

**Response Summary for EPA's Proposed Listing of the Lower Esopus Creek on New York's
2012 303(d) List**

Contact: Sheri Jewhurst / 212-637-3035 / jewhurst.sheri@epa.gov

Section 303(d) of the Clean Water Act (CWA), 33 U.S.C. § 1251 *et. seq.*, requires states to “identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters.” In other words, states are required to identify all waters for which existing pollution controls or requirements are inadequate to provide for attainment and maintenance of water quality standards. The means by which a State identifies these waters has been commonly referred to as a state’s 303(d) List or list of impaired waters.

Pursuant to section 303(d) of the CWA, on July 25, 2012, New York State submitted a list of impaired waters to the U.S. Environmental Protection Agency (EPA) for approval or disapproval. EPA reviewed the list of impaired waters and supporting documentation. EPA’s review was based on whether the State developed its list in compliance with section 303(d) of the CWA and EPA’s implementing regulations, including whether the State reasonably considered existing and readily available water quality-related data and information and reasonably identified waters required to be listed.

New York’s narrative water quality standard for turbidity is “no increase that will cause a substantial visible contrast to natural conditions.” Existing and readily available data and information during the State’s 2012 data solicitation and public comment periods indicated an exceedance of this standard in the Lower Esopus Creek¹ (see EPA Response 1 below for a description of the data and information indicating impairment). However, the State did not include the Lower Esopus Creek on its 2012 303(d) List. In light of this, on August 16, 2012, EPA partially approved and partially disapproved the State’s 2012 303(d) List.

Pursuant to CWA section 303(d)(2), after disapproving a state’s 303(d) List for failure to list a water not meeting applicable water quality standards, EPA is required to list that water on the State’s 303(d) List if, after providing a public comment period and considering all comments received, EPA deems that listing is necessary. On September 6, 2012, EPA published a notice in the Federal Register (Federal Register, Vol. 77, No. 173, pp. 54909-54910) opening a public comment period (September 6 – October 9, 2012) to solicit comments on its proposed listing of the Lower Esopus Creek for silt/sediment² on New York’s 2012 303(d) List.

EPA received a large number of comments during the public comment period supporting the proposed listing of the Lower Esopus Creek, as well as several submissions opposing the listing.

¹ The term “Lower Esopus Creek” refers to the section of the Esopus Creek located downstream of the Ashokan Reservoir, extending until the mouth of the Creek where it meets the Hudson River. The Lower Esopus Creek consists of two New York State waterbody assessment units: Esopus Creek, Middle, and Minor Tribs (Waterbody ID Number: 1307-0003) and Esopus Creek, Lower, Main Stem (Waterbody ID Number: 1307-0010).

² Silt and sediment suspended in the water column are among a number of substances that may result in an increase in turbidity (or cloudiness). The 303(d) list identifies impaired waterbodies as well as the pollutant causing impairment.

EPA carefully reviewed all of the public comments, and EPA's response to these comments is provided below. EPA finds no new information indicating that the proposed listing of the Lower Esopus Creek on New York's 303(d) list is not necessary. Therefore, EPA is adding the Lower Esopus Creek (New York State Waterbody ID Numbers: 1307-0003 and 1307-0010) to New York's 2012 303(d) List.

Comments in Opposition

NYSDEC Comments Summary and EPA Responses

Submitted by: Jeff Myers, Director, Bureau of Water Assessment and Management, NYSDEC
625 Broadway, Albany, NY 12233-3502

NYSDEC Comments:

- Comments and photos submitted by Riverkeeper focus exclusively on conditions during and in the aftermath of significant storms in 2010 and 2011.
- The turbidity is from natural streambank erosion due to geologic conditions in the watershed.
- There was no "increase" in the sediment load from actions in or of the reservoir outside of what would have naturally occurred.
- The high sediment load and turbidity in this instance was a natural phenomenon, and conditions have returned to pre-storm conditions as of March 2012.
- Other tributaries in the area experienced greater sediment loading during the severe storm events than the Lower Esopus, and we do not consider them impaired (i.e. Catskill Creek).
 - "In the case of the Lower Esopus, the Ashokan Reservoir captured much of the initial sediment load [from hurricanes Irene and Lee] which was subsequently released over a much longer period of time. There is no such reservoir on the Catskill Creek, so a similar amount of sediment moved through that system in a much shorter period of time....The attenuation of these conditions in the Lower Esopus extended over a longer period of time than was the case for other tributaries. This was a result of the reservoir on the Esopus which trapped much of the storm-driven sediment load, which was then released over a longer period of time." (NYSDEC Response to USEPA Federal Notice Regarding Section 303(d) Listing of Lower Esopus Creek, pp. 2-3)
 - "A determination of impairment is dependent upon a number of factors, including the frequency and duration of impacts. Since the conditions cited were limited to the time during the flooding and the recovery from the flooding, they are not considered to be representative of typical conditions and not appropriately characterized as causing an impairment for 303(d) list purposes." (NYSDEC Response to USEPA Federal Notice Regarding Section 303(d) Listing of Lower Esopus Creek, p. 3).

