

# Regulating Water Withdrawals in New York: The Water Resources Protection Act

New York's Water Resources Protection Act was adopted in 2011 to regulate withdrawals of water from surface waterbodies and groundwater sources for water uses that were not previously subject to water withdrawal regulations, including electric power plants that use large quantities of water for cooling systems and most other commercial and industrial uses. Pre-existing agricultural water uses that were registered or reported to the state on or before the law went into effect are exempt from most requirements under this law. Water withdrawals for potable water supply systems were already subject to a permitting requirement for water withdrawals and this requirement remains in effect under the new law with some modifications. This article presents an overview of the requirements of this law and the regulations adopted to implement it, with brief discussion of some relevant environmental policy issues and considerations.

## Background

*"New York State is fortunate to have plentiful water resources. The preservation and protection of these resources is vital to New York's residents and businesses, who rely on these resources for drinking water supplies, and to support agriculture, manufacturing and other industries and recreation in the State. Aquatic and terrestrial flora and fauna are also dependent on these critical resources to maintain healthy populations. Good policy and sound natural resource management practices are critical to assuring long-term supplies of water to meet these needs now and into the future."* (New York State Assembly, 2011.)

The language above is from the legislative Statement of Support in the state's Water Resources Protection Act, which was signed into law by Governor Andrew Cuomo in August 2011, and this statement captures several key policy goals relevant for understanding its significance. In his press release announcing the law, the Governor stated "This law will enhance the state's ability to manage its water to promote economic growth and address droughts while protecting the environment" and described it as "a balanced program that manages significant water withdrawals across the state and protects New York's farmers and businesses from undue regulatory burdens." (Cuomo, 2011.)

The history of the Water Resources Protection Act (WRPA) can be traced to recommendations issued by the New York State Water Resources Planning Council, which was established by Title 29 of Article 15 in the state's Environmental Conservation Law. Entitled *Water Resources Management Strategy*, this law was passed by Governor Andrew Cuomo's father, Governor Mario Cuomo, and became effective in July, 1984. In his annual message to the state earlier that year, Governor Cuomo noted that "water resources are one of the greatest environmental and economic assets we have." The Council was formed to develop water resources policies for the state after previous frameworks for water planning had become inactive and based in part on serious concerns about the adequacy of water supplies in southeastern New York. For the first time, this law established the role of the New York State Department of Environmental Conservation (NYSDEC) as the primary agency responsible for comprehensive management of the state's water resources. (Negro & Porter, 2009.) After several years of work the New York State Statewide Water Resources Management Strategy was adopted by the Council on December 8, 1988. The Strategy, which remains as one of the main extant water planning and policy documents of the state in some respects, called for specific measures to establish a permitting program for water withdrawals exceeding 100,000 gallons per day (GPD). It also called for steps to gather data on water withdrawals and on significant diversions of water between major drainage basins. The WRPA adopted in 2011 is viewed as growing out of this older policy and it became effective on February 15, 2012. (Daly, 2005. Alpern, 2012.)

The proposed use of hydraulic fracturing for producing natural gas, and plans for new bottled water production projects, both of which require large quantities of water, were controversial issues that helped drive interest in the WRPA among many interests in New York, and some aspects of the law's approach were controversial among certain stakeholders. After its passage, development and implementation of the regulations has also been controversial and certain issues have been litigated in court. To understand some

of the underlying policy issues involved with the law, the regulations, and the implementation process, an overview of the basic approach for managing and allocating water use in New York provides important context.

For many years, New York's water laws have generally followed a legal approach known as riparian rights, which gives all users with access to water resources a right to "reasonable" use of water, recognizing that where one user's taking of water begins to adversely affect another user's ability to obtain water, no one user has the right to an unreasonable portion of the total available resource. The 2011 law amended parts of the state's Environmental Conservation Law (ECL), which is administered by the New York State Department of Environmental Conservation (NYS DEC). In keeping with the overall framework of the state's water laws, Article 15, Title 15 of the ECL is intended to support appropriate allocation of a limited resource among competing users, and includes this passage: (NYS DEC) "shall make a reasonable effort to meet the needs of the applicant, with due regard to the actual or prospective needs, interests and rights of others that may be affected by the project." (ECL §15-1503(4). Rodenhausen, May 13, 2015.)

