rely upon [Clean Water Act] § 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 [Clean Water Act] § 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 SR[F] program***, which was meant to be used for improvements to wastewater treatment infrastructure and habitat protection. In fact, as stated in the project EIS (Environmental Impact Statement), several of the most prominent activities Environmental Facilities Corporation (EFC) proposes to pay for with federal funds designed to improve water quality and conditions in the estuary have the potential to do damage to the river. . . .

The Citizens Advisory Committee urges the Members of the Board to vote against the proposed financing or, at a minimum, to delay a vote and allow sufficient opportunity for [US]EPA and all public stakeholders to carefully consider the proposal and be heard.

Estrin Affirmation Ex. 26 at 1-2 (emphases added).

93. Despite the above-referenced enormous public protest and the numerous serious concerns raised and questions asked by the federal government in USEPA’s June 25, 2014 letter, the NYSEFC Board of Directors carried out their “marching orders” as they were plainly expressed in Governor Cuomo’s June 16, 2014 press release, and proceeded “full speed

ahead” during its meeting on June 26, 2014, voting unanimously to approve the \$511.5 million CWSRF financing package for the NNYB.

94. After financing is approved by NYSEFC, pursuant to Sections 50 and 51 of the New York State Public Authorities Law, a unanimous resolution of approval must be received from the three voting members of the PACB (Defendants Silver, DeFrancisco, and Megna). Shortly after NYSEFC approved the subject financing, the public learned that this resolution would be taken up by the PACB at a meeting on July 16, 2014. Despite statements to the press by Senator DeFrancisco in the weeks before the vote suggesting that he was prepared to vote against the financing because it was apparent that there was no financing plan to demonstrate how the State would pay for the rest of the NNYB project, *see* Estrin Affirmation Ex. 20, upon information and belief, on or about July 16, 2014, PACB passed a resolution approving half of the \$511.45 million, or approximately \$256 million in CWSRF financing for the NNYB. *See* Estrin Affirmation Ex. 27. Immediately following this PACB resolution, NYSTA publicly vowed to soon return to the PACB to obtain approval of the quarter billion dollars in CWSRF financing that had not yet been approved by PACB. *See* Estrin Affirmation Ex. 28.

95. Upon information and belief, on or about August 6, 2014, the Board of Directors of NYSTA approved the subject financing proposal as it had been temporarily amended by PACB, and voted to accept up to \$256 million in financing for NNYB project components from the New York State CWSRF.

USEPA’s September 2014 Ruling Letter

96. On September 16, 2014, the USEPA transmitted its Ruling Letter to Defendants Commissioner Martens of the NYSDEC, and Matthew Driscoll, the President and Chief

Executive Officer of the NYSEFC. *See* Estrin Affirmation Ex. 1. This letter was a follow-up to USEPA's June 25, 2014 letter in which the federal agency had expressed its reservations regarding the eligibility of the proposed NNYB project components. *See* Estrin Affirmation Ex. 25. In its Ruling Letter, USEPA announced its formal determinations with respect to the substantive eligibility of the twelve proposed NNYB project components for CWSRF financing.

97. USEPA ruled that of the original twelve projects that had been proposed by Defendants for CWSRF financing, only five are substantively eligible: (1) Gay's Point Restoration; (2) Piermont Marsh Restoration; (3) Net Conservation Benefit Plan; (4) Stormwater Management Measures; and (5) Atlantic Sturgeon Outreach Program. The estimated costs for these projects total \$29.1 million. *See* Estrin Affirmation Ex. 1 at 4.

98. USEPA further ruled that the following seven NNYB project components are not eligible for CWSRF financing: (1) Removal of Existing Bridge; (2) Dredging for Construction Vessels; (3) Armoring the Hudson River Bottom; (4) Underwater Noise Attenuation System; (5) Shared Use Path; (6) Oyster Bed Restoration; and the (7) Relocation of Falcon Nest Box. The estimated costs for these ineligible projects total \$481.8 million. *See* Estrin Affirmation Ex. 1 at 4.

99. For each of the project components that USEPA disallowed as substantively ineligible for CWSRF financing, the agency provided the facts, analysis and its rationale supporting its ruling, as summarized in the following paragraphs.

