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**VIA E-MAIL: [pamela.young@health.ny.gov](mailto:pamela.young@health.ny.gov)**

Pamela L. Young, Ph.D.  
Bureau of Water Supply Protection  
NYC Watershed Section  
New York State Department of Health  
Corning Tower Room  
1110 Empire State Plaza  
Albany, NY 12237

**Re: Preliminary Recommendations for New York City's 2017 Filtration Avoidance Determination**

Dear Dr. Young:

Riverkeeper, Inc. ("Riverkeeper"), appreciates the opportunity to engage in New York State Department of Health's ("DOH") early review process of New York City's ("NYC" or the "City") forthcoming 2017 Filtration Avoidance Determination ("FAD") application. We thank DOH and NYC for working with their many partners to continue to provide over one billion gallons per day of pristine drinking water for over nine million New Yorkers.

Riverkeeper is a member supported environmental watchdog organization dedicated to defending the Hudson River and its tributaries and to protecting the drinking water supply of nine million NYC and Hudson Valley residents. Through enforcement and litigation, policy and legislation, as well as educational outreach, Riverkeeper focuses on three overarching problems facing Hudson River communities: preserving the New York City Watershed, restoring the Hudson River ecosystem, and improving public access to the Hudson River.

Riverkeeper is a signatory of the 1997 Watershed Memorandum of Agreement ("MOA"), which provides the framework through which NYC conducts its water supply operations and funds projects to address such water quality issues as septic system upgrades, infrastructure repair and extension, pollution control and land acquisition. As a signatory, Riverkeeper has a unique public role to ensure that the agreement succeeds and that its provisions are implemented and enforced to maintain filtration avoidance.

In response to DOH's request for preliminary input regarding the 2017 Filtration Avoidance Determination, we recommend that DOH address the following priority areas to maintain high quality drinking water and the natural lands, waterways, and forest systems that make it possible as set forth in detail below.<sup>1</sup>

**1. DOH Must Serve as Lead Agency for the Environmental Review of NYC's 2017 FAD Application and Evaluate the Impacts to the Lower Esopus Creek in an Environmental Impact Statement.**

The Department of Health's determination to approve or to deny the City's 2017 FAD application is subject to the State Environmental Quality Review Act ("SEQRA"). Under SEQRA the governmental entity "principally responsible for carrying out, funding or approving" a proposed action—in this case DOH—must, as a threshold issue, "determine whether a proposed action may have a significant effect on the environment."<sup>2</sup>

Approval of a Filtration Avoidance Determination application is a SEQRA Type I action, carrying with it "the presumption that it is likely to have a significant adverse impact on the environment and may require an [environmental impact statement]."<sup>3</sup> If approved, the FAD would require the City to use ground or surface water in excess of 2,000,000 gallons per day, and it may authorize the physical alteration of 10 or more acres, prompting the Type I designation.<sup>4</sup> A full Environmental Assessment Form must be prepared for all Type I actions,<sup>5</sup> and a lead agency must be established for coordinated review prior to the determination of significance.<sup>6</sup>

Riverkeeper requests that the Department of Health serve as lead agency for the SEQRA review. The agency would perform transparent and even-handed assessments of all potential environmental impacts, fully evaluate potential alternatives to FAD programs, and identify mitigation measures to minimize any impacts that are unavoidable.

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<sup>1</sup> Riverkeeper reserves the right to submit further recommendations as well as comments on any forthcoming draft Filtration Avoidance Determination.

<sup>2</sup> *In re Coca-Cola Bottling Co. v. Bd. of Estimate*, 72 N.Y.2d 674 679-80 (1988) (citing ECL §§ 8-0109(2) & (4), 8-0111(6); 6 NYCRR § 617.2(v)).

<sup>3</sup> 6 NYCRR § 617.4(a)(1).

<sup>4</sup> *See id.* § 617.4(b)(6)(i)-(ii).

<sup>5</sup> *See id.* § 617.6(a)(2).

<sup>6</sup> *Id.* § 617.6(b)(2)(i).

It is well settled that the lead agency for a project *must* be the agency that is principally responsible for *approving* the action."<sup>7</sup> Although NYC has been and will remain an integral part of implementing and funding the many water quality programs required under the Filtration Avoidance Determination, DOH has primary enforcement authority to oversee the success of the FAD and is responsible to 9 million NYC and Hudson Valley consumers to ensure the City meets the minimum requirements of the Surface Water Treatment Rule promulgated under the Safe Drinking Water Act.<sup>8</sup> DOH is the only agency with "both the power and the duty to impose practicable conditions" upon the City to mitigate adverse impacts on public health and the environment.<sup>9</sup> As such, DOH must not delegate its authority to oversee the environmental review as lead agency.<sup>10</sup> If DOH determines it does not have sufficient technical or legal expertise to adequately evaluate the potential significant environmental impacts of the FAD approval, the agency must at least serve as co-lead agency.

Moreover, DOH, as lead agency, must complete a full environmental impact statement prior to making any determination to allow or require releases from the Ashokan Reservoir during the 2017 Filtration Avoidance Determination. Such releases have had, and are likely to have in the future, a significant impact on New York State's environment.<sup>11</sup> As the New York State Department of Environmental Conservation ("DEC") correctly observed in July 2009, "depending on how the diversion channel is used, there [is] the potential for negative impacts to biota, residents and property from periodic, and/or poor quality releases to the lower Esopus Creek."<sup>12</sup> DOH is obligated to complete an environmental impact statement regardless of whether the

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<sup>7</sup> *Price v. Common Council*, 3 Misc.3d 625, 629 (Sup. Ct. Erie Co. 2004) (citing 6 NYCRR § 617.2(u) (emphasis added)).

