

**Hands Across the Border  
19 Sunset Place  
North Salem, NY 10560  
914-485-1052**

January 18, 2012

NYSDEC  
Division of Water  
Attn. Robert Simson  
625 Broadway  
Albany NY 12233-3500

Re: Submission of Comments on draft Water Withdrawal regulations with  
Proposed Amendments to 6 NYCRR Parts 601 and 621

Dear Mr. Simson,

**Improper Procedure**

NYS DEC has issued draft water withdrawal regulations with Proposed Amendments to 6 NYCRR Parts 601 and 621 without issuing at the same time the draft permit or permits it intends to use. Thus, the public would have no chance to review and comment on the permit/s before they are finalized and is contrary to proper procedure. The promulgation of new regulations regarding water is a matter of deep concern for all NY residents. Without appropriate public comment -- including that of local agencies and municipalities -- DEC cannot fulfill its responsibility under the State Environmental Quality Review (SEQRA) to ensure that these regulations are the most effective and well-developed rules possible. Because New York State permits are the culmination of these regulations, it is improper to issue the draft water regulations without the draft permit(s) being available for public review.

Since these new water rules allow for the exportation of massive amounts of NYS water, and if gas drilling proceeds in NY, the hydrofracking industry is expected to be one of the state's largest new water withdrawers, the DEC should have waited until the FSGEIS is issued on high volume horizontal hydraulic fracturing before issuing these regulations and should provide the public with longer notice regarding these regulations. The draft water withdrawal regulations were issued quietly on November 23, 2011 -- during the Thanksgiving holiday week and while the public focused on the hydrofracking dSGEIS comments -- and with very short notice for public meetings rather than public hearings. Public hearings are generally considered necessary on matters of great public concern. The protection of the state's fresh water supplies is without question such a matter.

Comment period on the regulations ends January 22, 2012 and these rules may go into effect as soon as February 15, 2012. The public is largely unaware of this premature, under-the-radar issuance, does not have the proposed draft permit/s in hand to review with the regulations, and there have been no hearings to debate our points of concern and come to greater clarity on the regulations.

We have serious concerns with the regulations themselves as well as their timing before the SGEIS on hydrofracking is finalized and the fracking regulations re-issued.

### **Concerns**

#### **Thresholds amounts too high**

The threshold volume of 100,000 gpd is too high. It is not applicable for DEC to defend such a high threshold by stating that other northeast states have the 100,000 gpd threshold because those states are not situated atop shale deposits of methane gas and are not facing enormous drawdown of their water resources for hydrofracking as is New York State. Furthermore, to merely have to register proposed diversions out of basin in excess of the enormous threshold of 1,000,000 gpd is reckless. We should have 20,000 gpd as the threshold on all withdrawals for the reasons stated below by Rachel Treichler and as requested by other environmentalists for the White Paper recommendations for inclusion in the water withdrawal/resources bill. This would give appropriate monitoring, scrutiny and protection of our precious, finite fresh water supply.

Rachel Treichler at New York Water Law

<http://nywaterlaw.com/blog/1201/1201nywaterregs.html> summarizes some of the above as well as additional concerns with which we totally concur:

#### **“New York's Proposed Water Withdrawal Regulations: Unequal Treatment for the Great Lakes Basin**

My initial review of the proposed water withdrawal regulations published by the New York State Department of Environmental Conservation (DEC) in the [New York State Register on November 23, 2011](#), discloses six preliminary areas of concern:

1. The proposed regulations are being issued without a cumulative impact analysis of water usage in the state, including water usage for hydrofracking
2. The proposed regulations are being issued without the revised permit language being available for review.
3. The proposed withdrawal regulations do not address the consumptive use of water for gas drilling and will not cover most withdrawals for this purpose, leaving the Great Lakes Basin less protected than the Delaware and Susquehanna River Basins
4. A staggered schedule of implementation is proposed, with the largest permits being issued first, thereby prioritizing the state's largest water users
5. No public hearings are required before permits are issued, leaving residents of the Great Lakes Basin with fewer rights than residents of the Delaware and Susquehanna River Basins
6. No water usage fees are imposed for withdrawals in the Great Lakes Basin although fees are imposed by the DRBC and the SRBC for withdrawals in the Delaware and Susquehanna River Basins

I urge the DEC to withdraw the proposed regulations and offer new regulations for comment that address these concerns.