Removal of the Existing Bridge

100. “The removal of the existing bridge infrastructure is ineligible for CWSRF funding because it is intended to mitigate harms caused by major new construction within the estuary.” Estrin Affirmation Ex. 1 at 5.
101. The USEPA clearly and correctly discerned this purported “water quality project” for what it truly is—pretext. USEPA dismissed Defendants’ arguments that this NNYB project component will reduce sediment scour, the deposition and resuspension of sediment, lead-based paint contamination, and floatable debris, noting that any reduction in sediment scour and resuspension “as a result of the removal of the old bridge will be offset by the increased sediment scour, deposition and resuspension resulting from the presence of the new bridge.” USEPA further noted that regular dredging activities for the preservation of navigation channels will destroy benthic habitats, striking a shattering blow to ecological diversity. Moreover, the removal of the existing structures themselves will temporarily increase sediment suspension. *See* Estrin Affirmation Ex. 1 at 5.
102. USEPA pointed to the numerous painting contracts that have been executed for the Tappan Zee Bridge in past years, and aptly noted that two of them were conducted to “fully remove the paint.” Thus, USEPA correctly ruled that the risk of lead-based paint contaminating the estuary had already been diminished to such a degree that there will be no further quantifiable reduction of this risk as a result of removing the existing bridge. *See* Estrin Affirmation Ex. 1 at 5.
103. Lastly, USEPA correctly explained that it is “not aware of any evidence that the existing bridge structures are a significant source of floatable debris.” Furthermore, the relevant

CCMP chapter on “The Management of Floatable Debris” provides the following examples of covered debris materials:

Wood, beach litter, aquatic vegetation, and detritus; street litter (cans, bottles, polystyrene cups, sheet plastic straws and paper products); sewage-related wastes (condoms, sanitary napkins tampon applicators, diaper liners, grease balls, tar balls, and fecal material); fishing gear (nets, floats, traps, and lines); and medical wastes (hypodermic needles, syringes, bandages, red bags, and enema bottles).

Estrin Affirmation Ex. 1 at 5-6. As USEPA rightfully noted, this list “does not encompass removing a bridge that, if abandoned for some extended period of time, could eventually deteriorate to the point where it is a significant active source of floatables to a water body.” *Id.*

Dredging and Mound Removal

104. USEPA correctly determined that dredging and mound removal are ineligible for CWSRF funding because there is no nexus between Defendant’s assertions and the CCMP as the “CCMP does not identify or recommend any dredging project(s), and certainly none in the area of the Tappan Zee Bridge.” Estrin Affirmation Ex. 1 at 6.
105. Moreover, dredging for the NNYB and “securing the necessary permits will not result in any new or unique coordinated or integrated efforts with federal groups, state groups or a dredged material management task force of the type cited in the CCMP.” Estrin Affirmation Ex. 1 at 7.
106. Nor will the NNYB result in any beneficial re-use of dredged material because the disposal of dredged material “will not result in implementation of any new or innovative beneficial use alternatives as discussed and envisioned in the draft Management of Dredged Material chapter of the CCMP.” Estrin Affirmation Ex. 1 at 7.

107. The dredging will also not restore and maintain a healthy and productive ecosystem because the “sediment being removed is not materially different from the sediments that will remain in place.” In fact, the dredging will result in a decrease in both the quantity and diversity of benthic organisms because it will remove all benthos in the dredging area. Moreover, because of the “continued disturbance associated with the maintenance of the new bridge . . . the system will likely remain ecologically stressed.” Estrin Affirmation Ex. 1 at 7.

108. In response to Defendants’ claim that the NNYB will eliminate toxicity or bioaccumulation impacts on living resources, USEPA noted that each of the four dredging areas tested “showed that the material was suitable for placement at the Historical Area Remediation Site (HARS) ocean disposal site, which is subject to very stringent standards.” Estrin Affirmation Ex. 1 at 7. USEPA further pointed out that recent sediment core data showed that all of the dredged material was Class A, which is “clean” material for purposes of disposal at the HARS. Furthermore, the CCMP identifies point and nonpoint sources of contaminants as ongoing sources, and Defendants failed to demonstrate that point and nonpoint sources of contaminants entering the Harbor will be reduced. *See* Estrin Affirmation Ex. 1 at 7-8.