<sup>8</sup> 42 USC § 300g-2(a); Pub. Health Law § 201(1)(l) (DOH is required to "supervise and regulate the sanitary aspects of water supplies and sewage disposal and control the pollution of waters of the state.").

<sup>9</sup> *Price*, 3 Misc.3d at 629 (citing 6 NYCRR §§ 617.3(b), 617.12(a)(2)(i)).

<sup>10</sup> *Id.* at 629 ("A lead agency under SEQRA may not delegate its responsibilities to any other agency.").

<sup>11</sup> See ECL §§ 8-0801 to 08-0117; 6 NYCRR § 617.7(a) ("To determine that an [environmental impact statement] will not be required for an action, the lead agency must determine either that there will be no adverse environmental impacts or that identified adverse environmental impacts will not be significant.").

<sup>12</sup> Letter from James M. Tierney, Assistant Comm'r for Water Resources, N.Y. State Dep't of Env'tl. Conservation, to David Warne, Assistant Comm'r, N.Y. City Dep't Environmental Prot., and Tina Johnstone, P.E. Operations Dir., N.Y. City Dep't of Env'tl. Conservation, at 3 (Jul. 17, 2009). See N.Y. State Dep't of Env'tl. Conservation, Administrative Complaint, DEC Case No: D0007-0001-11, at ¶ 53 (Feb. 14, 2011).

environmental impacts would occur within or outside the NYC Watersheds. The environmental review being conducted in connection with the Catskill Aqueduct State Pollutant Discharge Elimination System permit modification does not relieve DOH's obligation to comply with SEQRA before taking action to approve NYC's 2017 FAD application. Given the clear role DOH has in approving the FAD revisions, it should not and cannot walk away from its obligation to address the consequences, both environmental and human, that will result from a decision to allow or require operation of the Ashokan Release Channel.

## 2. DOH Should Set Ambitious Land Acquisition Goals.

The U.S. Environmental Protection Agency ("EPA") and the National Academy of Sciences have identified land acquisition as the primary line of defense for safeguarding watershed lands from pollution.<sup>13</sup> New York City concurs, having stated that "the highly successful Land Acquisition Program [] has been instrumental in maintaining New York City's status as one of only five large cities to receive the majority of its water from unfiltered sources."<sup>14</sup> DOH has also publicly noted the effectiveness of land acquisition efforts.<sup>15</sup> The Land Acquisition Program is a key part of the City's efforts to protect the quality of its water supply because it maintains natural features that filter pollutants before they reach reservoirs; precludes land uses that would otherwise introduce new pollutants into the water supply; and shifts development toward areas of less sensitivity.<sup>16</sup> The Land Acquisition Program provides an "anti-degradation strategy, which seeks to avoid potential adverse water quality impacts associated with development and other land uses."<sup>17</sup>

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<sup>13</sup> Eric Goldstein, *New York State Authorizes 105,000 Acre NYC Watershed Land Acquisition Program to Safeguard Downstate Water Supply and Region's Economy* (2011), <https://www.nrdc.org/experts/eric-goldstein/new-york-state-authorizes-105000-acre-nyc-watershed-land-acquisition-program> (last accessed June 8, 2016).

<sup>14</sup> Press Release, New York City Dep't of Env'tl. Prot. [DEP], State, City Announce Landmark Agreement to Safeguard New York City Drinking Water (Feb. 16, 2011), *available at* [http://www.nyc.gov/html/dep/html/press\\_releases/11-11pr.shtml#.V2wMHpMrJ-U](http://www.nyc.gov/html/dep/html/press_releases/11-11pr.shtml#.V2wMHpMrJ-U).

<sup>15</sup> DOH, *Mid-Term Revisions to the 2007 Surface Water Treatment Rule Determination for New York City's Catskill/Delaware Water Supply System 33* (2014) [hereinafter *Revised 2007 FAD*] ("Land acquisition is one of the most effective, and therefore, important mechanisms to protect the City's Catskill/Delaware watershed.").

<sup>16</sup> DEP, *Land Acquisition*, [http://www.nyc.gov/html/dep/html/watershed\\_protection/land\\_acquisition.shtml](http://www.nyc.gov/html/dep/html/watershed_protection/land_acquisition.shtml) (last accessed June 8, 2016).

<sup>17</sup> DEP, *Final Environmental Impact Statement (EIS) The Extended New York City Watershed Land Acquisition Program*, at ES-1 (2010), *available at* [http://www.nyc.gov/html/dep/pdf/reviews/land\\_acquisition\\_program/extended\\_lap\\_feis\\_.pdf](http://www.nyc.gov/html/dep/pdf/reviews/land_acquisition_program/extended_lap_feis_.pdf).

New York Stands alone as the only major American city with an unfiltered drinking water supply where fewer than 50% of its watershed lands are protected in perpetuity. Seattle, San Francisco, and Portland all own or control virtually their entire watersheds. And Boston has more than 50% of its Quabbin Reservoir watershed lands under protective ownership or control.<sup>18</sup> In stark contrast, only 38% of New York's lands are permanently protected. New York City must continue its land acquisition program to protect against future risks such as climate change. The program's impact on development is only minimal as 62% of the watershed lands are currently under private control and ready to be developed. We urge the Department of Health to solidify this cornerstone of the Long-Term Watershed Protection Program ("LTWPP") and work with NYC and other stakeholders to set ambitious goals for the Land Acquisition Program for the duration of the next FAD term, especially in sensitive areas.

a. Wetlands and Riparian Buffers Should Be a Primary Target for Land Acquisition.