EPA Reponse 1:

New York's narrative standard for turbidity includes a component for magnitude only ("no increase"); it does not include components for frequency and duration. Therefore, this standard must be interpreted as a "not to be exceeded" value. In other words, the magnitude cannot be exceeded at any frequency and for any duration of time, unless an exemption applies. New York's narrative standard does include an exemption for natural conditions, but New York did

not define natural conditions nor did it demonstrate that the exceedance was the result of natural conditions.

EPA's *Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act*, July 29, 2005, (Integrated Reporting Guidance or "IR") explains that an exemption from 303(d) listing is appropriate where periodic exceedances of water quality standards from natural conditions occur "solely from nonanthropogenic causes...if the state's water quality standards include a specific exclusion for exceedances due to natural conditions." (IR at 62). When a state includes an exclusion for exceedances due to natural conditions and bases an attainment decision on the existence of natural conditions, it is the State's responsibility to both define what is meant by "natural conditions" and to provide an adequate demonstration that the exceedance is the result of natural conditions. EPA's Integrated Reporting Guidance indicates that "these background or natural conditions can be defined by assessing the results of water quality monitoring efforts, by the use of predictive models, or a characterization based on data from a watershed with similar hydrologic, land use, and pollutant loading characteristics." (Id.) During the 2012 listing cycle, NYSDEC has not defined "natural conditions" nor demonstrated that reservoir operations result in conditions that can be considered natural. Further, because the operation of the release channel is an anthropogenic activity impacting the water, conditions in the Creek cannot be assumed to be natural.

EPA's Integrated Reporting Guidance allows a State to disregard "valid data gathered during extreme conditions," such as floods. However, this exclusion applies "if applicable state water quality standards include a provision specifying that some or all water quality criteria do not apply during certain rare events, such as a 7Q10³ low (or high) stream flow." (Id. at 36). New York does not have such an exclusion in its standards; therefore, the State cannot be precluded from recognizing data and information that indicate that water quality standards have been exceeded during or as a result of extreme events.

In addition, the "conditions" present in the Lower Esopus Creek involve not only the sediment load, but the duration that this load was conveyed through the Creek. Comments submitted by NYSDEC on October 9, 2012⁴, specifically state that the duration of turbidity was increased through release channel operations. Submissions from Riverkeeper, including a brief from Ulster County Executive Hein describing elevated turbidity in the Creek for several months, and comments from residents living or recreating near the Creek, also describe unusually long periods of turbid flow thorough the Creek.

NYSDEC Comments:

- A TMDL would not be an effective means of addressing the problem.
 - A TMDL would need to address streambank erosion in the watershed above the Ashokan Reservoir that is then conveyed through the channel.

³ The 7Q10 is the lowest (or highest) 7-day average flow that occurs (on average) once every 10 years.

⁴ "There is no such reservoir on the Catskill Creek, so a similar amount of sediment moved through that system in a much shorter period of time....The attenuation of these conditions in the Lower Esopus extended over a longer period of time than was the case for other tributaries. This was a result of the reservoir on the Esopus which trapped much of the storm-driven sediment load, which was then released over a longer period of time." (NYSDEC Response to USEPA Federal Notice Regarding Section 303(d) Listing of Lower Esopus Creek, pp. 2-3)

- Sediment loading is from erosion in the upper watershed that is conveyed through a reservoir release, which is not regulated under SPDES/NPDES.
- A SPDES permit would need to address streambank erosion in the upper watershed or other permitted turbidity discharges in the upper watershed. This would place a burden on dischargers, particularly MS4s, and their reductions would not have significant impacts on turbidity reduction in the Lower Esopus Creek.
- Other control measures are more appropriate than a TMDL to deal with this problem.
 - The Interim Release Protocol tries to balance competing uses (drinking water, aquatic life, and recreation) in the watershed.
 - The pending Order on Consent requires an Environmental Impact Statement, which will provide a robust platform for public comment and review to determine the best way to balance all competing uses.
 - Since October 2011, the Interim Release Protocol allows only for conservation and flood mitigation releases, but because of high sediment loading, these also contribute to turbidity.
 - As part of the renewal of the Filtration Avoidance Determination (FAD), the Catskill Turbidity Control Program will attempt to reduce sources of turbidity in the watershed (i.e., a TMDL would not be necessary).

