



February 6, 2012

Roger Simson
NYSDEC
Division of Water
625 Broadway, 4th Floor
Albany, NY 12233-3500

Dear Mr. Simson:

Riverkeeper appreciates the opportunity to comment on the New York State Department of Environmental Conservation's (DEC) draft water withdrawal regulations, proposed as amendments to 6 N.Y.C.R.R. Parts 601 and 621.

Riverkeeper is a member-supported, watchdog organization dedicated to defending the Hudson River and its tributaries and protecting the drinking water supply of nine million New York City and Hudson Valley residents. Since 2008, Riverkeeper has been actively involved in advocacy and public education surrounding the issue of shale gas extraction via high-volume hydraulic fracturing (HVHF), in particular because of its potential impacts on New York's fresh water supply.

Since HVHF associated with natural gas production requires millions of gallons of water per fracture, HVHF and water withdrawal issues are inextricably related. Riverkeeper strongly supports DEC's issuance of permits for water withdrawals associated with HVHF activity and other water-intensive activities that mandate water conservation measures, which are protective of New York's rivers, lakes, and streams.

While the draft regulations go far to establish a solid program to oversee large-scale water withdrawals, there are a number of significant changes that must be made before they can be considered adequately protective of the environment and sustainable in the long-term. We respectfully request that DEC revise its draft regulations to address these deficiencies, and issue the revised draft for the minimum public comment period required. To that end, we have outlined below the key changes that need to be made to the proposed draft regulations.

I. DEC's proposed schedule for issuing permits to existing water withdrawers is unacceptable.

The phased permitting schedule that DEC proposes in draft section 6 N.Y.C.R.R. 601.7(2) is unacceptable as it waives permit requirements for many large-scale water withdrawers for up to five years.¹ Riverkeeper strongly recommends that DEC mandate submission of permit applications within a fifteen-month period starting on September 15, 2012, in three-month phases (the first round of permit applications would be due September 15, 2012, the next December 15, 2012, and so on with all applications due by December 15, 2013). If HVHF activities are greenlighted, existing water hauling companies who have reported prior to February 1, 2012, will likely work at full capacity. This potential upswing in water withdrawals makes it especially important for DEC to issue individual permits for all existing users as close to the same time as possible in order to prevent cumulative adverse impacts to natural resources.

The proposed permitting schedule is also unfair because it gives the state's largest water users priority over smaller, potentially more efficient water withdrawers. Phasing by water volume could prejudice smaller withdrawers as they may not be able to obtain a permit to make withdrawals from water bodies that are already subject to high-volume withdrawals by other permittees, based on DEC's determination that further withdrawals would cause adverse impacts. In order for DEC to weigh properly competing uses and assign uses in a manner that prevents cumulative adverse impacts to particular water bodies or watersheds, we strongly suggest that DEC phase permits based on regions of the state or watersheds rather than volume of water withdrawn.

As discussed in Section II of these comments, we recognize that DEC is resource-strapped and it may not be feasible for the agency to process the number of applications it will

¹ Specifically, draft section 601.7(2) provides that:

A complete application for an initial permit shall be submitted by and in accordance with the following schedule: February 15, 2013 for water withdrawal systems that withdraw or are designed to withdraw a volume of 100 million gallons per day (mgd) or more; February 15, 2014 for water withdrawal systems that withdraw or are designed to withdraw a volume equal to or greater than 10 mgd but less than 100 mgd; February 15, 2015 for water withdrawal systems that withdraw or are designed to withdraw a volume equal to or greater than 2 mgd but less than 10 mgd; February 15, 2016 for water withdrawal systems that withdraw or are designed to withdraw a volume equal to or greater than 0.5 mgd but less than 2 mgd; February 15, 2017 for water withdrawal systems that withdraw or are designed to withdraw a volume equal to or greater than 0.1 but less than 0.5 mgd.

receive in a timely manner without additional funding. We suggest in the following sections that DEC generate the funds needed to administer this program by imposing permit application and consumption fees that go directly to the Division of Water.

II. DEC should impose permit fees.

The draft regulations fail to propose any permit application fees, despite the known need for funds to implement this program.² The legislation, at ECL § 15-1501.4, gives DEC the authority to impose fees, stating DEC's regulations "may establish . . . any other conditions, limitations and restrictions . . . to ensure the proper management of the waters of the state." Even without this legislative language, DEC has broad authority to impose fees reasonably necessary to carry out its regulatory scheme.³

We understand from DEC's public information session on its draft regulations that DEC's primary, if not sole, reason for phasing the permitting schedule is that it lacks the resources to review all permit applications at once. To cure this deficiency and facilitate timely review of all applications as soon as possible, Riverkeeper recommends that DEC impose a reasonable permit application fee, and then allocate the resulting funds to water withdrawal permit review, monitoring, inspection, and enforcement. Given the agency's already resource-strapped situation, a new permitting program without any revenue to fund the program is unsustainable, irresponsible, and fundamentally unfair to New York taxpayers.