According to the New York City Department of Environmental Protection ("DEP"), only 2,740 of 15,190 wetland acres – just 18% – have been protected within the West-of-Hudson Watershed.<sup>19</sup> Wetlands provide a number of essential benefits to protecting water quality, including:

They slow stormwater runoff to help abate flooding and prevent erosion. Waters that pass through wetlands are filtered by a variety of mechanisms that remove sediments and nutrients, thereby improving water quality. Wetlands also provide stream baseflow, crucial to maintaining aquatic habitat during dry periods, and are often the sources of headwater streams.<sup>20</sup>

The water quality benefits of wetlands are clear; these lands should be a primary target for acquisition. A greater proportion than a mere 18% of these sensitive areas must be protected to ensure sufficient water quality protection in the long term.

Similarly, DEP protects only 16% of all acres within 300-foot stream buffers in West-of-Hudson Watersheds, which is "roughly consistent with the percent of watershed

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<sup>18</sup> Eric Goldstein, Comments of the Natural Resources Defense Council Before the New York State Health Department Concerning Proposed Revisions to NYC's Waiver from Filtering Drinking Water from the Catskill/Delaware Water System, at 4 (Nov. 15, 2013).

<sup>19</sup> DEP, Watershed Protection Summary and Assessment Report 108 (2016), available at [http://www.nyc.gov/html/dep/pdf/reports/fad\\_5.1\\_watershed\\_protection\\_program\\_summary\\_and\\_assessment\\_report\\_03-16.pdf](http://www.nyc.gov/html/dep/pdf/reports/fad_5.1_watershed_protection_program_summary_and_assessment_report_03-16.pdf).

<sup>20</sup> *Id.* at 101.

protected by the City overall.”<sup>21</sup> While these buffer areas are critical to water quality protection, NYC does not seem to have prioritized them over other watershed lands. Healthy riparian buffers can, among many other things, stabilize stream banks and reduce erosion, filter sediment and materials from overland runoff, absorb nutrients from overland and sub-surface flows; and reduce the impacts of flooding through temporary storage, interception and slow releases from heavy rains.<sup>22</sup> The City should focus its land acquisition efforts on these riparian lands.

b. East-of-Hudson Land Should be a Primary Target for Land Acquisition.

East-of-Hudson unfiltered supply watersheds lands should also be a primary target for land acquisition, especially the sensitive Kensico, West Branch, Croton Falls, and Cross River basins. Successful land protection West-of-Hudson must not be diminished by failure to protect the Catskill/Delaware basins that sit East-of-Hudson and continue to face threats from heavy development pressure. Since 2011, Riverkeeper has noticed an uptick in the number of proposed development projects in these basins. These proposed projects include:

*Baker Residential Subdivision*, a 116-lot subdivision in Mt. Pleasant, approximately one third of which drains to the Kensico Reservoir;<sup>23</sup>

*King Street Airport Parking Facility*, a proposed new parking garage for the Westchester County Airport in North Castle in the Kensico Basin;<sup>24</sup> and

*The Vue*, a proposed 200-apartment complex on a 24-acre plot in the Kensico Basin.<sup>25</sup>

Maintaining water quality in the East-of-Hudson Reservoirs is vitally important to ensuring the high quality of the water from the unfiltered Catskill/Delaware system.

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<sup>21</sup> *Id.* at 55-6.

<sup>22</sup> W.V. Dep't of Env'tl. Prot., Importance of Riparian Buffers, <http://www.dep.wv.gov/WWE/getinvolved/sos/Pages/RiparianMagic.aspx> (last accessed June 15, 2016).

<sup>23</sup> DEC, Environmental Notice Bulletin (Jan. 28, 2015), [http://www.dec.ny.gov/enb/20150128\\_not3.html](http://www.dec.ny.gov/enb/20150128_not3.html).

<sup>24</sup> DEC, Environmental Notice Bulletin (Mar. 30, 2016), [http://www.dec.ny.gov/enb/20160330\\_not3.html](http://www.dec.ny.gov/enb/20160330_not3.html).

<sup>25</sup> North Castle Planning Bd., Work Session Agenda (June 8, 2016), *available at* [http://northcastleny.granicus.com/GeneratedAgendaViewer.php?view\\_id=2&clip\\_id=1596](http://northcastleny.granicus.com/GeneratedAgendaViewer.php?view_id=2&clip_id=1596).

East-of-Hudson water quality will become even more important in the coming decade when the City increases its dependence on the Croton system to supplement the water supply while the West-of-Hudson aqueducts are taken offline for badly-needed maintenance and repairs.

### **3. DOH Should Set and Enforce Firm Milestone Deadlines, Ensure Accountability, and Quantitatively Evaluate Program Effectiveness.**

There are several milestone deadlines for programs in the 2007 Filtration Avoidance Determination as revised in 2014. While some deadlines are tied to dates certain, many others depend on prerequisite trigger events which, upon occurring, set the timeframes for implementation of subsequent milestones. When the trigger event deadlines are malleable, so too are all subsequent milestones. The practice of setting milestones based on indeterminate trigger events has allowed the City to delay or avoid implementation of certain programs without consequence. In theory, this allows the City to delay programs indefinitely. Thus, reasonable, certain deadline dates must be set and complied with, thereby assisting DEP to move through its contracting processes, set expectations for all stakeholders, and, most importantly, protect water quality and local communities.

