

December 15, 2011

Commissioner Joe Martens
Assistant Commissioner James Tierney
NYSDEC
625 Broadway
Albany, NY 12233-1750

Re: Comments on the Proposed Interim Ashokan Release Protocol, dated 10-18-2011

Dear Commissioner Martens and Assistant Commissioner James Tierney:

The Lower Esopus Watershed Partnership, Riverkeeper and other lower Esopus Stakeholders appreciate being afforded the opportunity to comment on the DEC/DEP Interim Ashokan Release Protocol dated October 18, 2011 (“Interim Protocol”). We preface our comments by reiterating our support of a long-term, science-based release strategy for the Ashokan Reservoir that optimizes multiple objectives and promotes ecosystem-based watershed management. With that eventuality in mind, we have a number of key, overarching comments and recommendations that we would like to make before the proposed protocol is finalized or memorialized in any way.

The stakeholders have two ultimate goals with respect to any protocol governing releases from the Ashokan Release Channel (also known as the Waste Channel) to the lower Esopus. The first is to ensure that the values found in any release protocol governing the quality, quantity and duration of both community and flood mitigation releases are science-based. The values recommended herein represent a starting point to be re-visited on an ongoing basis as monitoring data and other additional information becomes available. The stakeholders request that DEC put a mechanism in place to facilitate that ongoing discussion and to guarantee the stakeholders’ regular and active participation in it.

The second goal is that any interim protocol be in place only as long as is necessary to allow the SPDES application and environmental review process to be initiated on an expedited basis and moved forward to completion, resulting in a permit with appropriate effluent limitations being put in place to govern DEP’s releases from the Release Channel to the lower Esopus.

Key Recommendations

1. DEC should not include the October 18, 2011 Interim Protocol, nor any interim release protocol, in the Order on Consent being negotiated between DEC and DEP to settle the

enforcement action initiated by DEC against DEP with its February 15, 2011 complaint for several significant reasons. First, the Interim Protocol purports to authorize discharges that violate state environmental law. Second, the Interim Protocol does not require that those discharges comply with state water quality standards. Third, the Interim Protocol has been subject to no environmental review and no public process that would otherwise be guaranteed if the discharges had been addressed by a permit application and environmental review process pursuant to SAPA (the State Administrative Procedures Act) and SEQRA (the State Environmental Quality review Act).

2. Instead, we strongly recommend that the Order on Consent require DEP to apply for a SPDES permit that regulates the discharges from the Release Channel outfall by a date certain, that that date certain be as soon as possible, within the next month at the latest, and that the permit application process be subject to the full requirements of SAPA and SEQRA with their guarantees for transparency, public involvement and a comprehensive evaluation of environmental impacts, mitigation and alternatives to the releases proposed.
3. To the extent that an interim release protocol is necessary during the period of time that a permit application and environmental review process is ongoing, and only for that period, the stakeholders again request the opportunity, at the earliest possible date within the next month, to meet with DEC to discuss the specifics of any such protocol and to afford us the opportunity to give concrete input that would be seriously considered for inclusion. Until that meeting can occur, we have the following specific comments and recommendations regarding the October 18, 2011 draft Interim Protocol:

Specific Draft Protocol Comments and Recommendations

1. Operational Releases. No operational releases should be a part of or be authorized by the draft Interim Protocol as the operational releases proposed constitute a violation of state environmental laws. Section 3 of the Interim Protocol titled Operational Releases should be deleted from the document. To the very limited extent that DEP has said that non-flood mitigation, operational releases would be necessary, DEC has the authority under the Reservoir Releases Regulations to require, and should require, that DEP request authorization for such releases on a case-by-case basis and should ensure that those releases comply with New York State law and regulations, including New York State water quality standards. See 6 NYCRR Section 672-1.3(e).
2. Interim Status of Protocol. Introductory language in the Interim Protocol should be revised to make it clear that:

“Such Protocol is interim as it may be revised as a result of monitoring and other lessons learned during its implementation, further discussions conducted between DEP and DEC, with input from the stakeholder members of the ARWG, and will be replaced by a date certain by a SPDES permit for any discharges from the Ashokan Release Channel after a full environmental review in compliance with the requirements of SEQRA.”

3. Water Quality. For both Community releases and Discharge Mitigation releases, until additional turbidity control mechanisms can be identified and put in place, both protocols should require releases of the best West Basin water available. Until this can be provided through the ability to select the least turbid water in the basin mechanically, the protocols should require that release of the equivalent of the best West Basin water available be achieved by blending with East Basin water to achieve the turbidity of the least turbid layer in the West Basin.

4. Community or Conservation Releases. We recommend an increase in the quantity of community releases (also known as conservation releases), particularly in the late summer and early fall and during above normal hydrologic conditions, to assist with improving both stream health and flood mitigation (see suggestions below).
 - a. **Minimum Flow:** DEP will make releases from the Ashokan Reservoir through the release channel at the rates prescribed in the following table.

Reservoir Storage Condition¹	Summer (May 1 – Aug 31)	Winter (Sep 1 – Apr 30)
Above Normal Hydrologic	50 MGD (77 cfs)	65 MGD (100 cfs)
Normal Hydrologic Condition	30 MGD (46 cfs)	45 MGD (69 cfs)
Drought Warning Condition	10 MGD (15 cfs)	4 MGD (6 cfs)
Drought Condition	0	0

Note that the 1979 Final Environmental Impact Statement on the Part 672 Reservoir Release Regulations considered as an alternative to the proposed action a release from the Ashokan Reservoir of 50 to 100 cfs for improvement of fisheries in the lower Esopus Creek.