109. Finally, USEPA correctly noted that the dredge and mound removal lacks a nexus to the NNYB and the supporting Port of New York and New Jersey. The dredging for this project lacks channel deepening or maintenance, which is required to maintain navigational channels for commercial or recreational vessels that use the port. *See* Estrin Affirmation Ex. 1 at 8.

Shared-Use Path

110. USEPA correctly ruled that the “Shared Use Path is ineligible for CWSRF funding because it does not implement the CCMP.” Estrin Affirmation Ex. 1 at 8. Although relevant provisions of the HEP CCMP emphasize public access as an important action item, this access is attuned to the “physical and programmatic access to the Harbor’s waters and to the water’s edge.” Moreover, USEPA recognized that the “CCMP acknowledges ‘the public demand for open space opportunities along the coastline,’ which could ‘build a constituency for enhanced protection of natural habitat and species populations.’” The public access uses contemplated by the HEP CCMP include “places to fish, places to swim, places close to wildlife habitat for observation, safe places for boating . . . and places to walk along the water.” Clearly, the HEP CCMP demonstrates a keen focus on public access in close proximity to the waterfront. Meanwhile, “[a] highly elevated path that goes over an estuary does not provide for close observation of wildlife . . . is not included within or contemplated by the CCMP, and does not implement the CCMP.” Estrin Affirmation Ex. 1 at 8-9.

111. In addition, if any of NYSTA’s efforts can be said to have the potential for implementing the public education component of the HEP CCMP, these efforts could only possibly entail the installation of educational public signage along the path, but would certainly not include the construction of the pathway itself. *See* Estrin Affirmation Ex. 1 at 9.

112. The shared use path carries no discernible nexus to any increase in public engagement with the New York-New Jersey Harbor Estuary Program or its stakeholders. Facilitating one’s ability to bike or walk over the Hudson River offers no attendant opportunity for

“users to make their opinions and priorities known to program stakeholders and decision-makers.” Estrin Affirmation Ex. 1 at 9.

River Bottom Armoring

113. “River bottom armoring is ineligible for CWSRF funding because this activity is intended to mitigate harms caused by major new construction within the estuary.” Estrin Affirmation Ex. 1 at 9. Given the intensive and disruptive activity involved in the installation of armoring materials to the river bottom, these operations are guaranteed to promote the resuspension of sediments into the water column, thereby reducing the water quality for aquatic species. USEPA was rightfully skeptical of the long-term impacts of this armoring project. If NYSTA later desires to remove the armoring materials, this will agitate the riverbed and induce additional sediment resuspension. Yet, if these armoring materials are left in place, “107 acres of benthic habitat and forage areas for fish will be lost” for many years. The proposed armoring activities have the potential to cause not one, but two distinct harms to the estuary’s water quality and habitat. *See* Estrin Affirmation Ex. 1 at 10.

114. USEPA accurately noted that the river armoring will also harm fish that remain in the area by reducing their foraging habitat. In addition, the benthos will be buried in a tomb of sand and rocks. This will effectively wall off the life-sustaining sunlight and oxygen utilized by aquatic plants and animals, inevitably causing death by starvation and suffocation. *See* Estrin Affirmation Ex. 1 at 10. Clearly, armoring the river bottom will actually destroy ecologically important habitats. The deposition of armoring materials over existing benthic communities will kill most living organisms dependent on its resources. While the benthic community may reestablish itself after an extensive period

of years, it will emerge in an altered state, having had to adapt to the new stresses these materials place on the aquatic biota.

115. USEPA also correctly ruled that “[t]here is no nexus between river bottom armoring and dredging windows, beneficial uses or identification of upland placement sites[,]” and thus the armoring will not strengthen “watershed planning and dredged material management” or other related coordination efforts. Estrin Affirmation Ex. 1 at 10.