#### Water Withdrawal and Registration Regulations and Implementation Process

Water withdrawals for water supply systems serving the public have been regulated in New York through a water supply permitting process since 1905. (Treichler, 2015.) The new law adopted in 2011 expanded the regulation of water withdrawals to include most other uses for the first time. The law became effective on February 15, 2012 and NYS DEC adopted regulations to implement it in 2013. Existing agricultural water users who reported their withdrawals to NYS DEC by February 15, 2012, were exempted from most provisions of the regulations, except that they must still report their withdrawals to DEC annually. For public water suppliers that had permits by this date, the first step required under the new regulations is to submit an application for an "initial permit," a term referring specifically to applicants with a qualified, pre-existing permitted water withdrawal that is not proposed to be expanded and that meets several other conditions. A phased application schedule was established for these initial permittees, with the first deadline on June 1, 2013 applying to the largest water users -- ones that use at least 100 million GPD. Initial applications are required from progressively smaller users beginning in February, 2014 and extending to February 2017 for the smallest users for withdrawals between 100,000-500,000 GPD. During this phased implementation period for the new regulations, the other category of permit applications is for a "new permit," and this refers to any new withdrawal and to any existing, permitted withdrawal that is proposing to increase the water withdrawal or undertake certain other new activities. After this implementation period, all initial and new permits will then be subject to periodic review and renewal requirements in the regulations. (NYS DEC, 2015.)

#### Activities Subject to Permit Requirements

Under the law in the ECL, Article 15, Title 15 requires a permit for activities including:

- withdrawal from an existing or new source
- increased withdrawal from permitted source
- taking of land
- construction of water works
- extension of a water supply system
- provision of water to other states
- significant change in permitted use

The criteria for permit review by NYS DEC are listed in the law as follows:

#### ECL §15-1503(2) -- determinations required during the permit review process:

- a. Have other sources been considered
- b. Is the quantity of supply adequate
- c. Is the project just and equitable to all affected municipalities

- d. Is there a water conservation program
- e. Can the need be lessened through conservation
- f. Is it limited to reasonable quantities
- g. Will it have no adverse impacts on quantity or quality
- h. Is it environmentally sound and economically feasible
- i. Is it consistent with regional agreements

The water withdrawal regulations also address diversions of water from one of the state's 17 major drainages basin to any another basin. The regulations do not require a permit for these diversions, however, and they simply require diversions of 1,000,000 GPD or more to be registered with NYS DEC. (NYS DEC, 2015.)

#### Exemptions

Water withdrawals for certain uses, or in certain watersheds in New York, are exempt from most requirements under the WRPA. Agricultural users that were registered or their annual water usage reported to DEC by February 15, 2012 are exempt from most requirements for pre-existing withdrawals, but these withdrawals must be reported annually to DEC. The law also exempts uses for firefighting and other public emergencies, withdrawals by hydropower facilities operating under a valid Federal Energy Regulating Commission license, withdrawals from the New York State Canal System that are used by the New York State Canal Corporation for purposes authorized by law, and certain Long Island wells regulated another pre-existing law. Finally in certain watersheds in the state, water withdrawals are already regulated by several regional commissions. These commissions include the Delaware River Basin Commission and the Susquehanna River Basin Commission, formed in 1961 and 1970, respectively, and the newer Great Lakes-St. Lawrence River Basin Water Resources Council formed in 2008. To avoid duplication with the regulatory frameworks that were already established by these interstate agencies, New York exempted water withdrawals in those watersheds from the new law. (Rodenhausen, 2015. NYS DEC, 2015.)

