Bridge (Loan) Over Troubled Water

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I. Introduction

On September 16, 2014, the federal Environmental Protection Agency ("EPA") rejected the vast majority of a low-cost loan request from the administration of New York State Governor Andrew Cuomo to help finance a replacement for the aging Tappan Zee Bridge across the Hudson River approximately 25 miles north of midtown Manhattan.[1] The decision was hailed by environmental advocates who had argued that the federal funding, authorized by a 1987 amendment to the landmark Clean Water Act ("CWA"), should be reserved for "genuine environmentally beneficial projects" such as those financing municipal wastewater facilities and improving water quality.[2] The federal rejection of $481.8 million in funding was also notable in that the full $510.9 million request had been *approved* by the agency responsible for managing the revolving loan fund, the New York State Environmental Facilities Corporation ("EFC").[3]

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1. Letter from Joan Leary Matthews, Dir., EPA Region 2 Clean Water Div., to Joseph Martens, Comm'r, N.Y.S. Dep't. of Envtl. Conservation, and Matthew Driscoll, President, N.Y.S. Envtl. Facilities Corp. (Sept. 16, 2004), *available at* http://www.epa.gov/region2/ tappanzeeletter.pdf [http://perma.cc/36RP-M7B8].

2. Letter from Citizens Campaign for the Env't, *et al.,* to Members of the Bd. of Dirs., N.Y.S. Envtl. Facilities Corp. (June 26, 2004), *available at* http://www.riverkeeper.org/wp-content/uploads/2009/06/Group-Letter-to-EFC-re-TZB-construction-funding-June-24-2014-updated-June-26.pdf [http://perma.cc/66TR-57NA].

3. N.Y.S. Envtl. Facility Corp. Res. 2322, 2014 Leg. (N.Y. 2014), *available at* http://www.riverkeeper.org/wp-content/uploads/2014/06/EFC-Resolution-No.-2322-Authorizing-CWSRF-for-TZB-Project-June-26-2014.pdf [http://perma.cc/U84T-Q7ZG].

New York State has maintained its position that the bridge replacement projects are eligible for funding—and on November 13, submitted an administrative appeal prepared by outside counsel to the EPA. The appeal proposes several grounds for a reversal, but the main dispute between the EPA and the EFC presents a compelling legal question: does Section 603(c)(3) of the Clean Water Act require, as the EPA and environmental advocates suggest, that eligible revolving fund projects improve water quality? Or, as the State contends, may projects merely implement a conservation and management plan that maintains the chemical, physical, and biological integrity of an estuary?

While both sides claim that the text of the authorizing legislation is clear enough to ascertain congressional intent behind the law, legislative history may be examined in cases of genuine textual ambiguity. This Field Report argues that the Joint Explanatory Statement of the Committee of Conference in the Water Quality Act Conference Report suggests that Congress did indeed intend to promote water quality through the state revolving funds, supporting the EPA's interpretation of the law.

II. BACKGROUND: CLEAN WATER ACT STATE REVOLVING FUNDS AND THE "NEW NY BRIDGE"

In 1987, Congress enacted the Water Quality Act, amending the primary federal law regulating water pollution (the Federal Water Pollution Control Act), commonly referred to as the Clean Water Act. The new law added a Title VI to the CWA to provide for the establishment of state-administered Water Pollution Control Revolving Funds, also known as Clean Water State Revolving Funds ("CWSRFs"), replacing an inflexible and centralized federal program that had directly provided more than $60 billion for the construction of publicly-owned wastewater treatment facilities.[4] Over the past 25 years, the vast majority of funding from CWSRFs, in the form of no-

4. EPA, Construction Grants Program, http://water.epa.gov/grants_funding/cwf/Construction-Grants-Program.cfm [http://perma.cc/6TKG-KRPU] (last visited Mar. 2, 2015).

interest and low-interest loans, has continued to support wastewater infrastructure projects across the country.[5]

In addition to providing assistance for the construction of publicly-owned treatment works, the amendment also authorized funding for the implementation of nonpoint pollution source management programs and the development and implementation of comprehensive conservation and management plans ("CCMPs") under the National Estuary Program.[6] Neither provision has been extensively used in New York; since 1990, the EPA has provided $4.1 billion to the state's EFC for CWSRF purposes, funding that has "always been used to support municipal wastewater treatment systems."[7]