116. Lastly, USEPA Region 2 enforces a policy that CWSRF monies will not be “awarded under the authority of Section 320 of the Clean Water Act . . . for projects that involve the placement of fill into waters of the United States.” USEPA has determined that “[r]iver bottom armoring is a fill activity since it involves placing stones and sand on the bottom of the Hudson River. Armoring the bottom of the Hudson River for the rebuild of the Tappan Zee Bridge does not comply with this Region 2 policy.” Estrin Affirmation Ex. 1 at 10-11.

Underwater Noise Attenuation System

117. The underwater noise attenuation system is ineligible for CWSRF funding because the use of this system “will create, rather than minimize, disturbances to the preexisting natural systems.” Estrin Affirmation Ex. 1 at 11. The noise attenuation system “is designed to reduce short-term negative impacts associated with construction and will have no beneficial long-term effects on the ecosystem, the diversity of living resources or habitats, or in the reduction of pollutant loadings.” Estrin Affirmation Ex. 1 at 11.

118. Additionally, because the bubble curtains will not reduce contaminant loads, “their use will not result in any preservation or restoration of ecologically important habitat and

open space, preserve or restore ecologically important habitats or open space, or minimize human disturbances.” Estrin Affirmation Ex. 1 at 11.

Oyster Bed Restoration

119. Oyster bed restoration is ineligible for CWSRF funding because “[b]ut for the bridge construction dredging activity, the oyster beds would not be harmed and would not need to be restored elsewhere.” Estrin Affirmation Ex. 1 at 12. In other words, the only purpose of the project is to mitigate harms caused by new construction within the estuary (destruction of existing oyster beds), which makes it ineligible for such financing. *See* Estrin Affirmation Ex. 1 at 12.

Falcon Nest Box Relocation

120. “The falcon nest box relocation is ineligible for CWSRF funding because this activity mitigates a harm caused by major new construction within the estuary.” Estrin Affirmation Ex. 1 at 12.

121. Moving the falcon nest to the new bridge “is direct mitigation for the harm caused by the bridge construction . . . [and thus,] [b]ut for the bridge construction activity, the falcon nest box would not be harmed, requiring that it be relocated elsewhere.” Estrin Affirmation Ex. 1 at 12.

122. In sum, USEPA’s substantive project eligibility rulings, as set forth in its Ruling Letter and discussed above, are consistent with the plain language of federal law, and with Congress’ intent in establishing the CWSRF program. This Court should adopt USEPA’s rulings, as set forth in its September 2014 Ruling Letter, as the correct interpretation of federal law with respect to substantive eligibility for CWSRF project financing. Moreover, because projects ineligible for CWSRF financing under federal law are also

ineligible under New York State law, the Court should deem USEPA’s substantive interpretations as binding with respect to State law as well. *See* 6 NYCRR § 649.2(51) (Expressly conditioning the eligibility of a project upon, *inter alia*, the project being “eligible for financing under the [Clean Water] Act.”). *See also* 21 NYCRR § 2602.2(53).

FIRST CAUSE OF ACTION

(PURSUANT TO ARTICLE 7A OF THE STATE FINANCE LAW, FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AS AGAINST ALL RESPONDENTS/DEFENDANTS)

Seven of the NNYB Project Components Proposed by Defendants to be Financed from the New York State CWSRF do not Qualify as Projects Substantively Eligible for CWSRF Financing Under Federal or State Law, and Thus Constitute Wrongful Expenditures, Misappropriations, Misapplications, and/or Illegal Disbursements of State Funds or State Property.

123. Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 122 of this Complaint as if fully stated herein.

124. State Finance Law Section 123-b provides in part as follows:

Notwithstanding any inconsistent provision of law, any person, who is a citizen taxpayer, whether or not such person is or may be affected or specially aggrieved by the activity herein referred to, may maintain an action for equitable or declaratory relief, or both, against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property.

N.Y. STATE FIN. LAW § 123-b (McKinney 2014).

125. State Finance Law Section 123-e provides in part, as follows:

The court may grant equitable or declaratory relief, or both, including, but not limited to: enjoining the activity complained of; restitution to the state of those public funds disbursed or public property alienated . . . a declaration that a proposed disbursement or alienation of property would

be illegal; and such other and further relief as to the court may seem just and proper.