As described in a [previous post](#), the proposed regulations are to implement the water withdrawal legislation [passed unanimously](#) by both houses of the legislature earlier this year and [signed into](#)

[law](#) by Governor Cuomo on August 15, 2011. The proposed regulations, prepared as amendments to 6 NYCRR Parts 601 and 621, are posted on the DEC website at <http://www.dec.ny.gov/regulations/78258.html>. No public hearings on the proposed regulations have been scheduled. On Dec. 2, 2011, the DEC announced public information sessions in New Paltz on December 6, 2011, in Henrietta on December 13, 2011, and in Albany on December 12, 2011. Written public comments on the proposed regulations are being accepted through next Sunday, January 22, 2012.

## **1. There Needs to Be a Cumulative Impact Analysis of Water Usage in the State, including Water Usage for Hydrofracking**

A comprehensive revision and expansion of New York's water withdrawal regulations would appear to require a cumulative impact analysis under the New York State Environmental Quality Review Act (SEQRA). A cumulative impact analysis is being urged as part of the DEC's environmental review of its amended gas drilling regulations and permit requirements.

Both the [Delaware River Basin Commission](#) (DRBC) and the [Susquehanna River Basin Commission](#) (SRBC) are being challenged for their failures to conduct cumulative impact analyses of water usage for gas drilling and other uses in the Delaware and Susquehanna River Basins, *see* [NY AG Sues for Full Environmental Review of Gas Drilling in Delaware River Basin, Nonprofits Challenge DRBC Gas Drilling Regulations](#), and [SRBC Adopts Rulemaking on Gas Drilling, Ignores Concerns](#). Similarly, the DEC needs to prepare a cumulative impact analysis of New York's water resources before amendments to the state's water withdrawal regulations are proposed.

The August 2010 Final Report of the New York Great Lakes Basin Advisory Council, titled [Conserving and Protecting Our Water Today for Use Tomorrow](#), states, 'Prior to managing or regulating new and expanded uses as required by the [Great Lakes-St. Lawrence River Basin] Compact, New York State must establish a baseline of current existing withdrawals, diversions and consumptive uses.'

Furthermore, why the rush to close the comment period on the proposed water withdrawal regulations before New York State's environmental review of hydrofracking and horizontal drilling is completed? There are many overlapping issues between the regulation of gas drilling and the regulation of water withdrawals since water withdrawals for gas drilling will be a major new water use in the state if hydrofracking and horizontal drilling are permitted. For this reason, the DEC should wait to close the comment period on the water withdrawal regulations until after the SGEIS on hydrofracking and horizontal drilling is completed.

## **2. Updated Permit Language Is Not Available for Review**

In the ongoing environmental review of hydrofracking and horizontal drilling, the DEC has made the proposed new permit conditions available as part of the review process. Updated water withdrawal permits reflecting the proposed new regulatory requirements have not been made available. When I called the DEC to request an opportunity to review the new permit language, I was told that updated permit language has not been finalized. In order to adequately evaluate the proposed water withdrawal regulations, it is necessary to review the proposed permit revisions.

### 3. The Consumptive Use of Water for Gas Drilling Must be Subject to Review and Approval

Unlike the rules of the [Susquehanna River Basin Commission](#) (SRBC) or the proposed rules of the [Delaware River Basin Commission](#) (DRBC), the DEC's proposed water withdrawal regulations contain no special requirements for water withdrawals for the consumptive use of gas drilling. The proposed regulations thus fall short of the oft-stated goal of putting in place regulations in the Great Lakes Basin that will give the state's water resources in the Great Lakes Basin the same protections that apply in the Susquehanna and Delaware Basins.

The Delaware River Basin Compact and the Susquehanna River Basin Compact, codified in New York at ECL Section 21-0701 *et seq.* and Section 21-1301 *et seq.*, respectively, delegate authority to the Delaware and Susquehanna River Basin Commissions to regulate withdrawals from, diversions into or out of, and consumptive uses of, water in each basin. No similar provision is contained in the Great Lakes-St. Lawrence River Basin Water Resources Compact, codified in New York at ECL Section 21-1001 *et seq.*, leaving withdrawals in the Great Lakes Basin subject to the regulations of New York.

Furthermore, it would appear that, because the DEC's proposed withdrawal permitting requirements are not tied to the consumptive use to which the withdrawals will be put, except in one limited case, the regulations fail to implement the requirements of the Great Lakes-St. Lawrence River Basin Water Resources Compact (GLSLRBC). Article 1, Section 4.3.1 of the GLSLRBC provides that 'Each Party, within its jurisdiction, shall manage and regulate New or Increased Withdrawals, Consumptive Uses and Diversions, including Exceptions, in accordance with this Compact.' ECL § 21-1001.