It was therefore surprising to many observers when the state released a proposal on May 30, 2014 to obtain $510.9 million in CWSRF funding to finance a variety of initiatives associated with the replacement of the Tappan Zee Bridge, a project estimated to cost $3.9 billion total.[8] The state based its request on the Section 603(c)(3) estuary provision—under which the CWA requires that each CCMP recommend:

> [P]riority corrective actions and compliance schedules addressing point and nonpoint sources of pollution to restore and maintain the chemical, physical, and biological integrity of the estuary, including restoration and maintenance of water quality, a

5. As of 2009, more than $75 billion has been used to support wastewater projects while less than $4 billion has funded nonpoint pollution or "other" projects. U.S. ENVTL. PROT. AGENCY, EPA-832-R-10-001, ANNUAL REPORT: CLEAN WATER STATE REVOLVING FUND PROGRAMS, at 32 (2009). *See also* Letter from Joseph Martens, N.Y.S. Dep't. of Envtl. Conservation Comm'n, to Gina McCarthy, E.P.A. Adm'r (June 23, 2014), *available at* http://www.riverkeeper.org/wp-content/uploads/2009/06/EFC-Board-Chair-letter-to-EPA-Administrator-McCarthy-June-23-2014.pdf [http://perma.cc/JTF6-BU9L] ("Of the $100 billion in financial assistance provided by the Nation's CWSRFs since inception, only $6 million was originated in direct support of one of the 28 Estuaries of National Significance.").

6. 33 U.S.C. **§** 1383(c)(1)-(3) (2014); *see also* 40 C.F.R. § 35.3115 (2014) (listing "[e]ligible activities of the SRF").

7. Letter from Judith A. Enck, E.P.A. Region 2 Adm'r, to Joseph Martens, N.Y.S. Dep't. of Envtl. Conservation Comm'r (June 25, 2014), *available at* http://www.riverkeeper.org/wp-content/uploads/2009/06/Response-Letter-from-EPA-to-EFC-June-25.pdf [http://perma.cc/8DRK-2ZYX].

8. N.Y.S. ENVTL. FACILITIES CORP., PROJECT LISTING FORM (CWSRF): WATER QUALITY PROTECTION ELEMENTS OF THE NEW NY BRIDGE PROJECT (May 30, 2014), *available at* http://www.riverkeeper.org/wp-content/uploads/2014/06/Project-Listing-Form-signed-by-NYSTA-May-30-2014.pdf [http://perma.cc/C7KJ-NFC2].

> balanced indigenous population of shellfish, fish and wildlife, and recreational activities in the estuary, and assure that the designated uses of the estuary are protected.[9]

The state's initial request for funding and associated documents suggested that it would attempt to justify funding based on "water quality" considerations.[10] But by June 23, however, the state had begun to develop a different legal strategy. The New York State Department of Environmental Conservation Commissioner (and EFC Board Chairman) Joseph Martens's letter to EPA Administrator Gina McCarthy asserted that the test for project eligibility was not whether a proposed project would "provide benefits to water quality."[11] Instead, "the only relevant inquiry is whether each of the projects under consideration can be fairly characterized as implementing one or more objectives of the CCMP".[12] The CCMP referenced is a long-term regional plan for the New York–New Jersey Harbor Estuary finalized in March 1996 with recent major revisions in 2009 ("the Hudson–Raritan Estuary Comprehensive Restoration Plan") and 2011 ("New York–New Jersey Harbor Estuary Action Plan for 2011–2015").[13] Some of its provisions include management of habitat and living

9. 33 U.S.C. § 1330(b)(4) (2014).

10. *See*, *e.g.*, Letter from James R. Levine, Senior Vice President and Gen. Counsel, N.Y.S. Envtl. Facilities Corp., to George Ames, Chief, State Revolving Loan Funds Branch, E.P.A. (May 28, 2014), *available at* http://www.riverkeeper.org/wp-content/uploads/2009/06/
Letter-from-EFC-to-EPA-May-28-2014.pdf [http://perma.cc/2VG2-QSXT] (claiming that "the processes of dredging and mound removal will improve the water quality of the Hudson River" and "use of armoring to avoid large increases in [total suspended solids] due to movement of vessels within the construction channel benefits water quality"). *See also* PROJECT LISTING FORM (CWSRF): WATER QUALITY PROTECTION ELEMENTS OF THE NEW NY BRIDGE PROJECT, *supra* note 8; N.Y.S. Envtl. Facilities Corp. Res. 2322, *supra* note 3 ("This action consists of the financing of costs associated with the planning, design and construction of certain water quality related components associated with the New NY Bridge (NNYB) Project"; "[t]he water quality related elements of the Project are consistent with the recommendations for implementation of the United States Environmental Protection Agency approved New York–New Jersey Harbor & Estuary Comprehensive Conservation and Management Plan of 1996.").