N.Y. STATE FIN. LAW § 123-e.

126. Monies contained in the New York State CWSRF constitute “state funds or state property” even if some portion of such funds were originally sourced from the USEPA’s CWSRF program.
127. Under the federal Clean Water Act, only specified categories of clean water infrastructure projects are eligible for financial assistance from the CWSRF. Upon information and belief, the Defendants have relied upon only one of these categories as a basis for purported CWSRF eligibility, which permits financial assistance from a CWSRF “for development and implementation of a conservation and management plan under section 1330 of this title.” 33 U.S.C. § 1383(c)(3).
128. Section 1330 of the Clean Water Act is entitled “National Estuary Program,” and sets forth a process under which states may nominate, and USEPA may approve, nationally important estuaries for development of CCMPs, which recommend priority corrective actions and set compliance schedules in order to protect water quality and designated uses in the estuary. *See* 33 U.S.C. § 1330(b)(4).
129. The Hudson River estuary is part of a USEPA-approved final CCMP, which was finalized in 1996, and is known as the New York-New Jersey Harbor Estuary Program Comprehensive Conservation and Management Plan (“HEP CCMP”).
130. USEPA has made clear its interpretation of the Clean Water Act and the federal regulations promulgated thereunder, ruling that in order to be eligible for CWSRF assistance pursuant to 33 U.S.C. § 1383(c)(3), the proposed project must implement a specifically recommended activity in the HEP CCMP, and must not have the intended

purpose of mitigating harms caused by the undertaking of major new construction activities within an estuary. Estrin Affirmation Ex. 1 at 4.

131. Seven of the twelve projects for which Defendants have approved CWSRF financing do not substantively qualify for such financing because they are clearly not projects being undertaken “for development and implementation” of the HEP CCMP, and/or are projects intended for the purpose of mitigating harms that are being inflicted upon the estuary by the very same transportation infrastructure project for which Defendants seek CWSRF assistance.
132. With respect to the “development” of the HEP CCMP, this plan was finalized in 1996, many years before planning for the NNYB project even began. As such, it should go without saying that the NNYB construction project has not been undertaken for the Plan’s “development.”
133. Nor have the seven substantively ineligible NNYB project components that Defendants seek to fund with CWSRF monies been undertaken for the “implementation” of the HEP CCMP. Rather, the entire NNYB project has been undertaken for the purpose of constructing transportation infrastructure, and each purported “project” for which Defendants seek financing is in reality a component of the bridge construction and demolition project.
134. For approximately two years prior to the commencement of construction of the NNYB project, Defendant NYSTA conducted an extensive environmental impact review pursuant to NEPA and SEQRA, which resulted in an extensive FEIS numbering in the thousands of pages. These studies, documented in the FEIS, purported to carefully consider the decision to construct the NNYB, all of the reasonable alternatives to the

construction project, and all of the environmental impacts from the project. Notably, upon information and belief, *not once in the entire FEIS is the HEP CCMP even mentioned!* Thus, Defendants’ suggestion that the components of the NNYB project for which CWSRF financing is sought—which were all subject to review in the FEIS—are actually being done “for the . . . implementation” of the CCMP, is proved to be a complete and utter fiction. Such obvious *post hoc* justifications attempting to completely redefine the actual purposes of the NNYB project components must be rejected.

135. In addition, as noted above, NYSEFC’s and NYSDEC’s governing regulations each also expressly require with respect to projects for which financing is purportedly eligible under 33 U.S.C. § 1383(c)(3) of the Clean Water Act, that the applicant demonstrate “*how the project implements a recommended activity in*” the CCMP. 6 NYCRR § 649.2(51) (emphasis added); *see* 21 NYCRR § 2602.2(53). This language confirms that a project’s mere purported “consistency” with general clean water goals set forth in an estuary management plan will not suffice to render that project substantively eligible for CWSRF financing unless the project also “implements” a specific “activity” that is expressly “recommended” in such plan.