In only one instance under the proposed regulations does the use to which a withdrawal will be put trigger a permitting requirement. Section 601.6(f) requires a permit 'for a public water supply system with a capacity equal to or greater than the threshold volume, to enter into a contract or other agreement for the bulk sale of water for a commercial, industrial, or oil or gas well development purpose outside of the public water supply system's approved water service area.' Certain types of uses are exempted from the permitting requirements, including agricultural uses and power production. *See* section 601.9, Permit Exemptions.

Because the proposed permitting requirements apply to the withdrawers of water and not to the end uses of the water, and because many of the water withdrawals made for gas development purposes are made by independent trucking companies withdrawing less than the permitting threshold of 100,000 gpd, the DEC's proposed permitting requirements will not apply to many of the water withdrawals used for gas drilling purposes.

Both the SRBC rules and the proposed DRBC rules require **all** consumptive uses of water for the purposes of gas development to be reviewed and approved. As summarized by Thomas W. Beauduy, Deputy Executive Director and Counsel of the SRBC in his [testimony](#) to the Subcommittee on Water and Power of the US Senate Committee on Energy and Natural Resources on October 20, 2011, the SRBC's regulatory program generally requires review and approval of any project proposing to withdraw 100,000 gallons per day (gpd) or more, based on a 30-day average, from groundwater or surface waters, similarly to the proposed New York requirements. However, the SRBC also requires review and approval of any project requiring the

consumptive use of 20,000 gpd or more, also based on a 30-day average. By definition, diversions of water out of the basin are considered to be a consumptive use and are subject to a similar 20,000 gpd threshold. Diversions into the basin, regardless of quantity, are likewise subject to review and approval. In the case of water used for gas drilling, the SRBC requires that **any** consumptive use of water for gas drilling in the Susquehanna River Basin be reviewed and approved. The SRBC defines consumptive use as the loss of water ‘due to transpiration by vegetation, incorporation into products during their manufacture, evaporation, injection of water or wastewater into a subsurface formation from which it would not reasonably be available for future use in the basin, or any other process by which the water is not returned to the waters of the basin.’ 18 CFR §806.3.

In his [testimony](#), Mr. Beauduy identified the reasons why the SRBC has implemented special requirements for gas development uses:

‘As exploratory well development of the Marcellus Shale formation got underway in the second half of 2008, the Commission experienced a dramatic increase in the number of applications seeking approval for water withdrawals and consumptive water use. It also saw the potential for this activity to create adverse, cumulative adverse or interstate effects to the water resources of the basin, regardless of whether individual projects met or fell below its regulatory thresholds.

‘Why the concern? Save for the bottled water industry, which tends to focus on pristine watersheds for high quality water, the vast majority of projects regulated by the Commission have historically located themselves alongside the mainstem river, or major tributaries, or at least down in the valleys along streams with appreciable flow characteristics. Furthermore, the typical project could be analyzed for impact based on withdrawals from specific locations to feed adjacent operations with attendant calculations of return flow and consumptive loss.

‘But the natural gas development industry is different, fundamentally different. It takes water from multiple de-centralized locations, on an inconsistent basis, and uses it at any one of dozens of ever-changing locations, based on its operational needs. Perhaps most significantly, and what sets it apart, is the fact that it engages in water-demanding activity in remote, often environmentally sensitive headwater areas.

‘Quantities of water that one could otherwise consider inconsequential on a major tributary can represent an important component of the flow regime in headwater areas. When you overlay the extent of headwater streams in our basin with the extent of the Marcellus shale formation, as depicted graphically in Attachment 2, you can see that alignment.

‘As a result of that alignment, coupled with the operational nature of the industry, the Commission elected to modify its regulatory approach for this industry. . . . Those modifications include the following:

- ‘The regulatory threshold for initiating Commission review and approval authority **commences at gallon one**, rather than the traditional regulatory thresholds noted above. . . [emphasis added.]’

See also, [Ecosystem Flow Recommendations for the Susquehanna River Basin](#), The Nature Conservancy, 2010.

The proposed regulations need to be withdrawn and requirements added that permits be obtained for all water used in the state for the consumptive use of gas well development.

#### **4. All Water Users Need to Be Eligible for Permitting at the Same Time**

The permitting requirements in the proposed regulations are being implemented on a staggered schedule, with permits for the largest water withdrawals being issued first. 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.’

How can the DEC weigh competing usage requirements if it does not consider all initial permit applications at the same time? The proposed schedule is manifestly unfair in that it gives priority to the state's largest water users in descending order. Implementation of the proposed regulations needs to be postponed until the DEC is sufficiently staffed so that all applicants can be treated equally.

Also, if the first initial permits are not scheduled to be issued until 2013, why the rush to finalize the regulations now before the SGEIS on hydrofracking and horizontal drilling is completed?