EPA Response 2:

Section 303(d) of the CWA requires states to “identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters.” In other words, states are required to identify all waters for which existing pollution controls or requirements are inadequate to provide for attainment and maintenance of water quality standards. Where existing and readily available data and information indicate an exceedance of water quality standards in a particular water, a state must list that water on its 303(d) List.

EPA regulations recognize that alternative pollution control requirements may obviate the need for a TMDL. Segments are not required to be included on the section 303(d) list if technology-based effluent limitations required by the Act, more stringent effluent limitations required by state, local, or federal authority, or “[o]ther pollution control requirements required by local, State or Federal authority” are stringent enough to implement applicable water quality standards (see 40 CFR 130.7(b)(1)) within a reasonable period of time. Further, EPA’s Integrated Reporting Guidance acknowledges that the most effective method for achieving water quality standards for some water quality impaired segments may be through controls developed and implemented without TMDLs (referred to as a “4b alternative”). However, EPA expects States to adequately demonstrate that there are “other pollution control requirements” in place that are sufficiently stringent to achieve applicable water quality standards within a reasonable period of time (IR at 54).

EPA recognizes that various management actions involving the Ashokan Reservoir releases are underway or are planned in the near future. During the 2012 303(d) listing cycle, New York did not demonstrate that the management actions currently in place constitute pollution control requirements that will result in attainment of water quality standards for turbidity in the Lower Esopus Creek within a reasonable period of time. Because data and information indicate

exceedance of the turbidity standard, and because New York did not make this demonstration nor list the Lower Esopus Creek on its 2012 303(d) List, EPA partially disapproved New York's 2012 303(d) List and is now listing the Creek. If New York demonstrates in future listing cycles that required control measures will result in water quality standards attainment in the Lower Esopus Creek, EPA will evaluate that demonstration and determine whether 303(d) listing remains necessary. Until then, the Lower Esopus Creek must be listed.

EPA notes that the portion of the Esopus Creek upstream of the Ashokan Reservoir (Waterbody ID: 1307-0007) referenced by NYSDEC as the "upper watershed", in which the problematic erosion is occurring has been on the 303(d) list since 1998. EPA encourages NYSDEC to address the silt/sediment impairment in this 303(d) Listed water.

NYSDEC Comments:

- There are negative ramifications to stopping the releases that should be considered.
 - Turbid water moving through the Catskill Aqueduct would burden drinking water suppliers in downstream communities and cost a great deal to remediate.
 - Turbid water leaving the Ashokan reservoir would result in more alum use in the Kensico Reservoir, violating the settleable solids water quality standard.
 - There may be negative impacts to flood mitigation downstream.
 - Changing weather patterns may result in more of these extreme events, and listing waters based on storm-related erosion will provide no additional benefit.
 - The 303(d) program does not list all waters that periodically run turbid due to storm events, and this listing may set a precedent for listing waters due to turbidity after rainfall events.

EPA Response 3:

EPA is fully aware that the situation in the Lower Esopus Creek and Ashokan Reservoir is complex and that there are a number of competing uses to be considered. However, release channel management considerations are outside the scope of the 303(d) program, which focuses only on water quality standards attainment and identifying impaired waters.

Information submitted and available to EPA during the 2012 303(d) listing cycle indicates that the Lower Esopus Creek is not simply periodically turbid due to storm events and natural erosion, but is turbid for a longer period of time than could reasonably be expected, due to anthropogenic activities. When New York fails to list waters for which data indicate exceedances of New York's water quality standards, EPA is required to list that water if, after disapproving a State's 303(d) List and after providing a public comment period and considering all comments received, EPA deems that listing is necessary.