136. USEPA correctly determined that only five of the twelve NNYB project components for which NYSEFC approved CWSRF financing—totaling approximately \$29 million of the original \$511.5 million approved by Defendants—are substantively eligible for such financing. These five substantively eligible projects are: Gay’s Point Restoration, Piermont Marsh Restoration, Net Conservation Benefit Plan, Stormwater Management Measures, and the Atlantic Sturgeon Outreach Program. Estrin Affirmation Ex. 1 at 4.

137. USEPA correctly determined that seven of the twelve NNYB project components for which NYSEFC approved CWSRF financing—totaling approximately \$481 million of the \$511.45 million originally approved by Defendants—are not substantively eligible for such financing. These seven ineligible projects are: Removal of Existing Bridge, Dredging for Construction Vessels, Armoring the Hudson River Bottom, Underwater Noise Attenuation System, Shared Use Path, Oyster Bed Restoration, and Falcon Nest Box. Estrin Affirmation Ex. 1 at 4.

138. For all of the above reasons, Defendants’ determinations and approvals of NYSEFC’s financing of NYSTA’s seven project components that are substantively ineligible for CWSRF financing under federal and State law constitute the “wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property,” and should be declared as such and enjoined by the Court. N.Y. STATE FIN. LAW §§ 123-b, 123-e.

SECOND CAUSE OF ACTION

(PURSUANT TO ARTICLE 78 AND SECTION 3001 OF THE CPLR, TO ANNUL AND VACATE DEFENDANTS’ ILLEGAL DETERMINATIONS, FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AS AGAINST ALL RESPONDENTS/DEFENDANTS)

Defendants’ Determinations to Approve Financing from the New York State CWSRF for NNYB Project Components That Are Not Substantively Eligible for Such Financing Under Federal or State Law were Made in Violation of Lawful Procedure, were Affected by Errors of Law, and were Arbitrary, Capricious, and Abuses of Discretion.

139. Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 138 of this Complaint as if fully stated herein.

140. CPLR Section 7803(3) permits a Petitioner to challenge a determination by a body or officer where such determination “was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.”

141. For all of the reasons stated herein, Defendants’ determinations approving NYSEFC’s financing of NYSTA’s seven project components that are substantively ineligible for CWSRF financing under federal and State law constitute determinations made by Defendants in violation of lawful procedure, that were affected by errors of law, and/or that were arbitrary, capricious, and abuses of discretion. N.Y.C.P.L.R. 7803(3) (McKinney 2014).

THIRD CAUSE OF ACTION

(PURSUANT TO ARTICLE 7A OF THE STATE FINANCE LAW, FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AS AGAINST ALL RESPONDENTS/DEFENDANTS)

The Determinations Violated Mandatory Federal and State Public Participation and Other Procedural Requirements.

142. Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 141 of this Complaint as if fully stated herein.

143. As noted above, federal law expressly requires that all projects proposed to be financed from a state’s CWSRF be included in an IUP that has been subjected to public notice and comment. *See* 33 U.S.C. § 1386(c); 40 C.F.R. § 35.3150(a).

144. New York State law also expressly requires that all projects proposed to be financed from New York State’s CWSRF be included on an IUP that has been subjected to public notice and comment. *See* 6 NYCRR §§ 649.2(29), 649.3(h); 21 NYCRR § 2602.2(31).

145. It is indisputable that NYSEFC and NYSDEC added over one half billion dollars in financing for all twelve of the NNYB project components to the 2014 IUP without providing for the public participation required by binding federal and New York State statutes and regulations.
146. NYSEFC's and NYSDEC's apparent defense to these blatant violations of federal and State law is that the addition of this enormous and unconventional financing proposal was only a "minor modification" to the 2014 IUP, and that they have reserved for themselves the right to make "minor modifications" to the IUP with a simple notice in NYSDEC's ENB, and without providing for public comment. *See, e.g.,* Estrin Affirmation Ex.10.
147. Any argument that the fast-tracked, late addition of these NNYB transportation project components to the 2014 IUP was a "minor modification" of that document would be facially frivolous. Indeed, upon information and belief, the \$511.5 million financing package approved by NYSEFC for the NNYB construction project, standing alone, is *more than triple* the amount of the entire federal CWSRF capitalization grant to New York State for fiscal year 2015. In no way can Defendants' proposal to provide over a half billion dollars in no-interest and low-interest CWSRF financing for a transportation infrastructure project rationally be sustained as a minor modification to the 2014 IUP.
148. Each of the twelve proposed NNYB project components that comprise the overall CWSRF financing package challenged herein was subject to mandatory public notice and comment requirements under federal and State law. These twelve projects are Gay's Point Restoration, Piermont Marsh Restoration, Net Conservation Benefit Plan, Stormwater Management Measures, Atlantic Sturgeon Outreach Program, Removal of

