

January 30, 2007

Alan J. Steinberg
Regional Administrator
United States Environmental Protection Agency
290 Broadway
New York, New York 10007-1866

Re: Request for EPA compliance review and audit of the New Jersey “Clean Water State Revolving Fund (CWSRF) Program – FFY 2007 Proposed Priority System, Intended Use Plan and Project Priority List”

Dear Administrator Steinberg:

I am writing on behalf of Public Employees for Environmental Responsibility (PEER). PEER is a national support group for environmental professionals in state and federal agencies.

PEER requests that USEPA conduct a programmatic compliance review and financial audit of the New Jersey Department of Environmental Protection’s (NJDEP) and the New Jersey Environmental Infrastructure Trust’s (NJEIT) implementation of the NJ Clean Water Clean Water State Revolving Fund (CWSRF).

We understand that this program is adopted by the State as a requirement to qualify for federal capitalization and various program grants designed to achieve the goals and objectives of the Clean Water Act. We understand that New Jersey is required to develop a proposed Priority System, Intended Use Plan and Project Priority List for USEPA review and approval pursuant to Title VI of the federal Water Pollution Control Act (WPCA), which governs STATE WATER POLLUTION CONTROL REVOLVING FUNDS.

We are concerned that the NJ’s CWSRF’s may be used to fund purposes not authorized by the WPCA for projects, activities, and/or to entities for the purpose of providing financial benefits and subsidies to private development projects. We are concerned about use of CWSRF monies for private construction and development with a limited or non-existent nexus to achieving Clean Water Act objectives. We are particularly concerned about use of CWSRF funds for “transit villages” and “transfer of development rights” programs, and question how such uses are remotely related to clean water.

Specifically, according to the NJDEP's proposed FFY 2007 Proposed Priority System, Intended Use Plan and Project Priority List, NJ's CWSRF would be used for:

1. Landfill Closure and Construction –

The Financing Program also includes landfill closure and landfill construction projects (including new landfill cells) under eligible NPS projects. The Department recognizes that landfills are a major pollution concern and are identified as a nonpoint source of pollution in the State's Stormwater and NPS Program Plan developed under Section 319 of the Clean Water Act. (@ page 23, emphasis supplied)

2. Conduit Financing Solid Waste/Brownfield Remediation Projects

The Department has determined that funding limits are needed so that the CWSRF funds available are not depleted too rapidly. An analysis of the Department's funds indicates that if the program continues to fund these high cost projects at the full funding level, there would be insufficient funds to fund all of the traditional projects in the future.

As such, the Department is proposing to limit the amount of the Department's loan share available for "Conduit Financing" solid waste/brownfields remediation projects to \$25 million per project. This represents a change from prior years' financing cycles where the limit was set at \$40 million per year. By doing so, sponsors classified as conduit borrowers are better equipped to evaluate the financial benefits of the program without the underlying concern that other conduit borrowers may participate in the same year and adversely impact the financial package that was initially anticipated through the program.

This policy is effective for the loans to be awarded in SFY2008 and beyond, unless otherwise modified through the Priority System document for Clean Water Financing. Even with this \$25 million per project limitation, the Division of Water Quality anticipates that as early as State Fiscal Year 2010, the Clean Water SRF will have insufficient funds remaining to fund the entire pool of projects that it has traditionally funded. Therefore, the Department may need to revisit the policy as early as next year, depending upon the amount of funds available and the aggregate amount of CWSRF loans for which applications are received or anticipated.

3. Smart Growth Financing

The FFY2007 Priority System includes an additional category under the Smart Growth Financing Program for wastewater and/or stormwater infrastructure projects that serve areas designated as Transfer of Development Rights (TDR) Receiving Areas. Sponsors of projects that serve areas designated as TDR Receiving Areas under the State TDR Act (P.L. 2004, c.2), by the Highlands Council, by the Pinelands Commission or by Burlington County pursuant to the Burlington County Transfer of Development Rights Demonstration Act (P.L. 1989, c. 86) will be eligible to receive the enhanced financing package with 75% DEP and 25% Trust financing combined to provide loans at one-quarter the market rate. The proposal maintains the other categories for the Smart Growth Financing Package (i.e., the "75/25" funding), which include:

- (a) wastewater and/or stormwater infrastructure projects to serve urban centers/urban complexes or increased populations in Transit Villages designated as such by the interagency Transit Village Task Force;
- (b) brownfields remediation projects located in DEP-designated Brownfields Development Areas (BDAs); and
- (c) projects that involve the repair and/or replacement of individual septic systems, the acquisition of open space land for water quality protection and the construction of combined sewer overflow abatement facilities.