There is no set deadline in the Revised 2007 FAD for the final expert panel report on the Operations Support Tool, despite its status as a deliverable. Instead DOH states in the FAD that timeframes for the final report will be devised by the City and set forth in the City's scope for the review.<sup>26</sup> DOH stacks another dependent milestone on top of the final report deadline, requiring the City to submit evaluation criteria for the Catskill Turbidity Control Program based on the final report six months after that report is finalized.<sup>27</sup> These milestones leave the City too much discretion to set its own deadlines and never actually require the report to be finalized. Riverkeeper requests that DOH set in the 2017 FAD a hard deadline for this report.

Milestone deadlines for the expert panel review of the City's Long-Term Watershed Protection Program are similarly indeterminate. The review of the LTWPP is paramount to understanding and improving the Program, and it has been over 20 years since an independent assessment has been undertaken. While DOH appropriately retained discretion to set a deadline for the stakeholder meeting that would begin to frame the scope of review, the agency did not set a firm milestone deadline for that meeting when implementing the Revised 2007 FAD. Thus, the deadline for the City's submission of the final scope for the expert panel review was not set until DOH held the meeting. DOH could have instead worked in some flexibility for the scoping process while also setting a reasonable limit on the timeframe for the final scope. It is important

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<sup>26</sup> Revised 2007 FAD at 64-5.

<sup>27</sup> *Id.* at 65.

that this independent review get underway immediately, as its conclusions and recommendations will be informative during the 2022 round of FAD approval and/or revision. We recommend that DOH set reasonable but firm deadlines for each phase of the report, especially when deadlines are dependent solely upon the City's action.

In some circumstances where program milestones have deadlines based on dates certain the City has failed to comply with those deadlines without consequence. For instance, the City should have implemented the Riparian Buffer Program by November 1, 2014, but nearly two years later we have yet to see the program get off the ground.<sup>28</sup> Firm deadlines should be coupled with some sort of accountability appropriate for each scenario, whether that means stipulated penalties or another mechanism to ensure that the programs are implemented and water quality is protected.

For the programs that have been implemented on a timely basis, there has been a lack of clarity regarding measures of success, making it difficult to evaluate how effective they have been at protecting drinking water quality. We urge DOH to work with stakeholders to develop and utilize meaningful, quantitative measurements for the success of these programs vis-à-vis water quality. We recommend that DOH, EPA, DEC, and the Watershed Inspector General ("WIG") meet with City officials in order to define goals for NYC's newer programs aimed at achieving successful implementation and establish targets tied directly to measurable effects on water quality. These implementation goals could help DOH formulate ways for the City to streamline its annual deliverable progress reporting and make it easier to quantify the annual progress of all New York City programs.

In addition, baseline data included in the Program reports that have been deliverables for many years should be used to evaluate the performance of the various watershed protection programs. DOH states in the revised 2007 FAD that activity and reporting milestones for each program element were established in the City's Long-Term Watershed Protection Program and original 2007 FAD. The 2006 LTWPP provides that the "reports are designed to give regulatory oversight agencies and watershed stakeholders the information they need to assess the progress of the watershed protection program."<sup>29</sup> A list of 37 such reports appears in Table 2.64 of the more recent 2011 LTWPP.<sup>30</sup> It appears that neither EPA nor DOH has been making use of this existing data to inform their oversight and assessment of progress.

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<sup>28</sup> *Id.* at 54.

<sup>29</sup> DEP, 2006 Long-Term Watershed Protection Program 64 (2006) available at [http://www.epa.gov/region2/water/nycshed/2007wp\\_program121406final.pdf](http://www.epa.gov/region2/water/nycshed/2007wp_program121406final.pdf); see Section 3, *supra*.

<sup>30</sup> DEP, 2011 Long Term Watershed Protection Program 91 tbl.2.64. (2011) available at [http://www.nyc.gov/html/dep/pdf/watershed\\_protection/2011\\_long\\_term\\_plan](http://www.nyc.gov/html/dep/pdf/watershed_protection/2011_long_term_plan).



Since many of the FAD programs have been operating for years without independent evaluation, Riverkeeper recommends that DOH solicit review of the baseline and monitoring data and evaluation of program performance by an independent panel to bring a neutral perspective to the City's own review process. Such an independent review could help facilitate evaluation of the effectiveness of a number of programs, including the Stream Management, Riparian Buffer Protection, Septic System Replacement, Catskill Turbidity Control, and Whole Farm Plan Programs. The FAD should provide that such an independent evaluation be conducted every five years.