² Permit fees are only mentioned once in draft section 601.5(c), which states "Any person who submits an annual water withdrawal report to the Department in compliance with the requirements of this subpart shall satisfy the registration and annual reporting provisions of E.C.L. article 15 title 16 and 33, respectively, until the effective date of their repeal, which is December 31, 2013, except that such person . . . shall continue to be subject to the two-year registration fee of two hundred dollars (\$200), or the annual report fee of fifty dollars (\$50) pursuant to E.C.L. article 15 title 16 or title 33, as applicable, until the effective date of their repeal."

³ See *Matter of Walton v. New York State Dep't of Correctional Services*, 13 N.Y.3d 475, 485 (2009) ("Municipalities and administrative agencies engaged in regulatory activity can assess fees that need not be legislatively authorized as long as 'the fees charged [are] reasonably necessary to the accomplishment of the regulatory program.'") (quoting *Suffolk County Bldrs. Assn. v. County of Suffolk*, 46 N.Y.2d 613, 619 (1979)); see also E.C.L. § 72-0101 (the New York State Legislature "declares that those regulated entities which use or have an impact on the state's environmental resources should bear the costs of the regulatory provisions which permit the use of these resources in a manner consistent with the environmental, economic and social needs of the state." (Article 72 sets fees for several DEC programs, including water transport permit fees under Article 15)).

III. DEC should impose fees based on consumptive use.

In addition to not providing for permit application fees, the draft regulations do not provide for fees for water usage. Under the terms of the Delaware River Basin Compact and the Susquehanna River Basin Compact, water withdrawals in the Delaware and Susquehanna River Basins are subject to Delaware River Basin Commission (DRBC) and Susquehanna River Basin Commission (SRBC) approval processes and not the draft DEC regulations.⁴ Both the DRBC and the SRBC charge application fees and/or fees for permitted water usage.⁵ Since DEC does not propose to charge for withdrawals, this may have the unintentional consequence of incentivizing withdrawals outside the Delaware and Susquehanna Basins, and in the Great Lakes Basin.

Riverkeeper recommends that DEC impose block pricing, similar to the SRBC program fee structure. SRBC imposes fees based on a range of consumptive use; for example, SRBC imposes a particular fee for water usage of between 100,000-500,000 gallons per day. DEC should impose similar block-based consumption fees, and as recommended above, DEC should use the fees generated to fund the implementation of this program within the Division of Water.

IV. Proposed regulatory language which provides that "[s]ignificant individual or cumulative adverse impacts on the quantity or quality of the water source and water dependent natural resources, including aquatic life" should be defined.

Draft section 6 N.Y.C.R.R. 601.11 states that in deciding whether to grant or deny a permit, DEC must determine whether the proposed water withdrawal "will be implemented in a manner to ensure it will result in no significant individual or cumulative adverse impacts on the quantity or quality of the water source and water dependent natural resources, including aquatic life." While we support this proposition, DEC does not define the term "significant individual or cumulative adverse impacts," making it difficult to determine what the standard is that if not met, would cause DEC to deny a permit. To carry out the intention of the legislature to protect natural resources, DEC should define this term in a manner that ensures DEC will require applicants to strictly uphold water quality and quantity standards uniformly, and in manner that is protective of natural resources.

⁴ See 33 N.Y. State Register 47, at 8 (Nov. 23, 2011) (to be codified at 6 N.Y.C.R.R. § 601.9(b) (for ease of reference the proceeding cites to the draft regulations are referred to by draft section number)).

⁵ See SRBC Compact Section 3.9 ("The commission, from time to time after public hearing upon due notice given, may fix, alter, and revise rates, rentals, charges, and tolls, and classifications thereof"); SRBC Regulatory Program Fee Structure, http://www.srbc.net/programs/docs/Regulatory%20Program%20Fee%20Schedule%202010%20Amended%206_11_10.pdf; Delaware River Basin Commission Basin Regulations – Water Supply Charges, Article 5.3, http://www.state.nj.us/drbc/library/documents/water_charges.pdf.

In formulating this definition, DEC should give special consideration to the protection of sensitive state and federally designated habitat areas, such as Significant Coastal Fish and Wildlife Habitats. Not all water bodies in New York are exactly alike, and DEC should take specific measures to make certain that aquatic habitat areas of statewide significance are not compromised.

DEC should also use the authority granted it by the governing statute to formulate a definition that incorporates “quantitative standards that maintain stream flows protective of aquatic life.”⁶ Quantitative standards would set minimum requirements that must be met by all applicants, which would both ensure uniformity and prevent adverse environmental impacts.

V. Permitting criteria should be mandatory, not discretionary.

The draft regulations include a list of criteria that DEC must consider before determining whether to grant a permit with conditions, or deny a permit.⁷ We support the criteria listed, but it should be incumbent upon DEC to ensure that the proposed water withdrawal meets each criteria prior to granting a permit. The regulations should flatly state that DEC *shall not* grant a permit when such activity, if permitted, would not meet all of the criteria.