Existing Bridge, Dredging for Construction Vessels, Armoring the Hudson River Bottom, Underwater Noise Attenuation System, Shared Use Path, Oyster Bed Restoration, and Falcon Nest Box.

149. Because Defendants blatantly violated federal and New York State statutory and regulatory public participation requirements, Defendants' approval of even the five substantively eligible project components was procedurally flawed and legally ineffective.
150. Defendants also blatantly violated another federal regulation that allows the IUP project list to be changed during the year under provisions established in the IUP, but only "as long as the projects have been previously identified through the public participation process." 40 C.F.R. § 35.3150. Defendants never "previously identified" the NNYB projects for which they have approved financing "through the public participation process," because they denied the public of the opportunity to "participate" in any "public process" at all.
151. Defendants' determinations, acts, and omissions challenged herein may have also been affected by numerous additional procedural problems that may have rendered them unlawful. For example, it is presently unclear to Plaintiffs whether the members of the NYSEFC Board of Directors ever reviewed a complete loan application from NYSTA prior to their vote to approve the financing proposal on June 26, 2014. Indeed, it is unknown to Plaintiffs whether a complete loan application even existed at the time of the NYSEFC Board's vote on June 26, 2014. Upon information and belief, the first formal indication that NYSTA intended to apply for the subject financing was not received by NYSEFC until on or about May 30, 2014, in the form of NYSTA's "project listing

form.” By NYSEFC’s stated procedures, project listing forms and all requisite application materials were supposed to be in NYSEFC’s possession by February 3, 2014. *See Estrin Affirmation Ex. 6 at 19.*

152. Indeed, for a project to even be included on the IUP’s PPL, there are a range of documents that must be on file with NYSEFC, including a complete loan application form. Upon information and belief, NYSEFC has not produced that form to USEPA, the New York State Office of the State Comptroller, Members of the State Assembly, or anybody else that has requested it.
153. Upon information and belief, if the complete application was not filed before the June 11, 2014 ENB notice, then all of the twelve project components are procedurally ineligible for CWSRF financing in 2014.
154. In addition, on its Project Listing Form, NYSTA incorrectly stated that none of the projects to be supported by the proposed financing were conditions of a permit. In fact, and as noted by USEPA in its letter of June 25, 2014, many of the activities to be supported by the proposed financing are explicit requirements of permits issued by the NYSDEC in connection with the NNYB construction project. *See Estrin Affirmation Ex. 24 at 2.*
155. Moreover, NYSEFC and NYSDEC could not have rationally and legally determined to draw the subject financing for the NNYB project components from “Category C” of the New York State CWSRF which, as noted above, is reserved solely to “municipal projects,” with Categories A through C being determined “solely by the number of people who reside within the municipality’s jurisdiction based upon the latest census figures published by the United States Department of Commerce Bureau of the Census.”

6 NYCRR § 649.3(c). “Category C” is defined by NYSDEC’s regulations as municipal projects where such municipality has a population of more than 2,000,000 residents. *See* 6 NYCRR § 649.3(c)(3). Upon information and belief, according to the census, there is only one such municipality in New York State: The City of New York. Defendants’ suggestion that NYSTA qualifies as a “municipality” with a “population” of more than 2,000,000 residents under its jurisdiction strains credulity beyond the breaking point and constitutes an obvious error of law.

156. For all of the above reasons, Defendants’ determinations and approvals of NYSEFC’s financing for all twelve of the subject NNYB project components without first providing for public participation as required under federal and New York State law, and in violation of other procedural requirements discussed above, constitute the “wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property,” and should be enjoined by the Court. N.Y. State Fin. Law §§ 123-b, 123-e.