**4. DOH Should Exercise Its Authority to Ensure Effective and Lawful Turbidity Control in the Ashokan Basin.**

The Revised 2007 FAD requires the City to convene an independent expert panel to evaluate the City's use of the Operations Support Tool.<sup>31</sup> Based on the conclusions in the final expert panel report, DOH would allow the City to determine whether modification of the Phase III Catskill Turbidity Control Implementation Plan is necessary. Only at the City's discretion would it "be required to propose alternative measures for achieving turbidity control and a timeline for implementing those alternatives."<sup>32</sup>

We propose instead that DOH take control of this process by permitting the City to submit *recommendations* as to whether Modification Phase III of the Catskill Turbidity Control Implementation Plan is necessary, but reserving DOH's right to make the final determination. In consultation with EPA, DEC and the WIG, DOH should base its determination on the conclusions of the expert panel report and those in the forthcoming final environmental impact statement concerning the proposed modification to the Catskill Aqueduct SPDES permit. In the event that DOH determines a modification is necessary, the City should be required to propose alternative measures for achieving turbidity control under a timeline for implementing those alternatives that will be set by DOH.

**5. DOH Should Require the City to Operate Reservoirs to Mimic Natural Flows for the Benefit of Local Ecosystems and Communities.**

While providing New York City consumers with clean drinking water is a paramount goal, it is important to keep in mind that the watersheds that fulfill the City's drinking water needs also support ecosystems and have major impacts on local communities

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<sup>31</sup> Revised 2007 FAD at 63.

<sup>32</sup> Revised 2007 FAD at 64.

whose support and cooperation is crucial for long-term success of the FAD. Under SEQRA, the Department of Health has a duty to ensure that significant adverse environmental impacts, such as those in these watersheds resulting from the City's operation of its water supply, are avoided or minimized.<sup>33</sup> Where possible, the City should operate reservoirs to mimic natural flows and help local ecosystems and communities survive. This goal should be woven throughout the 2017 FAD provisions.

The Ashokan Release Channel discharges have shown the manmade impact of operating reservoirs and the need for these significant adverse impacts to be mitigated. As a result of months of high-volume releases following Hurricane Irene and Tropical Storm Lee and the excessive turbidity in the Lower Esopus that resulted from them, EPA declared the Lower Esopus to be impaired under the standards of Clean Water Act section 303(d) due to high levels of suspended silt and/or sediment resulting from human activities "such as release channel operations associated with the Ashokan Reservoir."<sup>34</sup> The high-volume releases from the Ashokan have also harmed recreational and economic opportunities for Lower Esopus communities.

New York State's policy regarding releases from reservoirs is to "protect and enhance the recreational use of rivers and streams . . . while ensuring [] an adequate water supply from such reservoirs for drinking and other purposes."<sup>35</sup> The regulatory framework that implements this policy is now out of date as it pertains to the Ashokan Reservoir, as it blames the "lack of release works at the Ashokan" for obviating the need to protect and enhance downstream recreational opportunities.<sup>36</sup> Now that the City has established and placed into operation reservoir release works for the Ashokan Reservoir, we urge DOH to work with DEC and the City to devise a release protocol that will ensure constant minimum flows and avoid adverse impacts to downstream communities to the maximum extent possible while continuing to provide pristine water for consumers. DEC must then revise the part 672 regulations with an opportunity for public comment.

A second public controversy similarly highlights the importance of operating reservoirs for the benefit of local communities and ecosystems. The City is now constructing a Low-Level Outlet at Gilboa Dam for releases to the Lower Schoharie Creek. The Low-Level Outlet, if used for conservation releases as proposed, would draw down the cold water supply in the Schoharie Reservoir to the detriment of the world renowned fishery

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<sup>33</sup> ECL §§ 8-0109(1)-(2); 6 NYCRR § 617.9(b).

<sup>34</sup> EPA, LISTING THE LOWER ESOPUS CREEK ON NEW YORK STATE'S 2012 303(D) LIST OF IMPAIRED WATERS: FACT SHEET 1 (Jan 13, 2013) [hereinafter 303(d) FACT SHEET], *available at* <http://www.epa.gov/Region2/water/waterbodies/EsopusListingFactSheet.pdf>.

<sup>35</sup> 6 NYCRR § 672-1.1(a).

<sup>36</sup> 6 NYCRR § 672-2.3(b).

that the communities depend on in the Esopus Creek. To its credit the City is studying the feasibility of alternatives/additions to the Low-Level Outlet to prevent harm to the Upper Esopus. Riverkeeper requests that DOH impose a milestone deadline in the 2017 FAD for a draft feasibility study, as well as a 60-day period for the public to review and comment on the draft. The deadline will provide a clear requirement for a beneficial outcome for local fisheries and the NYC water supply system. DOH should also impose a milestone deadline for the final report.

**6. DOH Should Require the City to Develop an Emergency Stream Management Work Plan in Preparation for the Next Flooding Event and Prioritize Human Health Hazards in Its Stream Management Program.**

As we saw in 2011, post-Hurricane Irene and Tropical Storm Lee, bestowing carte blanche on private landowners or municipalities to remove debris and modify stream flows has disastrous consequences for both flood prevention and stream ecology. Poorly conceived projects can unintentionally worsen flooding risk for downstream riparian properties and local infrastructure, destroy fish habitats, and increase erosion and stream scouring to the detriment of water quality. These potential adverse impacts may include economic losses due to additional property, infrastructure and stream-bank repairs, and loss of tourism, among other expenses.

Once again, in the lead-up to Hurricane Joaquin in late 2015, New York State issued an emergency order allowing unvetted and destructive stream clearing operations. Some of these activities, like the clearance of the "strainer" where a young woman tragically drowned in 2015,<sup>37</sup> should have been subjected to the permitting procedures set forth in the Environmental Conservation Law and remedied long before the emergency conditions posed by Hurricane Joaquin. In the aftermath of the storm scare, Riverkeeper wrote a letter to Commissioner Seggos requesting that the emergency declaration be rescinded and that DEC take a more proactive approach to remedying hazardous waterway conditions in the future, attached to this letter as Appendix A.