#### **5. Public Hearings on Water Use Applications Must Be Required**

No public hearings are provided under the proposed regulations before a permit may be issued. The failure to provide for public hearings leaves residents of the Great Lakes Basin without the opportunity to present their concerns regarding proposed water withdrawal applications in a public forum.

Residents of the Delaware and Susquehanna River Basins have the right to publicly present their concerns pursuant to DRBC and SRBC policies and procedures, and have made use of that right to protest recent applications for water withdrawals for gas drilling in both River Basins. Hundreds spoke the DRBC hearing in Deposit, NY on XTO's water withdrawal application from Oquaga Creek in Broome County on June 1, 2011, and many spoke at the SRBC's meeting in Wilkes-Barre, PA on December 15, 2011, at which several dozen water withdrawal applications were before the SRBC. *See [SRBC Adopts Rulemaking on Gas Drilling, Ignores Concerns](#).*

The regulations need to give residents of the Great Lakes Basin the same public hearing rights as residents of the Delaware and Susquehanna River Basins.

#### **6. Water Usage Fees Are Needed**

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 DRBC and SRBC approval processes and not the proposed DEC regulations. Both the DRBC and the SRBC charge application fees and fees for permitted water usage. As noted on page 16 of the [August 2010 Report](#) of the New York Great Lakes Basin Advisory Council cited above,

‘e) ECL Article 21 [the Delaware River Basin Compact and the Susquehanna River Basin Compact] delegates authority to the Delaware and Susquehanna River Basin Commissions to regulate withdrawals from, diversions into or out of, and consumptive uses of, water in each basin. All withdrawals, diversions and consumptive uses are reported to the Commissions on an annual basis. Consumptive use is defined as water that is not returned to the basin due to evaporation, incorporation into products, or other processes. Both Commissions charge significant fees for both application review and annual water usage.’

The proposed regulations do not provide for fees to be charged for water usage or for application fees. Since these regulations apply principally to withdrawals in the Great Lakes Basin, why the disparate fees for waters withdrawn from the Great Lakes Basin?

Although fees were not required by the implementing legislation, Chapters 400-402, Laws of 2011, the DEC has authority to impose fees, both under the legislation which delegates to DEC the authority to promulgate regulations to implement a permitting program for water withdrawals. As amended, ECL § 15-1501.4 provides the Department ‘shall promulgate regulations to implement a permitting program for water withdrawals equal to or greater than a specified threshold volume consistent with the requirements of this section... Such regulations may establish...any other conditions, limitations and restrictions... to ensure the proper management of the waters of the state.’

The DEC also has general authority to establish reasonable fees to carry out its duties. At least one New York court held that administrative agencies are permitted to charge fees that are not explicitly authorized by statute if the fees are reasonably necessary for carrying out the regulatory scheme. *See Walton v. N.Y. Dep’t of Corr. Serv.*, 921 N.E.2d 145, 151 (N.Y. 2009) (reasoning that fees are legitimate when a benefit, such as a license, is received and stating that, ‘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’).

The proposed regulations need to provide permit application and water usage fees that will apply to waters withdrawn from the Great Lakes Basin which are comparable to the fees imposed by the SRBC and the DRBC.

### **Affirmation of Riparian Rights**

On the positive side, the proposed regulations contain good language affirming riparian rights, thus alleviating a concern that some of us had with last year's legislation. The proposed regulations address a concern raised during the passage of the legislation and make it clear that riparian rights are preserved, Section 601.12(o) of the proposed DEC regulations provides that, ‘The issuance of a water withdrawal permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property

or any invasion of personal rights, nor any infringement of federal, state or local laws or regulations; nor does it obviate the necessity of obtaining the assent of any other jurisdiction as required by law for the water withdrawal authorized.””

**Withdraw the Proposed Regulations, re-issue regulations that address concerns after SGEIS Findings, issue simultaneously draft permit/s, 120-day comment period, hearings**

Therefore, for the reasons outlined above, we urge the DEC to

1. withdraw the proposed regulations and wait to re-issue new regulations until after SGEIS review process on high volume horizontal hydraulic fracturing for natural gas is completed
2. issue regulations that address each of the above concerns
3. issue simultaneously the accompanying draft permit/s for comment
4. hold a public comment period of 120 days
5. hold at least seven public hearings, in different parts of the state, on the regulations and permits during the comment period.

Thank you for the opportunity to comment and we look forward to your action in response to our concerns and comments.

Yours sincerely,

Suzannah C. Glidden, Chair  
Hands Across the Border (HAB)