New York City Department of Environmental Protection (NYCDEP) Comments Summary and EPA Responses

Submitted by: Paul V. Rush, P.E., Deputy Commissioner, Bureau of Water Supply
P.O. Box 359, Grahamsville, NY 12740

NYCDEP Comments:

- Data submitted by Riverkeeper and used to make an impairment determination is not a representative sample.
- EPA relied on unspecified NYCDEP data, which NYCDEP believes is data regarding releases from the Ashokan Release Channel between 2006 and 2011 submitted by Riverkeeper. This data does not show conditions post implementation of the October 18, 2011 Interim Release Protocol.
- Relying on anecdotal evidence about the releases and limited photographs is arbitrary.
- Nephelometric Turbidity Unit (NTU) data submitted by Riverkeeper show turbidity levels in the release channel itself, not in the Lower Esopus Creek.
- Data is representative only of post-storm releases and photographs of turbid water are immediately after storms.
- There is no baseline data on the Lower Esopus Creek turbidity levels to compare with non-natural conditions.

EPA Response 4:

Regarding whether the post-storm data is representative of conditions in the Lower Esopus Creek, EPA's Integrated Reporting Guidance specifies that "...disregarding valid data gathered during extreme conditions (e.g., significant droughts or floods) can be appropriate if applicable state's water quality standards include a provision specifying that some or all water quality criteria do not apply during certain rare events, such a 7Q10 low (or high) stream flow" (IR at 36.). New York's water quality standards do not contain such a provision. As noted in EPA Response 1 above, because New York does not have such an exclusion in its standards, the State cannot be precluded from recognizing data and information that indicate that water quality standards have been exceeded during or as a result of extreme events. For a discussion on the conditions in the Creek resulting from release channel operations, see EPA Response 1 above.

Regarding the information used to evaluate the Lower Esopus Creek, the increased duration of turbidity was described by the New York State Department of Environmental Conservation, Riverkeeper, and in comments from the public. EPA considered all existing and readily available data and information, including EPA's institutional knowledge regarding the operation of the Ashokan Release Channel, in making the determination that the Lower Esopus Creek is impaired. EPA is aware of the Interim Release Protocol; however, the State did not demonstrate that this protocol constitutes a required control measure expected to result in attainment of water quality standards in the Lower Esopus Creek such that listing would not be necessary. See EPA Response 1 above regarding the use of valid data.

In reference to NTU data submitted, New York does not have a numeric water quality standard for turbidity in surface waters; therefore, NTU levels were not and could not be compared with a water quality standard to determine exceedance.

NYCDEP Comments:

- Data submitted is from operational releases and before the October 16, 2011 implementation of the Interim Release Protocol. After October 16, 2011, releases occur only for purposes of flood mitigation and conservation.
- Turbidity levels in the channel before the storm were not extreme and there are not ongoing problems in the Creek.
- Releases from September 2011 – May 15, 2012 were for flood mitigation only, as alum was used to address turbidity. DEP has conducted modeling to determine the impacts of the Interim Release Protocol that indicate that turbidity is expected to be under 10 NTU for 90% of release days and under 30 NTU for 97% of release days.

EPA Response 5:

The particular reasons for the releases are not relevant to whether the Lower Esopus Creek should be listed on New York's 303(d) List. As noted, all waters must be listed when existing and readily available information indicates impairment. Please see EPA Response 1 above for details regarding the frequency and duration of water quality standards exceedance. If future data from modeling or other studies show that the Lower Esopus Creek is no longer impaired, the Lower Esopus Creek can be considered for delisting.

NYCDEP Comments:

- EPA is ignoring the robust approach by NYSDEC and NYCDEP to analyze the potential impacts of various modes of operation for the Ashokan Release Channel, which will inform whether the Interim Release Protocol should be adjusted.
- NYSDEC authorized use of alum in extreme events through a permit, and as a condition of that permit, alternatives like the Ashokan Release Channel must be thoroughly examined.
- NYCDEP is committed to reviewing the environmental impacts of alum use, as well as alternatives such as the Ashokan Release Channel.
- Data in the Lower Esopus Creek and at the channel are being collected by NYCDEP moving forward to inform Ashokan Release Channel operations.
- The EIS and public comment periods will provide opportunity to find a balance between competing uses.
- It is premature to place this waterbody on the 303(d) list.

EPA Response 6:

EPA is fully aware that there are a number of detailed studies underway to examine the use of the Ashokan Release Channel and the Interim Release Protocol, and of the need to balance the competing uses of the Ashokan Reservoir and the Lower Esopus Creek. Please see EPA Response 2 above for details regarding required control measures or management actions that may obviate the need for a TMDL. EPA encourages the State, in future listing cycles, to demonstrate that required pollution controls or management actions will result in water quality standards attainment in the Lower Esopus Creek.