A pro-active approach is the only way to ensure that stream management projects are identified and subjected to the full environmental and public safety reviews required by law well in advance of emergency conditions. We propose that the City perform yearly reviews and prioritize the most pressing stream projects that endanger human health. This approach would help protect water quality and downstream communities from potentially ill-conceived, hasty solutions made after emergency conditions present themselves. We also propose that DOH require as a FAD deliverable that the City work with stakeholders to develop an integrated watershed-wide emergency plan for in-stream and riparian recovery projects in advance of the next major flooding event in

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<sup>37</sup> Julia Reischel, Soldiers Remove Deadly Strainer from Esopus, Warning Sign Installed, Watershed Post (Oct. 2, 2015), available at <http://www.watershedpost.com/2015/soldiers-remove-deadly-strainer-esopus-warning-sign-installed>.

order to prevent the types of “wildcat” projects that were approved following Irene and Lee.

We recognize that the City and local partners in Delaware County have begun “a flood hazard mitigation effort that will identify the most beneficial projects for reducing flood related losses and water quality impacts and provide funds to implement those projects.”<sup>38</sup> We also recognize that NYC has offered technical assistance to Delaware County communities and has trained contractors, local municipal officials and others in post-flood emergency stream intervention.<sup>39</sup> However, these initiatives are limited to one of five counties within the West-of-Hudson Watersheds, and they are not a substitute for an action plan to coordinate a response in the event of an emergency. Nor do these initiatives ensure that stream management efforts are focused on the most pressing public health risks.

#### **7. DOH Should Implement Mechanisms to Permanently Protect the Lands Brought into the Conservation Reserve Enhancement Program.**

Riparian buffers are critically important for water quality protection.<sup>40</sup> Through the U.S. Department of Agriculture’s (“USDA”) Conservation Reserve Enhancement Program (“CREP”), the City has protected over 2,000 acres of environmentally sensitive riparian buffer lands on nearly 150 watershed farms.<sup>41</sup> Former State Farm Service Agency Director Ron Robbins once called the program “a huge success, both environmentally and economically.” He further stated that, “[b]uffers have reduced soil erosion and prevented nutrients from reaching the creeks, while fencing has removed animals from the water. Meanwhile, the program has paid out over \$1.5 million into Delaware County and other watershed county economies.”<sup>42</sup>

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<sup>38</sup> Delaware Co. Soil & Water Conservation Dist., Delaware Watershed Stream Corridor Management Program; 2015 – 2017 Action Plan for the East and West Branch of the Delaware River 7 (2016), *available at* [http://www.nyc.gov/html/dep/pdf/reports/fad\\_4.6\\_stream\\_management\\_program\\_-\\_rolling\\_two-year\\_action\\_plans\\_05-15.pdf](http://www.nyc.gov/html/dep/pdf/reports/fad_4.6_stream_management_program_-_rolling_two-year_action_plans_05-15.pdf).

<sup>39</sup> *Id.* at 19.

<sup>40</sup> *See* Section 1(a) above.

<sup>41</sup> DEP, Watershed Protection Summary and Assessment Report 5, 71 (2016), *available at* [http://www.nyc.gov/html/dep/pdf/reports/fad\\_5.1\\_watershed\\_protection\\_program\\_summary\\_and\\_assessment\\_report\\_03-16.pdf](http://www.nyc.gov/html/dep/pdf/reports/fad_5.1_watershed_protection_program_summary_and_assessment_report_03-16.pdf).

<sup>42</sup> Press Release, DEP, New York City Watershed Conservation Reserve Enhancement Program Enrolls 1000 Acres Of Stream Buffers To Protect Drinking Water Quality (May 9, 2002), *available at* [http://www.nyc.gov/html/dep/html/press\\_releases/02-18pr.shtml](http://www.nyc.gov/html/dep/html/press_releases/02-18pr.shtml).

The Conservation Reserve Enhancement Program must be made permanent if its great successes are to be preserved. Under the program, easements on farms extend for only 10-15 year terms. Once the USDA contracts expire, these lands may be brought back into production to eventually degrade water quality in local streams and rivers that flow to City reservoirs. Between 2011 and 2016, "29 expiring contracts (301.9 acres) were re-enrolled" in CREP, but "21 expiring contracts (136 acres) were not re-enrolled by choice of the landowners."<sup>43</sup> Nearly one third of the once-protected riparian lands under expired CREP contracts will now be available for production. To prevent this outcome from recurring in the future, DOH and NYC should implement mechanisms to make these easement programs permanent and protective of water quality in perpetuity.

#### **8. DOH Should Consider Expanding the Septic System Rehabilitation and Replacement Program to Fund Such Repairs for Municipal Employers.**

The approximately 22,000 residential septic systems currently being used throughout the Catskill/Delaware Watershed pose a potentially significant contamination threat to water quality. The Septic Rehabilitation and Replacement Program has successfully repaired or replaced of more than 4,800 failing or likely-to-fail septic systems.<sup>44</sup> As these systems will continue to fail, it is imperative that this program be adequately funded for the duration of the 2017 FAD.

The Small Business Septic System Program has also successfully paid for the repair or replacement of fifteen septic systems serving businesses with fewer than 100 employees. Riverkeeper supports the expansion of this program to public places of employment, to repair all systems, public or private, that are failing or likely to fail.