FOURTH CAUSE OF ACTION

(PURSUANT TO ARTICLE 78 AND SECTION 3001 OF THE CPLR, TO ANNUL AND VACATE DEFENDANTS’ ILLEGAL DETERMINATIONS AND FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AS AGAINST ALL DEFENDANTS)

The Determinations by NYSEFC and NYSDEC to Approve the Proposed CWSRF Financing for NNYB Project Components without First Fulfilling Mandatory Federal and New York State Public Participation Requirements and Other Procedural Requirements were Made in Violation of Lawful Procedure, were Affected by Errors of Law, and were Arbitrary, Capricious, and Abuses of Discretion.

157. Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 156 of this Complaint as if fully stated herein.

158. For all of the above reasons, Defendants' determinations and approvals of NYSEFC's financing of all twelve of the NNYB project components without first providing for public participation as required under federal and State law, and in possible violation of other procedural requirements outlined above, constitute determinations made in violation of lawful procedure, that were affected by errors of law, and/or that were arbitrary, capricious, and an abuse of discretion. *See* N.Y.C.P.L.R. § 7803(3).

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment as follows:

- a) Adjudging and declaring that the subject votes, approvals and resolutions by NYSEFC, NYSDEC, PACB and NYSTA, and any loan closings made in connection with the NNYB CWSRF financing challenged in this action, violated federal and State law for all of the substantive and procedural reasons alleged herein;
- b) Annuling and vacating the subject votes, approvals, resolutions, and any loan closings for the subject NNYB project CWSRF financing by the NYSEFC Board of Directors, NYSDEC, PACB and the NYSTA Board of Directors, in all respects;
- c) Enjoining the NYSTA and its Board of Directors, to the extent that NYSTA has received any CWSRF monies to finance any component of the NNYB project, to return all monies transmitted to NYSTA by reason of the subject votes, approvals, resolutions, and closings, to NYSEFC for prompt redeposit into the New York State CWSRF;
- d) Enjoining Defendants from seeking to utilize CWSRF financing in the future for purposes of assisting with any component of the NNYB project found by USEPA or this Court to be substantively ineligible for such financing;
- e) Enjoining Defendants from seeking to utilize CWSRF financing in the future for purposes of assisting with any component of the NNYB project without first complying

with public notice and comment and other procedural requirements mandated by federal and New York State law;

- f) Granting Plaintiffs their reasonable legal fees, costs and disbursements of this hybrid proceeding and action pursuant to State Finance Law Section 123-g; and
- g) Granting Plaintiffs such other and further relief as the Court may deem just and proper under the circumstances.

Respectfully submitted,

PACE ENVIRONMENTAL LITIGATION CLINIC, INC.

By: 

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Counsel for Petitioners/Plaintiffs

Dated October 24, 2014
White Plains, New York

VERIFICATION

STATE OF NEW YORK)
 : ss.
COUNTY OF DUTCHESS)

Paul Gallay, being duly sworn, deposes and says:

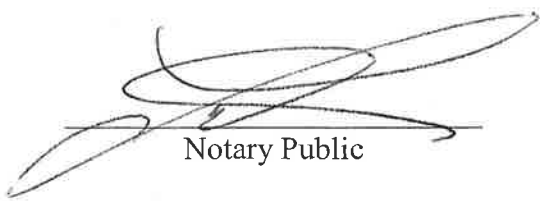
1. I am one of the Petitioners-Plaintiffs in this hybrid State taxpayer action and Article 78 proceeding.

2. I have read the foregoing petition and complaint, and can state that its factual allegations are true based upon my personal knowledge, except as to matters alleged upon information and belief, which matters I believe to be true based on my review of pertinent documents and conversations with persons with personal knowledge. I make no representation herein with respect to the legal contents of the petition and complaint, with respect to which I fully rely upon Petitioners' counsel in this proceeding.



Paul Gallay

Sworn before me this
24th day of October, 2014



Notary Public

LYNN M. MINDEL
NOTARY PUBLIC STATE OF NEW YORK
QUALIFIED IN DUTCHESS COUNTY
License #01M16100100 Comm. Exp 10-14-25