NYCDEP Comments:

- EPA is not following the NYS Consolidated Assessment and Listing Methodology (CALM), and NYCDEP is not aware of any regulation or guidance upon which EPA relied to reach the conclusion that the Lower Esopus Creek is impaired.
- The CALM includes provisions for frequency and duration of events. Impairment decisions should not be made based on short-term conditions.
- Baseline turbidity levels in the Creek have not been established to compare with current and future conditions.

EPA Response 7:

With regard to application of the CALM and other guidance, EPA's Integrated Reporting Guidance specifies the following:

If a state has not by rulemaking adopted a methodology into its water quality standards, EPA will consider the state's methodology, to the extent that it reflects a reasonable interpretation of the state's water quality standards and sound science, in determining whether to approve or disapprove the section 303(d) list... For methodologies that are not part of the state's applicable water quality standards, EPA will consider the methodology as it assesses whether the state conducted an adequate review of all existing and readily available water quality-related information, whether the factors that were used to make listing and removal decisions were reasonable, whether the process for evaluating different kinds of water quality related data and information is sufficient, and whether the process for resolving jurisdictional disagreements is sufficient. If EPA finds that the state's methodology is inconsistent with its water quality standards, and its application has resulted in an improper section 303(d) list, EPA may disapprove the list. Regardless of the suitability of the methodology, EPA must review the list for consistency with the relevant provisions of the CWA and the regulations. (IR at 29-30).

EPA has commented during both the 2010 and 2012 listing cycles that the CALM is inconsistent with the State's water quality standards because the water quality standards lack specificity in terms of applicable magnitude, duration and frequency of exceedances. EPA, in reviewing state 303(d) Lists, is required to ensure that approved water quality standards are being applied.

Please see EPA Response 1 above for details on exemptions from meeting water quality standards due to natural conditions or extreme events.

NYCDEP Comments:

- EPA is acting beyond its CWA mandate.
- Listing will impose a CWA mandate on municipal water management for 9 million people.
- Listing will increase alum use and place an unrealistic regulatory burden on water suppliers in the event of extraordinary storms.

EPA Response 8:

Regarding EPA's CWA mandate, Section 303(d)(1)(A) of the CWA states that "each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters." Pursuant to Section 303(d)(2) of the CWA, after

disapproving a State's 303(d) List for failure to list a water not meeting applicable water quality standards, EPA is required to list that water on the State's 303(d) List if, after providing a public comment period and considering all comments received, EPA deems that listing is necessary.

EPA recognizes the complicated nature of management actions and multiple competing uses with respect to the Ashokan Reservoir and the Lower Esopus Creek. However, the implementation of these management actions and their impacts are outside the scope of EPA's proposed listing of the Lower Esopus Creek on New York's 2012 303(d) List and EPA's request for public comments on the proposed listing.

American Water Works Association (AWWA) and New York Section,

AWWA (NYSAWWA) Comments:

AWWA Comments Submitted By: Tommy Holmes, Legislative Director, American Water Works Association,

1300 Eye St. NW, Suite 701W, Washington, DC 20005

NYSAWWA Comments Submitted By: Rochelle Cassella, Executive Director, New York Section AWWA

- “AWWA has serious concerns about EPA's proposed action, which is apparently based on the AWWA member New York City Department of Environmental Protection's operation of a municipal water supply structure – a reservoir – that simply moves water within a single water body for purposes of municipal water supply. By proposing the lower Esopus Creek for inclusion on New York's 303(d) list, we believe EPA is unwisely asserting Clean Water Act jurisdiction over municipal water supply operations. We have strong reservations about EPA imposing Clean Water Act jurisdiction on municipal water supply operations. We believe doing so goes beyond a reasonable use of EPA's discretion. It could lead to unwarranted and burdensome restrictions on water supply operations throughout New York State, and, by precedent, throughout the United States. These unwarranted regulatory burdens have the potential to significantly and adversely affect the level of community water service our members are able to provide to their customers.”
- “NYSAWWA is concerned about the United States Department of Environmental Protection's [sic] (EPA) intent to include the Lower Esopus Creek on New York State's 2012 Section 303(d) list for silt/sediment, due to exceedances of the narrative water quality standard for turbidity. By proposing the Lower Esopus Creek for inclusion on New York's 303(d) list, we believe EPA is asserting Clean Water Act jurisdiction over municipal water supply operations beyond the reasonable use of EPA's discretion. It is our view that these matters are best resolved through local and state jurisdictions and with the parties most knowledgeable about the potential impacts associated with these types of actions. NYSAWWA hopes that our strong reservations about EPA imposing Clean Water Act jurisdiction on municipal water supply operations are noted. Such action by the EPA could lead to unwarranted and burdensome restrictions on water supply operations throughout New York State and, by precedent, throughout the United States. Unwarranted regulatory burdens have the potential to significantly and adversely affect the level of community water service that our members provide to New York State residents.”

