

Local N.Y. Environmentalists Fight Fast Tracking of Water Bill as Increased Marcellus Gas Drilling Looms



Monday, 18 April 2011
Written by Peter Mantius

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ALBANY, N.Y. -- A bill in the New York State Legislature with broad support from green organizations, industry and agriculture would overhaul lax water withdrawal rules in the Empire State just as it prepares to open the door for water-intensive hydrofracking of Marcellus Shale natural gas wells.

While the legislation appears to be on a fast track toward approval, a handful of opponents are calling for public hearings on whether it would grant large water users the upper hand in future legal battles over water rights.

Across most of the state, water withdrawals, no matter how immense, are virtually unregulated.

Of the more than 400 major industrial, commercial and agricultural water withdrawers, at least 25 use more than 100 million gallons

STATE OF NEW YORK

5318--A
2011-2012 Regular Sessions
IN ASSEMBLY
February 16, 2011

Introduced by M. of A. SWEENEY, PEOPLES-STOKES, ZEBROWSKI, GUNTHER, TITONE, REILLY, SPANO, JACOBS, PAULIN, SCHMEL, ENGLESRIGHT, BOVI -- Multi-Sponsored by -- M. of A. BRENNAN, GABRYSAK, MARKEY, McENENY, M. MILLER, PHEFFER, ROBINSON -- (at request of the Department of Environmental Conservation) -- read once and referred to the Committee on Environmental Conservation -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the environmental conservation law, in relation to regulating the use of the state's water resources; and to repeal titles 16 and 33 of article 15 of such law relating to Great Lakes water conservation and management and water withdrawal reporting

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Section 15-1501 of the environmental conservation law, as
2 amended by chapter 233 of the laws of 1979, is amended to read as

per day and three draw more than one billion gallons per day, James Tierney, the state Department of Environmental Conservation's assistant commissioner for water resources, has testified.

"The DEC does not have reliable data to accurately access the full gamut of stressors to our water supplies," Tierney said.

The legislation would require anyone with the capacity to withdraw an average of more than 100,000 gallons per day over a 30-day period to obtain a state permit. While large farms would be exempt from permitting, they would need to register, as would any entity that transfers more than one million gallons a day between water basins.

The bill would also require the DEC to post detailed data on water usage, water conservation and inter-basin transfers on its website. The agency doesn't currently post a list ranking large users.

About 15 billion gallons are withdrawn each day from the state's lakes, rivers, streams, estuaries and groundwater. Two-thirds is fresh water; the rest is saline.

Electric power facilities consume more than 10 billion gallons a day, roughly half fresh and half saline. The public water supply draws between two and three billion gallons of fresh water a day, mostly surface water used for domestic consumption. Irrigation, livestock watering and mining are among the other major uses.

The DEC gave the following as examples of facilities that draw more than 100,000 gallons a day and thus would need permits: 925-room hotel, a day school for 6,500 students, a public water supply serving 300 homes and a dairy farm with 2,000 cows.

Hundreds of industrial and commercial facilities would also need to obtain permits.

The Business Council of New York State, which represents business interests in the state, grudgingly supports the bill, which it describes as a "new regulatory mandate." Key to winning the group's support was a provision that requires the DEC to grant permits to all existing large water users for their "maximum water withdrawal capacity" as of Feb. 15, 2012.

The New York Farm Bureau has said it supports the measure because it would "ease reporting requirements" for farmers. Currently, they have to report if they exceed 100,000 gallons on any one day. The bill only requires reporting by those who average that amount each day over 30 days.

Green groups, led by Environmental Advocates of New York, generally favor the Assembly and Senate bills, A.5318-A and S.3798. But the Sierra Club has sent mixed messages. After a local club official spoke out against the bill, as drafted, a higher-ranking official wrote a lukewarm letter of support to New York legislators.

"To be clear, the Sierra Club does not oppose these bills," David Scott, the club's vice president for conservation, wrote on March 25 to the bill's chief sponsors on letterhead from the Sierra Club's national headquarters in San Francisco.