#### **9. Climate Change Must Be Taken into Account When Creating and Implementing All FAD Programs.**

Climate change is an issue that must be thoughtfully considered when creating and implementing Filtration Avoidance Determination Programs. The implications of climate change can be found as a theme throughout these comments, and the FAD must address and mitigate these impacts under SEQRA. Every program in the FAD, including but not limited to Septic System Replacement, Stream Management, Riparian Buffer, and Flood Buyout will be affected by climate change. We have asked for the National Academy of Sciences to review each program in light of climate change and make recommendations for adaptation. We believe that the 2017 FAD should require

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<sup>43</sup> DEP, Watershed Protection Summary and Assessment Report 5, 71 (2016), *available at* [http://www.nyc.gov/html/dep/pdf/reports/fad\\_5.1\\_watershed\\_protection\\_program\\_summary\\_and\\_assessment\\_report\\_03-16.pdf](http://www.nyc.gov/html/dep/pdf/reports/fad_5.1_watershed_protection_program_summary_and_assessment_report_03-16.pdf).

<sup>44</sup> *Id.*

NYC to confer with DEC, DOH, EPA, WIG, and the public to implement the expert panel recommendations on climate change to the maximum extent practicable.

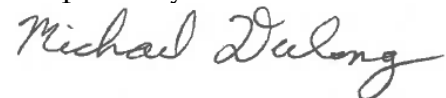
**10. DOH Should Devise a Ten-Year Budget Plan if the 2017 FAD Will Span a Decade.**

Provided its terms are sufficiently protective of water quality and upstate communities, Riverkeeper would support another FAD covering a 10-year period, with a built-in review and revision process after five years. If DOH does determine a 10-year FAD is warranted, funding in the FAD should be planned for all 10 years. If funding commitments cover only five years, there is no assurance that watershed protection programs will continue beyond that timeframe, and the FAD will be a 10-year FAD in name only. During the 5-year review, where DOH agrees that the funding should be modified, then an opportunity to do so, subject to public review and comment, should be provided for.

\* \* \*

Thank you for your consideration of these recommendations. Riverkeeper looks forward to supporting the Department of Health's and New York City's continued work to protect the pristine water supply, reduce impacts on communities affected by water supply operations, and strengthen the FAD for the short and long terms.

Respectfully submitted,



Michael Dulong  
Staff Attorney

Jeshica Patel  
Legal Intern

Encl.

# Appendix A



November 24, 2015

Basil Seggos  
Acting Commissioner  
New York State Department of Environmental Conservation  
625 Broadway  
Albany, New York 12233

**Re: Requests for Rescission of Hurricane Joaquin  
Emergency Declaration and for a More Proactive  
Departmental Approach to Remediating Potentially  
Hazardous Waterway Conditions**

Dear Acting Commissioner Seggos:

Riverkeeper, Inc., appreciates the immense responsibility imposed upon the Department of Environmental Conservation to swiftly respond to emergency situations. Further, we applaud many of the proactive steps taken by the State of New York and DEC in the days leading up to Hurricane Joaquin, especially the Department's pre-deployment of debris removal and manpower in an attempt to prevent or mitigate potential storm damage, particularly from flooding. Indeed, we support and encourage the State and DEC to build upon these efforts in the future.

The residents of New York, thankfully, did not have to endure the full wrath of Hurricane Joaquin originally forecast as a possibility for our region. Riverkeeper therefore respectfully requests that DEC withdraw the October 1, 2015 emergency declaration issued by Acting Commissioner Marc Gerstman.<sup>1</sup> The proper time and the need to invoke the emergency declaration has long since passed as evidenced by the lack of immediate danger to public health and property. There is no longer any legitimate justification to authorize heavy construction work in waterways statewide without requiring the thorough public safety and environmental reviews deemed necessary by the legislature to prevent adverse impacts to human health and natural resources. *See, e.g.,* Environmental Conservation Law §§ 15-0501(3); 24-0103; 24-0701.

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<sup>1</sup> *See* DEC, Emergency Declaration and Finding Pursuant to ECL 70-0111(d) and 70-0116 in the Matter of Damage Caused by Storms Associated with Hurricane Joaquin (Oct. 1, 2015).



## **Legal Authority for the Emergency Declaration Has Passed**

The path of Hurricane Joaquin did not progress as forecast and the dire conditions predicted for our region did not occur. In the absence of actual emergency conditions, any further action taken by DEC pursuant to the emergency declaration would not be authorized by law. The ECL guides the Department on this important point, allowing DEC “to issue general permits following natural disasters when numbers of individuals must undertake similar types of remedial projects.”<sup>2</sup> See ECL § 70-0111(d). Specifically, the law states that “general permits may be issued following such events as natural disasters or acts of God.” *Id.* As no natural disaster has occurred in New York State, there is no legal justification for the emergency declaration. Likewise, DEC has no authority under ECL § 70-0116 to waive procedural permitting requirements unless “immediately necessary to respond to an emergency.” No emergency ever materialized due to Hurricane Joaquin. The emergency declaration therefore must be lifted immediately. See ECL § 70-0116(6). The ECL is also abundantly clear on this point, stating that “the department shall issue an order suspending an emergency authorization if the department finds that the action is no longer immediately necessary to protect life, health, property or natural resources.”