EPA Response 9:

EPA is aware that municipal water suppliers are concerned and recognizes the challenges of balancing multiple competing uses with respect to the Ashokan Reservoir and the Lower Esopus Creek. However, section 303(d)(1)(A) of the CWA states that “Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters.” In other words, states are required to identify all waters, including those used for municipal water supply operations, for which existing pollution controls or requirements are inadequate to provide for attainment and maintenance of water quality standards. Regarding EPA’s reasonable discretion on this issue, where data and information indicate that a water is not meeting applicable water quality standards and a State fails to list that water on its 303(d) List, pursuant to Section 303(d)(2) of the CWA, EPA is required to list that water if, after disapproving a State’s 303(d) List and after providing a public comment period and considering all comments received, EPA deems that listing is necessary.

EPA also recognizes the complicated nature of management actions that consider multiple competing uses. EPA notes that states are provided flexibility in determining the most appropriate means of addressing water quality impairments. If New York demonstrates in future listing cycles that required control measures will result in water quality standards attainment in the Lower Esopus Creek, EPA will evaluate that demonstration and determine whether 303(d) listing remains necessary. However, the implementation of these management actions and their impacts on municipal water suppliers are outside the scope of EPA’s proposed listing of the Lower Esopus Creek on New York’s 2012 303(d) List and EPA’s request for public comments.

The City of Kingston Comments:

Submitted by: Shayne Gallo, Mayor, City of Kingston
City Hall, 420 Broadway, Kingston, New York 12401

- The Lower Esopus Creek is “impacted” by operational activities of NYCDEP, but designating the Creek as impaired will result in unwarranted operational and regulatory consequences to adjoining farmland operations and downstream. The City would like the Clean Water Act to be enforced in a way that penalizes the violator, not in a way that spreads the blame.

EPA Response 10:

Please see EPA Response 9. Comments with respect to the impacts of this listing are outside the scope of EPA’s request for public comments on the proposed listing.

Comments in Support of Listing

Pace Environmental Litigation Clinic for Riverkeeper Comments Summary

Submitted by: Michael Dulong, Esq., Staff Attorney, Riverkeeper, Inc.
E-House, 78 North Broadway, White Plains, NY 10603

Riverkeeper Comments:

- Riverkeeper supports the listing of the Lower Esopus Creek for silt/sediment and presents information describing why a 303(d) listing is necessary for the Lower Esopus Creek.
- Riverkeeper does not believe that required control measures are in place that will ensure water quality standards attainment in the Lower Esopus Creek within a reasonable period of time (i.e., a Category 4b listing is not appropriate at this time).

EPA Response 11:

EPA agrees with Riverkeeper regarding exceedances of the narrative standard for turbidity and agrees that available data indicate that the Lower Esopus Creek should be placed on the 303(d) list. EPA also agrees that New York has not demonstrated that other required control measures are currently in place that will result in water quality standards attainment in the Lower Esopus Creek.

Comments submitted by Riverkeeper in support of these conclusions will not be responded to individually.

Riverkeeper Comments:

- Without a 303(d) listing, impairment will be ongoing based on climate change predictions and precipitation forecasts.

EPA Response 12:

As of the 2012 listing cycle, EPA believes information demonstrates that a 303(d) listing is necessary. EPA will evaluate NYSDEC's use of existing and readily available data and information in subsequent listing cycles to determine whether continued listing of the Creek is appropriate.

Riverkeeper Comments:

- The Clean Water Act does not provide an exemption for not listing due to natural conditions.

EPA Response 13:

Please see EPA Response 1 for details regarding exemptions from meeting water quality standards due to natural conditions or extreme events.