3 follows:
 4 S 15-1501. [New or additional sources of water supply] WATER
 5 WITHDRAWALS; permit.
 6 1. Except as otherwise provided in this title, no person [or public
 7 corporation] who is [authorized and] engaged in, or proposing to engage
 8 in, the [acquisition, conservation, development, use and distribution of
 9 water for potable purposes, for the irrigation of agricultural lands,
 10 for projects taken pursuant to Article 8-D of the County Law, or for
 11 multi-purpose projects authorized by a general plan adopted and approved
 12 pursuant to title 11 of this article,] OPERATION OF A WATER WITHDRAWAL
 13 SYSTEM WITH A CAPACITY OF GREATER THAN OR EQUAL TO THE THRESHOLD VOLUME,
 14 shall have any power to do the following until such person [or public
 15 corporation] has first obtained a permit OR PERMIT MODIFICATION from the
 16 department pursuant to this title:
 EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
 [] is old law to be omitted. LBD08389-03-1
 A. 5318--A 2
 1 a. To [acquire or take] MAKE a water [supply] WITHDRAWAL FROM AN
 2 EXISTING OR NEW SOURCE or an [additional] INCREASED water [supply] WITH-
 3 DRAWAL from an existing [approved] PERMITTED source; [or]
 4 b. To take or condemn lands for THE PROTECTION OF ANY EXISTING SOURCES
 5 OF PUBLIC WATER SUPPLY; OR FOR THE DEVELOPMENT OR PROTECTION OF any new
 6 or additional sources of PUBLIC water supply [or for the utilization of
 7 such supplies]; [or]
 8 c. To commence or undertake the construction of any works or projects
 9 in connection with the proposed [plans] WITHDRAWAL; or
 10 d. [To exercise any franchise hereafter granted to supply water to any

(Click the bill to read) Bills in the New York State Senate and Assembly would require large water users to apply for permits for the first time. The text of Assembly bill A.5318.A, shown here, is similar to the text of Senate bill S.3798.

The flap was caused by Rachel Treichler, a Hammondsport lawyer who has served as chair of the Sierra Club Atlantic Chapter's Gas Drilling Task Force.

In a recent blog, Treichler wrote that planned hydrofracking of Marcellus gas wells in New York could lead to new withdrawals of "billions of gallons of the state's fresh water ... at a time when fresh water is becoming an increasingly scarce commodity in the United States and the world." The New York State Water Resources Institute at Cornell University agrees that drillers for natural gas in the Marcellus Shale are apt to need much more water than has been used in traditional drilling operations.

"While hydraulic fracturing is not likely to be a sizable user relative to the entire supply of basins in New York State overlying the Marcellus Shale, withdrawals will not be spread uniformly across a basin and intensive withdrawals from smaller headwater streams may lead to localized low flows."

Treichler said she was concerned that the proposed legislation fails to specify the rights of small water users if and when competition for water intensifies. If the withdrawals of large users are to be protected by state permits, what would protect the interests of smaller users who have no permits?

For decades, water rights in the eastern United States have been controlled by common law, as decided on a case-by-case basis in courts. The rules trace back to the British system of "riparian rights" held by those who live next to or above water sources.

According to Wikipedia: "Under the riparian principle, all landowners whose property is adjoining to a body of water have the right to make reasonable use of it. If there is not enough water to satisfy all users, allotments are generally fixed in proportion to frontage on the water source. These rights cannot be sold or transferred other than with the adjoining land, and water cannot be transferred out of the watershed."

Another key principle holds that the rights of one riparian owner must be weighed fairly and equitably with the rights of adjacent riparian owners.

"All people who live by a stream believe they have a relationship with the stream, legal rights that have been upheld for years in Eastern states," said Hilary Lambert, executive director of the Cayuga Lake Watershed Network, a nonprofit water quality watchdog group based in Aurora, N.Y. "Now, without their permission, these bills would change all that. They would give the first rights for withdrawal during drought to permit holders. Water would belong to people with the permits."

In recent years, water law has been evolving beyond riparian rights, as states and groups representing large water basins such as the Delaware, Susquehanna and Great Lakes-St. Lawrence try to efficiently manage water resources. Individual states and interstate "compacts" governing those three watersheds have imposed their own water withdrawal rules that overlay but do not necessarily cancel traditional riparian rights.



Rachel Treichler of the Sierra Club Atlantic Chapter calls for public hearings on fast-track bills that would change New York State's water withdrawal rules.