11. Letter from Joseph Martens to Gina McCarthy, *supra* note 5.

12. *Id.*

13. NEW YORK-NEW JERSEY HARBOR & ESTUARY PROGRAM, http://www.harborestuary.org/about-planningdocs.htm [http://perma.cc/6DJP-LGRM] (last visited Mar. 2, 2015).

resources, management of toxic contamination, management of dredged material, and public involvement and education.

The EPA was not convinced, responding with deep skepticism about the plan on June 25.[14] It instructed the EFC to "carefully scrutinize the proposed projects to ensure that they appropriately further the environmental goals that underlie the state's own intended use plan and CCMP" as well as consider the "implications vis-à-vis the legislative purpose of the Clean Water Act."[15] It suggested that the EFC address several issues regarding funding priorities and eligibility, including how the proposed projects would "improve water quality."[16]

Despite the response from the EPA and opposition to the plan from a coalition of environmental groups,[17] the EFC approved the request on June 26, certifying that each of the projects constituted "an 'eligible project' within the meaning of the CWSRF Act."[18] Action then moved to the EPA for review, where it stayed for the remainder of the summer.

On September 16, the EPA issued its decision, agreeing with the environmental advocates that the vast majority (94%) of the state's loan request was for projects ineligible for funding under CWSRF guidelines.[19] Notably, it rejected Commissioner Martens's repeated insistence that the test for eligibility had nothing to do with water quality. Instead, "the 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

14. Letter from Judith Enck to Joseph Martens, *supra* note 7.

15. *Id.* at 2.

16. *Id.* at 2.

17. Letter from Citizens Campaign for the Env't, *et al.* to Members of the Bd. of Dirs., N.Y.S. Envtl. Facilities Corp., *supra* note 2. Some of the same environmental groups have since brought a lawsuit against Martens and other EFC officials. *See* Notice of Verified Pet. and Compl., Riverkeeper, Inc. v. Martens, No. 5463-14 (N.Y. Sup. Ct. Oct. 27, 2014).

18. N.Y.S. Envtl. Facilities Corp., Res. 2322, *supra* note 3. On November 20, a report from the New York State Authorities Budget Office found that the EFC Board "did not consider or discuss delaying the authorization in light of the EPA letter, reaching out to the EPA to discuss its concerns, or consulting outside legal counsel for an independent opinion on the use of the CWSRF." N.Y.S. AUTHS. BUDGET OFFICE, REVIEW OF PUBLIC COMPLAINT: BOARD OF DIRECTORS OF THE ENVIRONMENTAL FACILITIES CORPORATION 13 (2014).

19. Letter from Joan Leary Matthews to Joseph Martens and Matthew Driscoll, *supra* note 1.

projects—such as the replacement of the Tappan Zee Bridge—within an estuary."[20] According to the EPA, there is "no evidence in CWA Sections 320(b)(4), 601(a)(2), or 603(c)(3) that the CWSRF was intended to fund mitigation for major construction projects within an estuary"; correspondingly, "construction activities arising from transportation projects do not advance water quality, and CWSRF funding should not be used for these purposes."[21]

On November 13, the State submitted an appeal arguing that the EPA exceeded the limited role granted by Congress under the CWSRF program.[22] According to the State, Congress did not constrain the CWSRF program by funding only certain estuary-related goals or efforts; it granted States the "primary authority to make CWSRF funding choices based on unique local insights about projects in their jurisdiction."[23] So long as the projects implement the State's CCMP by "maintaining the integrity of the Hudson River estuary during necessary development," state-approved projects should be funded under the federal program.[24]

Ultimately, both sides attempt to answer the same question: did Congress intend to limit Section 603(c)(3) to projects aimed at improving water quality? If so, the EPA's decision was correct—at least to the extent that the ancillary bridge projects did not further the state's water quality goals. If projects need not improve water quality in order to be eligible, however, the potential for New York and other states to pursue transportation infrastructure projects in estuaries with CWSRF funding in the future would be quite high.