The entities below submitted comments supporting listing the Lower Esopus Creek on the 303(d) List:

Ulster County

Submitted by: Beatrice Havranek, County Attorney
244 Fair Street, P.O. Box 1800, Kingston, NY 12402

Lower Esopus Watershed Partnership

Submitted by: Mary McNamara, Outreach Coordinator, Lower Esopus Watershed Partnership
PO Box 315, Saugerties, NY 12477

Federation of Fly Fishers

Submitted by: Glenn Erikson, Ph.D.
Conservation Director of the Federation of Fly Fishers

Scenic Hudson, Inc.

Submitted by: Steve Rosenberg, Sr. Vice President, Scenic Hudson
One Civic Center Plaza, Suite 200, Poughkeepsie, NY 12601

The Village of Saugerties

Submitted by: Patrick Landewe
Trustee, Village of Saugerties

EPA Response 14:

EPA has considered the comments submitted and agrees that 303(d) listing is necessary.

Members of the Public via the Riverkeeper website template:

EPA received 401 nearly identical comments using Riverkeeper's comment template supporting EPA's proposed listing of the Lower Esopus Creek on New York's 2012 303(d) List of Impaired Waters. An example of these nearly identical comments is provided below.

I appreciate being afforded the opportunity to comment on the Environmental Protection Agency's (EPA) decision to list the Lower Esopus Creek as an impaired waterbody, partially disapproving the New York State Department of Environmental Conservation's (DEC) 2012 List of Impaired Waters. I commend EPA for its focus on the protection and health of the Lower Esopus Creek and support its decision requiring DEC to place the Creek on that list, upholding the requirements of the Clean Water Act intended to guarantee swimmable, fishable and drinkable water for all communities.

As a citizen that depends on a healthy Lower Esopus, I greatly appreciate EPA's formal recognition of the Lower Esopus Creek's impairment. I fully support EPA's conclusion, reached after evaluating all available scientific data and information, including submissions provided by Riverkeeper. It is undeniable that the Lower Esopus Creek is impaired as a result of New York City Department of Environmental Protection's (DEP) continued discharges of highly turbid water from the Ashokan Reservoir. I am aware that DEC has issued a draft Consent Order to settle an enforcement action it brought against DEP for those discharges, as well as other violations. However, the draft Consent Order fails to require that these turbid discharges will stop or the impairment they are causing will be addressed. Instead, the draft Consent Order negotiated by DEC and DEP will continue to allow the City to make turbid discharges in volumes and duration similar to those we have seen over the past two winters. Given the draft consent order's

failure to provide for any pollution control measures, it is my hope that EPA's determination will require DEC to work with DEP to put such control measures in place so this significant source of pollution will finally be addressed.

The City's ongoing discharges impair the ecosystems of the Lower Esopus and hinder business and recreational opportunities for communities along the Creek. The first step to putting the Lower Esopus on a path towards restoration begins with EPA's formal recognition of its impairment, which I welcome and applaud.

Thank you for consideration of my comments. I look forward to EPA and DEC working together to restore the Lower Esopus Creek to the precious natural and community resource it has been in the past.

EPA Response 15: EPA has reviewed these comments, and agrees that 303(d) listing is necessary because water quality standards are not being attained. Comments regarding the actions of other agencies are outside the scope of EPA's proposed listing of the Lower Esopus Creek on New York's 2012 303(d) List and EPA's request for public comments.

Other Members of the Public:

EPA received written comments from the following members of the public:

B.M. Byrne
J. Capozzelli
Ron Eberlein
Roger Frary
Jennifer Organtini Judware
Konrad Kaltesch
Bob Kindt
Gregg Link
Linda LoPresti
Tom O'Dowd
Lorraine & Vincent Organtini
June J. Overbaugh
Fred Schreyer
Stephen Shirak
Mr. and Mrs. John W. Sullivan
Roger Yetzer
Roseanne Yetzer
No name disclosed; email alias "mstrugatz"

Out of the above submissions, 13 support listing the Lower Esopus Creek, none oppose listing, and 5 provide information or comments that are outside the scope of EPA's request for comments on the proposed listing of the Lower Esopus Creek. These comments are available upon request.

EPA Response 17:

In response to those who support listing, EPA agrees that the Lower Esopus Creek is impaired and should be placed on the 303(d) List. To those who submitted other comments, EPA has reviewed your comments and has determined that they are outside the scope of the 303(d) program, which focuses only on water quality standards attainment and identifying impaired waters.