#### In-Stream Flow and Other Environmental Concerns

To guide the application of many regulations NYS DEC's Division of Water develops technical standards and procedures known as "technical operations and guidance series," commonly referred to as TOGS. (NYS DEC, 2015). Draft guidance on technical criteria for decisions affecting in-stream flow has been developed by DEC but this has not been released to the public at the time of this writing (early September 2015.) This guidance is specifically focused on issues related to maintaining adequate flow in streams to support the "best usage" DEC has identified for them based on each stream's classification in the state's water quality regulations. In-stream flow, as it is often described, refers to the importance of having enough water in each stream at different times of the year so that the ecological health of the stream and the biodiversity and recreational values it supports are not compromised. One of the highest priorities for some stakeholders who have been actively engaged in education, advocacy, research and policy issues surrounding the water withdrawal law and regulations relates to these in-stream flow issues. The Nature Conservancy has been working for several years in a collaboration with the United States Geological Survey and NYS DEC on research and development of models and tools to guide management and permitting decisions for water withdrawal and other activities. (Schuler, 2015.) More broadly, concerns among a number of advocacy organizations about the implementation of the water withdrawal regulations include the "grandfathering" of the maximum existing capacity for withdrawals by existing users in their initial permits, the review and approval of initial permits for the largest water users before other existing users, and the NYS DEC's decision not to require more extensive review of permits under the state's SEQRA law. Questions have also been raised about the adequacy of the state's existing water conservation policies for water supply systems and other users. (Treichler, 2011-2015.)

#### Local Options for Managing In-Stream Flow: Water Conservation & Green Infrastructure

As a starting point, local government and other stakeholders who are concerned about maintaining sufficient in-stream flow for recreation, wildlife and other benefits can participate in the permitting process when NYS DEC is considering a new or revised water withdrawal permit. Local governments and others can play a

direct role in implementing several other strategies for conserving and maintaining in-stream flow. Reducing water consumption by installing more efficient plumbing fixtures (e.g., faucets, showers and toilets) and appliances, and by reducing outdoor water use for lawn and landscape irrigation, can have a beneficial effect on streams and watersheds by leaving more water in the ecosystem. Watering lawns is a significant portion of total water consumption in many places, and this occurs during warm weather which also tends to be the season when stream flow is already lower, so this is a particularly important step in some watersheds. Implementing green infrastructure (GI) measures, like smaller rain gardens and larger versions known as bioretention areas, porous paving, and capturing rainwater for watering gardens, is another way to help protect stream flow by recharging groundwater. This can augment the slow, gradual “base flow” from groundwater aquifers to streams, which forms a large portion of the total streamflow in drier times of the year in the Hudson River Estuary region. While vegetated GI practices provide very important water quality and other benefits, they probably have a minor impact on recharging groundwater, but porous paving can potentially do more to augment recharge by allowing water to infiltrate the ground without losing so much to evaporation, as planted areas do. Finally, for stakeholders working at the local and regional level, protecting forested lands and other open spaces that capture rain and snowmelt and release it slowly is one of the most important steps for sustaining in-stream flow.

#### References

1. [New York State Assembly. Bill number A5318A Statement of Support](#), passed May 2, 2011.
2. Cuomo, A. [Governor Cuomo to Sign Law to Protect New York's Waters](#). New York State 2011.
3. Negro, S. & Porter, K. [Water Stress in New York State: The Regional Imperative?](#), The Journal of Water Law, Lawtext Publishing Limited 2009, 20.
4. Daly, J. E. From Divining Rods To Dams: Creating A Comprehensive Water Resource Management Strategy for New York, Commemorative Pace Law Review 1995.
5. Personal communication with Robert Alpern, member, NY State Water Resources Planning Council, July 2012.
6. Rodenhausen, George A., May 13, 2015.
7. Treichler, R. [DEC Speeds Up Water Permit Giveaway](#), New York Water Law, April 2, 2015. Accessed at
8. [NYSDEC water withdrawal permits](#), August 28, 2015
9. [NYSDEC interbasin diversion requirements](#). August 31, 2015
10. Rodenhausen, George A., May 13, 2015.
11. [NYSDEC water guidance documents](#). August 28, 2015
12. Schuler, G. June 8, 2015.
13. Treichler, R. [New York Water Law](#), 2011-2015. August 29, 2015 a
14. [The Alliance for Water Efficiency](#)
15. [NYSDEC Green Infrastructure Examples for Stormwater Management in the Hudson Valley](#), September 14, 2015.

***This Project has been funded in part by a grant from the New York State Environmental Protection Fund through the New York Department of Environmental Conservation.***



November 2015