III. WATER QUALITY: A STATUTORY INTERPRETATION

Most modern legal scholars agree that the first place to start when interpreting legislative intent is in the text itself.[25] At

20. *Id.*

21. *Id.*

22. APPEAL OF SEPT. 16, 2014, AGENCY DECISION BY U.S. EPA REGION 2 (Nov. 13, 2014), *available at* http://www.scribd.com/doc/246591397/Appeal-of-9-16-2014-Region-2-decision-pdf [http://perma.cc/LVV9-3MM9].

23. *Id.* at 2.

24. *Id.* at 4.

25. "New textualists" believe that congressional intent is best ascertained by plain reading of the text of a law, while "textually-constrained purposivists" are more comfortable relying on indicia of the statutory purpose when the language of a statute

the crux of the EFC's argument is that neither Section 603(c)(3) nor 320(b)(4) requires the improvement of water quality as a criterion for funding. Alone, this might be persuasive. However, Section 320 does direct CCMPs to recommend priority corrective actions and compliance schedules addressing *point and nonpoint sources of pollution* in estuaries—a key clause omitted in the State's appeal. Thus, while improving water quality is not explicitly stated as a requirement, addressing pollution appears to be.

When the text is ambiguous, interpreters often turn to "canons of construction" to try to distill statutory meaning. The EFC employed a combination of the *expressio unius* and presumption of consistent usage canons to argue that since Congress had required water quality as a mandatory eligibility criterion in other parts of the Clean Water Act (and therefore "knew how"), the absence of a similar provision in the State Revolving Fund ("SRF") program was evidence of intent to omit it here.[26] But statutory canons of construction can often be employed to argue conflicting positions.[27] In order to support the EPA's argument, for example, one could look to canons lending weight to the overall legislative purpose (the Clean Water Act's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"[28]) or titles and preambles (the formal title of Section 603 is "Water Pollution Control Revolving Loan Funds").

Finally, a law's legislative history can help determine congressional intent. Interpreters often rely on a generally accepted "hierarchy of evidence" under which congressional intent can best be ascertained. Most commonly accepted are conference and committee reports, which are widely read,

is not clear or plain. *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 44, 60 (2d ed. 2013).

26. Letter from Joseph Martens, Comm'r, N.Y.S. Dep't. of Envtl. Conservation, to Citizens Campaign for the Environment *et al*. (June 24, 2014), *available at* http://www.riverkeeper.org/wp-content/uploads/2009/06/Response-Letter-from-EFC-Board-Chairman-to-Groups-June-24-2014.pdf [http://perma.cc/Y9RH-FVD9].

27. *See* Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

28. 33 U.S.C. § 1251(a) (2014).

circulated before a vote, and appended to the bill even though they are themselves not enacted.[29]

The EFC originally argued that "Congress elected not to require that such projects demonstrate a water quality benefit or even be integral to achieving such benefits"[30] but did not cite evidence from legislative history. Meanwhile, the EPA's decision noted that "the focus of corrective actions and compliance schedules in a conservation and management plan is . . . water quality-based"[31] but provided no support from legislative history that the congressional intent when creating the program was to limit eligible projects on that basis.

The State's appeal, on the other hand, relied on the House of Representatives Committee on Public Works and Transportation Report for the Water Quality Renewal Act of 1985, an early version of the Water Quality Act.[32] This report explained that "the revolving fund was intentionally developed to provide maximum flexibility to the states . . . with mandatory Federal requirements, policies, and practices kept to an absolute minimum."[33] Again, alone this might be persuasive.

But notably, the State did not reference the report for the conference bill combining provisions from both the House and Senate bills and ultimately enacted into law. The Joint Explanatory Statement of the Committee of Conference explains that:

> [F]unds from the SRF may be used for any other treatment works as defined by section 212 of the Act . . . programs and projects identified under the Nonpoint Source pollution Control Program (section 319), or programs and projects identified under the National Estuaries Program (section 320). *This provision is intended to allow States the flexibility to utilize funds from the*

29. Less widely accepted than conference and committee reporters are sponsor statements, prior versions of the bill, and finally floor statements. *See* MANNING & STEPHENSON*, supra* note 25, at 136–45.