New York signed on to the Great Lakes Compact, effective December 2008.

Treichler of the Sierra Club's Atlantic Chapter argues that all three compacts are guided by language that explicitly preserves common law riparian rights for small users. She cited one provision that says, "Nothing contained in this compact shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective signatory parties relating to riparian rights."

She says the proposed New York State bills lack that crucial legal safeguard, and that is her main reason for calling for public hearings.

But hearings could also delve into the question of whether the DEC has adequate staff to handle the crush of water withdrawal permit applications.

The size of the DEC's Department of Water staff has been declining steadily for 20 years, falling from 340 people in 1990 to less than 250 last year.

Although the DEC does not issue permits to large private users, it does grant permits to public water systems. In his 2009 testimony, the DEC's Tierney noted that the DEC water staff was already stretched thin, overseeing 11,000 existing public water system permits and performing analyses of 130 new applications a year, "all of which are overseen by only five staff (members)."

Lambert said she foresees "a tsunami-size wave of permit applications" by private large water users that will completely overwhelm the DEC's stressed-out staff. It hardly matters, Lambert says, that the bills call for the agency to carefully weigh complex issues before granting permits to new users. "They won't have time when they're up against the clock," she said.

But others believe it's too important for the state to move quickly to establish some sort of water withdrawal regulation and that public hearings would bog down the process.

Richard Smardon, chair of the Great Lakes Basin Advisory Council, wrote the sponsors of the New York legislation on April 13 to encourage them to pass the Assembly and Senate bills "as soon as possible."

Almost half the state -- including virtually all the Finger Lakes and areas to the north -- lies within the Great Lakes Basin. As a member of that compact, New York State has five years from the date of its enactment in December 2008 to develop and implement regulations for water withdrawal for areas that fall within the basin. That clock is ticking.

Meanwhile, the DEC has said it expects to complete rules for hydraulic fracturing of natural gas wells that tap New York's Marcellus Shale later this year. Regulatory and industry officials expect permits for Marcellus drilling to be granted in short order.

The gas drilling industry has said it intends to drill



States surrounding the Great Lakes Basin, including New York, have entered into a compact that seeks to conserve and protect water resources. Under that compact, New York must implement water withdrawal

thousands of Marcellus wells, each of which will require *regulations by December 2013.* up to 5 million gallons of water, much of which may need to come through “inter-basin transfers” that are frowned on or banned under riparian principles.

Meanwhile, other industrial and commercial water users and farmers want to nail down guarantees of water rights before competitors from the gas drilling industry line up for their share.

“Given the potential of drilling the Marcellus Shale and the considerable water use associated with the drilling process,” the Farm Bureau wrote in a March 10 analysis of the pending bills, “we generally support the effort to protect water supplies.”

The Senate bill is sponsored by freshman Sen. Mark Grisanti (R-Buffalo), chairman of the Senate Committee on Environmental Conservation. The Senate is not scheduled to be in full session until May 2, when passage seems likely.

The Assembly bill is sponsored by Sen. Robert Sweeney (D-Babylon), chair of the Assembly Committee on Environmental Conservation, a legislator who tends to win high marks from green organizations. That bill also has strong momentum, but is seen as the more likely of the two to be amended.

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Scobies 2 weeks ago

I live in the country with a private water well.

As best I can tell, this legislation and all the discussion of it focuses on surface water withdrawals. The briefing I sat in on from the Susquehanna River Basin Commission recently said that the SRBC anticipated more groundwater withdrawals by drillers for fracking as or if Marcellus Shale drilling moved north into NY. This is because there is less surface water available closer to the Susquehanna headwaters.

Now, I can just about hear the giant sucking sound as a driller pumps say 99,000 gallons a day from a new driller's well near my house to use for fracking. I cant see any protection for me for quantity of water in the DEC's water bill.

There is precious little protection and recourse if the quality of my water is wrecked by fracking - maybe test before and after and then what if it is bad? - will the DEC make sure my water is fixed - like the PA folks in Dimock got?

And apparently none at all in this bill for quantity of water.

I am against the bill and I am against the bill's promoters who have apparently forgotten me and the roughly two million folks who live from NY water wells. What are we, chopped liver?

Stanley R Scobie, Binghamton, NY

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