Links: NJDEP SRF link to the document:

http://www.state.nj.us/dep/dwq/pdf/cwf_2007prop_toc.pdf

Additionally, the Sunday January 28, 2007 Bergen Record reported that a \$200 million loan from the CWSRF was provided to the benefit of private developers at the “EnCap” project in the Hackensack Meadowlands. According to the Record:

“In 2005, for example, a little-known arm of the Department of Environmental Protection gave EnCap an unprecedented \$200 million loan from a pot of federal money that had been earmarked for towns and local public utilities.” Your tax dollars fund Encap golf venture. Sunday, January 28, 2007

We request that USEPA review the NJ determine if the activities described in the propose FFY and the Bergen Record Encap story are consistent with NJ’s CWSRF program and constitute approved eligible uses of CWSRF funds.

We appreciate your consideration of our concerns. We look forward to your timely and favorable disposition of this request.

Sincerely,

Bill Wolfe, Director

Statutory Background

The federal Water Pollution Control Act, commonly known as the “Clean Water Act”, was amended in 1987. Changes in 1987 phased out the construction grants program, replacing it with the State Water Pollution Control Revolving Fund, more commonly known as the Clean Water State Revolving Fund. This new funding strategy addressed water quality needs by building on EPA-State partnerships.

Title VI of the WPCA ties State CWSRF to meeting the goals, objectives and requirements of the Clean Water Act. Section 601 provides in pertinent part:

“all funds in the fund as a result of capitalization grants under this title and section 205(m) of this Act will first be used to assure maintenance of progress, as determined by the Governor of the State, toward compliance with enforceable deadlines, goals, and requirements of this Act, including the municipal compliance deadline;

Section 602 provides implementation provisions, including EPA oversight via State agreements:

SEC. 602. CAPITALIZATION GRANT AGREEMENTS.

(a) GENERAL RULE.—To receive a capitalization grant with funds made available under this title and section 205(m) of this Act, a State shall enter into an agreement with the Administrator which shall include but not be limited to the specifications set forth in subsection (b) of this section

Section 603 sets forth EPA oversight responsibilities governing State Revolving Fund programs. Section 603 also sets eligibility criteria for projects funded with CWSRF monies, as follows:

SEC. 603. WATER POLLUTION CONTROL REVOLVING LOAN FUNDS.¹

(a) REQUIREMENTS FOR OBLIGATION OF GRANT FUNDS.—Before a State may receive a capitalization grant with funds made available under this title and section 205(m) of this Act, the State shall first establish a water pollution control revolving fund which complies with the requirements of this section.

(b) ADMINISTRATOR.—Each State water pollution control revolving fund shall 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 this Act.

(c) PROJECTS ELIGIBLE FOR ASSISTANCE.—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 212 of this Act), (2) for the implementation of a management program established under section 319 of this Act, and (3) for development and implementation of a conservation and management plan under section 320 of this Act. The fund shall be established, maintained, and credited with repayments, and the fund balance shall be available in perpetuity for providing such financial assistance. 2

Title VI established a planning process, including procedures and criteria for State adoption, public participation, and EPA approval of proposed State Intended Use Plans for CWSRF monies.

(c) INTENDED USE PLAN.—After providing for public comment and review, each State shall annually prepare a plan identifying the 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 216 of this Act and a list of activities eligible for assistance under sections 319 and 320 of this Act;**
- (2) a description of the short- and long-term goals and objectives of its water pollution control revolving fund;**
- Sec. (3) information on the activities to be supported, including a description of project categories, discharge requirements under titles III and IV of this Act, 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 602(b) of this Act; and**
- (5) the criteria and method established for the distribution of funds.**

According to Title VI, EPA is required to conduct an annual oversight on New Jersey’s CWSRP plan. Specifically:

(e) ANNUAL FEDERAL OVERSIGHT REVIEW.—The Administrator shall conduct an annual oversight review of each State plan prepared under subsection (c), each State report prepared under subsection (d), and other such materials as are considered necessary and appropriate in carrying out the purposes of this title. After reasonable notice by the Administrator to the State or the recipient of a loan from a water pollution control revolving fund, the State or

loan recipient shall make available to the Administrator such records as the Administrator reasonably requires to review and determine compliance with this title.