## **Absent Emergency, the Provisions of the ECL and DEC Regulations Apply.**

The Hurricane did not significantly impact New York, therefore the State Environmental Quality Review Act (“SEQRA”) now applies to all actions proposed to be taken under the emergency declaration (until withdrawn). There is no longer any danger to life, health, property or resources, and any conditions that may have been caused by Hurricane Joaquin have now subsided, all actions taken pursuant to the emergency order must be subject to full environmental review under SEQRA. Although the emergency declaration states, “the actions taken as a result of the emergency shall be exempted from [SEQRA],”<sup>3</sup> the emergency exemption from SEQRA applies only to “actions that are *immediately necessary* on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency.” 6 NYCRR § 617.5(c) (emphasis added), *see id.* § 617.5(a). The provision also states that actions taken “after the emergency has expired” are subject to SEQRA. *Id.* § 617.5(c).

Riverkeeper has been told of a number of emergency actions taken purportedly

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<sup>2</sup> DEC, Emergency Declaration, *supra* note 1, at 1.

<sup>3</sup> DEC, Emergency Declaration, *supra* note 1, at 2.

*in preparation for Hurricane Joaquin, and that such work was undertaken only after it became clear that the storm would not make landfall and instead would follow a course easterly over the Atlantic Ocean. The actual course of the Hurricane eliminated potential danger to human life or property. The absence of a threat to human life or property from the Hurricane further clarifies the legal authority of the Department. DEC does not have authority to approve in-stream actions on an emergency basis without first giving due consideration to potential human health, property, and environmental harms caused by the emergency event.*

### **Department Action to Identify and Address Potential Emergency “Flash Points” Is Welcome and Necessary Before the Next Extreme Weather Event**

There are a number of legal and regulatory processes and procedures that guide and direct what types of activities are permissible with respect to streams, stream disturbance, wetlands, and water quality. These legal requirements are implemented daily by DEC staff through permitting and environmental review. These rules are necessary for the resiliency of both forests and streams, and the communities that live in these areas. The New York State legislature has acknowledged the importance of resiliency, particularly in response to a changing climate, when it recently enacted the Community Risk and Resiliency Act, which requires that decisions regarding certain State permits and expenditures consider climate risks such as projected sea level rise and flooding. The careful and important work done under the ECL and its regulations to implement important forest, stream, and community protections must no longer be allowed to be undone or over-ridden in times of emergency.

State officials and Department staff’s clear understanding of the likely increase in extreme weather events and their likely impacts provides the impetus and opportunity to address situations in “flash points” before they occur. To avoid last-minute, rushed work, Riverkeeper urges DEC to take a more aggressive approach to stream management. In preparation for future major storms, Riverkeeper respectfully requests that DEC work with local communities to proactively identify sites where potentially dangerous conditions exist, and to work to develop environmentally responsible solutions through the permitting processes to ameliorate such conditions to protect public health, life, and the environment. In the New York City drinking water watersheds, for instance, Riverkeeper welcomes the opportunity to work with DEC, local municipalities, the New York City Department of Environmental Protection and other community stakeholders to identify these potentially hazardous sites and to participate in the DEC approval of necessary projects. Such an approach would allow for immediate public notice of identified hazards and proper and thoughtful duly reviewed and permitted solutions.

**A Robust Effort to Understand Local Conditions and to Act Responsibly Before Disasters Strike Is Necessary for the Long-Term Benefit of the Region**

A pro-active approach is the only way to ensure that projects are identified and subjected to the full environmental and public safety reviews required by law well in advance of emergency conditions. This approach would also help protect water quality and downstream communities from potentially ill-conceived, hasty solutions. DEC is charged with the challenging task of stewarding New York's waterways to simultaneously minimize flood risk and protect ecological resources. This responsibility cannot be swept aside during and after storm emergency conditions. Indeed, as we saw in 2011, post-Hurricane Irene and Tropical Storm Lee, bestowing carte blanche on private landowners to remove debris and modify stream flows has disastrous consequences for both flood prevention and stream ecology. Poorly conceived projects can unintentionally worsen flooding risk for downstream riparian properties and local infrastructure, destroy fish habitats, and increase erosion and stream scouring to the detriment of water quality. These potential adverse impacts may include economic losses due to additional property, infrastructure and stream-bank repairs, and loss of tourism, among other expenses. Therefore, it is in the long-term interest of all stakeholders to submit projects to the permit application processes set forth in the ECL well in advance of the next storm.

The issues facing the Department during emergency situations are truly significant and extraordinary. The Department's work protecting the streams, forests, and water quality of New York on a daily basis are equally compelling and challenging. New Yorkers expect these responsibilities to be balanced to support public health and safety at the direst moments without compromising years of implementing important environmental protections and safeguards. We look forward to continue working with DEC and other stakeholders to help strike that delicate balance. Riverkeeper also anticipates the Department's continued commitment to community and environmental resiliency and to proactively managing our waterways and natural resources before extreme weather strikes – a balance that will create well thought out options when they are needed most.

Thank you for your consideration of our requests and for withdrawing the Hurricane Joaquin emergency declaration.

Regards,

A handwritten signature in blue ink that reads "John Parker".

John Parker  
Watershed Program Director

Cc (via email):

Paul Rush  
Assistant Commissioner  
Department of Environmental Protection

Dave Warne  
Assistant Commissioner  
Department of Environmental Protection

Phil Bein  
Watershed Inspector General  
Office of the Attorney General