30. Letter from Joseph Martens to Citizens Campaign for the Environment *et al.*, *supra* note 26.

31. Letter from Joan Leary Matthews to Joseph Martens and Matthew Driscoll, *supra* note 1.

32. H.R. REP. NO. 99-189 (1985), *reprinted in* CONGRESSIONAL RESEARCH SERVICE, 100TH CONG., A LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987 (PUBLIC LAW 100-4) INCLUDING PUBLIC LAW 97-440; PUBLIC LAW 97-117; PUBLIC LAW 96-483; AND PUBLIC LAW 96-148, at 1072 (1988).

33. *Id.* at 23, *reprinted at* 1094.

> *SRF to support a variety of measures that the State determines are needed to achieve water quality goals.*[34]

With respect to Section 320, the report notes that:

> The conference substitute contains purposes and policies of the National Estuary Program which declare that the Nation's estuaries are of great national significance for dish and wildlife resources and provide important recreation and economic opportunities. As such, *it is national policy to maintain and enhance the water quality in estuaries and provide for the biological integrity of these waters.*[35]

Because the conference report provides the last-in-time view of congressional intent in passing the law, encompassing both houses of Congress, the State's omission of language from the conference report is significant. To the extent that the conference report is, in fact, strong evidence of legislative intent, it seems clear that Congress created the CWSRFs as a way to maintain and improve water quality in estuaries. The State is correct to stress that Congress intended to give states a high level of flexibility in selecting and implementing projects. But deference to state determinations of projects to achieve water quality goals is not the same thing as a grant of complete discretion. Ultimately, the legislative history viewed in its totality supports the EPA's interpretation of congressional intent.

IV. CONCLUSION

This examination of the legislative history surrounding the CWSRFs bolsters the EPA's interpretation that the provision was, fact, designed to improve water quality in estuaries—even though it was designed to give states the flexibility to do so in ways they determined were best.

34. H.R. REP. NO. 99-1004, at 109 (1986), *reprinted in* CONGRESSIONAL RESEARCH SERVICE, 100TH CONG., A LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987 (PUBLIC LAW 100-4) INCLUDING PUBLIC LAW 97-440; PUBLIC LAW 97-117; PUBLIC LAW 96-483; AND PUBLIC LAW 96-148, at 798 (1988) (emphasis added). *See also id.* at 800 ("This provision is intended to provide a basis for funding of projects to control nonpoint pollution and pollution to estuaries where such projects are conducted by municipalities, a State, other public organizations, or individual.").

35. *Id.* at 836 (emphasis added).

One major caveat continues to apply. Despite the scope of disagreement around water quality, the EPA declared most of the projects ineligible for SRF funding not merely on water quality concerns but because the projects are "intended to mitigate harms caused by major new construction within the estuary."[36] The EPA is therefore not claiming that all of the projects themselves are damaging or even neutral in terms of water quality,[37] but rather that the projects must be considered in the context of the overall bridge construction plan.

It is not obvious why the EPA has adopted this position. If an ancillary project is, in fact, helpful to water quality, and has satisfied the other requirements for funding under Section 603, would it legally matter if an associated project harmed water quality? The EPA appears to believe that it does but provides little support for this position. The State's appeal, on the other hand, claims that this is an impermissible standard with no statutory basis. If the State is correct, the rejection of six out of seven projects fully or partially on this rationale could be in jeopardy.

After this administrative appeal is reviewed, there remains one additional appeal within the EPA that the State may pursue.[38] Presumably, after both reviews are exhausted, it could appeal the decision in federal court. But under modern judicial doctrine, agencies such as the EPA are given a very high level of deference on their interpretation of the law. Judges will defer to an agency's interpretation when the statute is ambiguous if the agency's construction is "reasonable" and the interpretation has the force of law.[39] Thus, it is fairly unlikely, though certainly not out of the question, that a judicial appeal would change the outcome. But by that time, the State will have likely determined other sources of funding to make up the shortfall, perhaps through revenue bonds secured by higher tolls on the bridge. One way or another, the New NY Bridge will be built.

36. Letter from Joan Leary Matthews to Joseph Martens and Matthew Driscoll, *supra* note 1. One project, the Shared Use Path, was declared ineligible because it did not implement the state's CCMP.

37. The EPA *does* dispute the claimed environmental benefits for many of the projects, but it is not clear that these disputes were controlling or determinative of the question of eligibility.

38. 40 C.F.R. § 31.72 (2014); 40 C.F.R § 31.75 (2014).

39. Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984).