VI. DEC should mandate water conservation.

The draft regulations require each permit applicant to submit a “water conservation plan,” that:

Demonstrates the applicant's water conservation and efficiency measures that are environmentally sound and economically feasible and that minimize inefficiencies and water losses. Such measures must include but are not limited to: source and customer metering; frequent system water auditing; system leak detection and repair; recycling and reuse; and reductions during drought.⁸

However, the draft regulations are unclear as to whether implementation of the water conservation plan will be a requirement of the permit and enforceable as a permit condition. The regulations should provide that DEC may suspend or revoke a water withdrawal permit if it determines that the permittee has failed to fully implement all water conservation measures specified in its water conservation plan. The permit should also require annual review and revision of the plan to ensure that the plan is achieving its desired goals. DEC may couple this annual review and revision with the annual inspection requirement, suggested in Section IX below.

⁶ E.C.L. § 15-1501.1(4).

⁷ Draft § 601.11(c).

⁸ Draft § 601.10(f).

VII. DEC should propose a water conservation and efficiency program in compliance with ECL § 15-1501.

Water withdrawal legislation mandates that DEC establish a conservation and efficiency program with the goals of:

- (a) ensuring improvement of the waters and water dependent natural resources, (b) protecting and restoring the hydrologic and ecosystem integrity of watersheds throughout the state, (c) retaining the quantity of surface water and groundwater in the state, (d) ensuring sustainable use of state waters, and (e) promoting the efficiency of use and reducing losses and waste of water.⁹

While the draft regulations require permit applicants to include a “water conservation plan” as discussed above, this alone does not achieve the requirement set forth in the water resources law.

DEC should establish a set of statewide goals for water conservation and efficiency, embodied in the regulations, as the basis for implementing the water conservation and efficiency program required by the statute. The regulations should provide DEC with the authority to adjust those goals to address cumulative impacts and climate change observed over time. The regulations should also, at a very minimum, set targets for meeting the requirements of the Great Lakes – St. Lawrence River Basin Water Resources Compact’s (the Great Lakes Compact) regional objectives of minimizing water use, developing science technology, research, and education programs, and information sharing for all water users.

VIII. Monitoring records should be kept with DEC, not the permittee, and made available to the public upon request.

The draft regulations require the permittee to self-monitor and retain records of all monitoring information.¹⁰ By failing to also require that DEC maintain its own copy of all ongoing compliance documents, the draft regulations render such documents publicly inaccessible. To ensure that the public can play a meaningful role in protecting the state’s waters, permittees should be required to submit all monitoring records on a monthly basis to DEC and DEC should make the records easily available to the public, upon oral or written request and/or on its website.

⁹ E.C.L. § 15-1501(8).

¹⁰ Draft § 610.20.

IX. DEC should formally require its staff to conduct routine inspections.

The draft regulations allow for DEC inspections, but do not ensure them at regular intervals.¹¹ At a minimum, the regulations should require DEC to conduct an annual inspection of each permittee in order to detect and deter violations.

X. DEC should require end users to be identified.

DEC's proposed reporting requirements require the identification of the end use of the water, but not the end users. To effectively monitor large-scale water consumption that is supported by multiple permitted withdrawers, the draft regulations should require the water withdrawer to identify the end user, so DEC and the public can track both the proposed use of the water and the user.

XI. Establish 5-year permits.

DEC's draft regulations propose a ten-year permit, the maximum term allowed under the law.¹² Water bodies can change drastically over the course of ten years, particularly when multiple entities are withdrawing water from the same waterbody. To protect New York's waterbodies, DEC should grant permits with terms no longer than 5-years.

XII. Ensure compliance with Great Lakes Compact.

While the draft regulations provide that Great Lakes Basin withdrawals must comply with the Great Lakes Compact, DEC should incorporate specific Compact requirements into its permitting criteria to ensure that they are adequately addressed by the applicant and DEC during the permitting process.

Specifically, DEC must incorporate two necessary elements from the Compact into the permitting criteria set forth in the regulations: (1) all water withdrawn from the Great Lakes Basin must be returned to the source watershed, less an allowance for consumptive use; and (2) the proposed use must be reasonable.

Likewise, the regulations should acknowledge that "interbasin diversions" from a Great Lake major drainage basin to another Great Lake major drainage basin are subject to limitations under the Compact. Finally, the draft regulations should provide a process for reviewing proposals for diversion exceptions subject to the Great Lakes Compact.

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¹¹ Draft § 610.21.

¹² E.C.L. § 15-1503.6; draft § 601.11(b).

Thank you for considering our comments. We look forward to working with DEC to implement a robust water withdrawal program which protects New York's precious water resources and aquatic life.

Sincerely,

/s/

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/s/

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