5. Turbidity Limits. Turbidity limits for Community Releases should be added to Section “c” of the protocol:

“Turbidity levels in excess of 30 NTU will trigger a 30% reduction in release flow. Turbidity in excess of 100 NTU will trigger a 50% reduction in release flow.”¹

¹ These turbidity limits would apply in addition to the Water Quality requirements set forth in Paragraph 3 above.

Note that over the last two years, it has been observed and recorded that releases with turbidity over 30 NTUs for periods longer than a few weeks have had adverse social, recreational and economic impacts on downstream communities.

6. Purpose of Discharge Mitigation Releases. The purpose and focus of Discharge (Flood) Mitigation releases should be to help mitigate the effects of flooding to lower Esopus Creek communities below the Ashokan Reservoir in a manner that is consistent with and has the least possible impact on the agricultural, recreational and ecological services that the creek provides. Calculation of releases necessary to achieve that objective should consider the impacts of climate change and increased precipitation over the past 30 years in attempting to model appropriate release volumes throughout the year, including late summer and early fall. The Interim Protocol's Figure 1 Void Target should be modified to facilitate reaching a lower objective over a longer period of time, by increasing regular community discharges during late summer and early fall months.
7. Flood Mitigation. Flood mitigation releases should be governed by clear caps as to the quality, quantity and duration of flows allowed, governed by the general principal that the more turbid the water, the more limited the quantity releases and the more frequent the interspersed releases of clearer water.

Specific recommendations for paragraph "c" of the Discharge Mitigation protocol governing maximum flow:

"Because the lower Esopus Creek is used for various recreational and agricultural purposes, it is necessary to limit the flow rate from July 1 to October 14 to be protective of those uses. Therefore, the maximum flow rates shall be 300 MGD or less unless another rate is deemed necessary by DEC."

Specific recommendation for paragraph "d" of the protocol governing turbidity:

"Releases lasting 14 days or longer with turbidity levels higher than an average of 100 NTU shall be followed by a 72 hour release of the least turbid water available in the reservoir every 14 days and upon meeting the storage objective." We recognize that 100 NTU is still a very high level of turbidity and that long-duration releases at this level are likely to create problems downstream. We anticipate that this recommendation will need to be revisited based upon experience with initial levels specified herein.

8. Utilization of the Shandaken Tunnel and Catskill Aqueduct:
 - a. During discharge mitigation releases, the use of the Shandaken Tunnel shall be minimized in keeping with the existing SPDES Permit.
 - b. During discharge mitigation releases, NYCDEP shall utilize the Catskill Aqueduct to deliver water to NYC to the maximum extent practical in keeping with water quality and supply objectives.

Modeling and Monitoring Recommendations

1. Modeling:
 - a. More actual data should be incorporated into the OST model, and allow refinement of flood height predictions. Model predictions should coincide with predicted flood heights on the flood maps.
 - b. Additional OST modeling should be conducted using a more recent meteorological data to reflect the increase in storm intensity observed in recent decades.
2. Monitoring:
 - a. We recommend that a USGS Gage be installed in the Lomontville area to provide additional stage/flow and quality data. Develop a protocol for use of this gage in conjunction with the Mount Marion Gage to be utilized to inform operation of the release channel.
 - b. Lower Esopus channel and bank stability: a protocol for monitoring the impacts of releases to the lower Esopus Creek channel and bank stability should be developed and implemented.
 - c. Sediment loading and transport: depth-integrated grab samples should be collected at selected locations downstream from the reservoir to Lake Katrine (the portion of the lower Esopus before major tributaries of the Sawkill and the Plattekill) during normal flows, reservoir releases and storm events. Data on channel morphology should be collected through the Kingston area. Consider using the Sawkill watershed (a major tributary of the lower Esopus) as a reference for sediment loading.
 - d. Biological monitoring should be conducted to evaluate the impact of different release regimes on aquatic and riparian ecosystems.
 - e. Findings should be synthesized through integrative study and analysis of the gage and sediment data with additional data (such as species' turbidity tolerances) to provide recommendations on the best timing, duration, and the water quality requirements of the releases. Recommendations should be tied to the ecosystem needs and the social uses of the lower Esopus.

Conclusion

Since informed stakeholder input is vitally important to optimizing the objectives of the release strategy, we restate our request that a more formal process be put in place to ensure that the stakeholders will have a regularized and guaranteed opportunity to comment, on an ongoing basis, on the details of any interim protocol governing releases to the Ashokan Release Channel as monitoring data and studies provide new information that will inform adaptation of the specific numbers and approaches that we recommend herein as a starting point for protocol development. In addition, we ask DEC to request that DEP honor its commitment to the stakeholders to retain a technical consultant to advise us as we participate in both the Interim Protocol review and the SPDES permit application processes.

Thank you for your consideration of our comments and recommendations. We look forward to working with DEC on an ongoing basis both on the development of the Interim Protocol and through the SPDES permit application and environmental review process.

Sincerely,

cc: Marc Gerstman, Executive Deputy Commissioner
Mark Klotz, Director, Division of Water
Tom Snow, Program Coordinator, NYC Watershed Program
Ken Kosinski,
Willie Janeway, Regional Director, Region 3
Bill Rudge,
Mike Flaherty
Paul Rush, DEP Deputy Commissioner, Bureau of Water Supply