

April 1995

## New York City's Drinking Water - Champagne or Beer?

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### Recommended Citation

Stephanie Perez, *New York City's Drinking Water - Champagne or Beer?*, 12 Pace Env'tl. L. Rev. 859 (1995)

DOI: <https://doi.org/10.58948/0738-6206.1449>

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## **New York City's Drinking Water — Champagne or Beer?**

**STEPHANIE PEREZ\***

Every day millions of New Yorkers drink the water from the reservoirs of the Hudson Valley. The water from these reservoirs, however, is dangerously contaminated with pathogens such as giardia and cryptosporidium. The New York City Department of Environmental Protection has undertaken measures to correct this problem and prevent further contamination by proposing revised watershed regulations. These proposed regulations, in effect, regulate the way that upstate landowners, whose property is located in a watershed, may use their land. Although the purpose of the proposed regulations is to protect the watersheds, the source of the New York City drinking water, it can only be achieved at the expense of regulating upstate landowners. This article explores the proposed regulations and the potential effects it may have on the upstate landowners.

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\* This article is dedicated to William Perez, Jr., who taught me that there are no limitations on what one can achieve.

The author wishes to thank all of the members of the Pace Environmental Law Review, especially this article's editing team, whose hard work immeasurably enhanced this article.

## CONTENTS

I. Introduction .....	860
II. Background .....	864
A. Problems Necessitating the Proposed Regulations .....	864
B. The Chronology of the Proposed Regulations ..	867
C. A Discussion of the Relevant Sections of the Proposed Regulations .....	869
1. Enforcement of Violations .....	870
2. Regulated Activities .....	871
a. Regulation of Hazardous and Solid Waste .....	873
b. Controlling Stormwater Runoff .....	874
c. Regulation of Pesticides and Fertilizers .....	875
3. Whole Community Planning .....	876
III. Analysis .....	878
A. Concerns Surrounding the Proposed Regulations .....	878
B. New York City's Authority and Duty to Enact the Proposed Regulations .....	880
C. Effect of the Proposed Regulations Upon the Upstate Counties of New York State .....	881
1. Effect on Industry .....	881
2. Effect on Landowners .....	882
D. Community Response .....	887
IV. Conclusion .....	888

## I. Introduction

Watersheds come in families: nested levels of intimacy. On the grandest scale the hydrologic web is like all humanity . . . it's broadly troubled, but it's hard to know how to help. As you work upstream toward home, you're more closely related. The big river is like your nation, a little out of hand. The lake is your cousin. The creek is your sister.

The pond is her child. And, for better or worse, in sickness and in health, you're married to your sink.<sup>1</sup>

Nearly nine million residents in New York City and an increasing number of communities in upstate New York have their health, welfare, and economic well-being "tied to the quality of the" watersheds<sup>2</sup> of the Catskill Region, which supply them with their drinking water.<sup>3</sup> In all, eighteen reservoirs and three controlled lakes, covering 1900 square miles, comprise the New York City water system.<sup>4</sup> Over the years, however, the cumulative and episodic impacts of various pollution sources and environmentally insensitive land uses have threatened the quality of the waters.<sup>5</sup>

"[O]ur nation's most glaring infrastructure problem . . . [is] one of inadequate and antiquated wastewater treatment facilities."<sup>6</sup> The United States Environmental Protection Agency (EPA) "estimates that pollutant discharges from small communities and nonpoint diffuse source pollution now constitute over 50 percent of the nation's clean water problems."<sup>7</sup> The health and welfare of America is affected by

1. Michael Parfit, *New Ideas, New Understanding, New Hope*, NAT'L GEOGRAPHIC, SPECIAL ED., Nov. 1993, at 114.

2. A watershed is an area of land that drains into a river, a river system, or a body of water. ENVIRONMENTAL ENGINEERING DICTIONARY 420 (2d ed. 1992).

3. NEW YORK CITY DEP'T OF ENVTL. PROTECTION, RULES AND REGULATIONS FOR THE PROTECTION FROM CONTAMINATION, DEGRADATION AND POLLUTION OF THE NEW YORK CITY WATER SUPPLY AND ITS SOURCES, § 18-11(a) (Dec. 1994) [hereinafter DEC. 1994 PROPOSED REGULATIONS]. The watersheds of upstate New York provide most of the drinking water for New York City; the Catskill Region supplies 90% of the City's drinking water. Jonathan Mandell, *Filling a Reservoir with Hope; Watershed Summit*, NEWSDAY, September 29, 1993, at 15.

4. Kevin G. Ryan, Trends in Environmental Law and Land Use: Regulation of New York City Watershed 1 (Dec. 6, 1990) (unpublished manuscript, on file with author).

5. DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-11(a).

6. Rep. Sherwood Boehlert, *In Considering Infrastructure, Don't Overlook Importance of Clean Water*, ROLL CALL, Mar. 8, 1993, at 29.

7. *Id.* Nonpoint source is defined as "a contributing factor to water pollution that cannot be traced to a specific spot; like agricultural fertilizer runoff, [and] sediment from construction." NICHOLAS A. ROBINSON, ENVIRONMENTAL LAW LEXICON N-7 (1994). The FGEIS defines nonpoint source as "pollution sources which are diffuse and do not have a single point of origin or are not introduced into a receiving stream from a point source." NEW YORK CITY DEP'T

the wastewater treatment practices of "small town" America.<sup>8</sup> The New York City watershed is a prime example of this.<sup>9</sup> "The wastewater treatment problems of a handful of small towns totaling less than 10,000 in population are impacting the drinking water quality" of nearly nine million people.<sup>10</sup>

In 1986, responding to demands from the public for a greater degree of protection and regulation of its water supply,<sup>11</sup> Congress amended the Safe Drinking Water Act (SDWA)<sup>12</sup> to "require more stringent standards for water systems fed by surface waters."<sup>13</sup> These amendments required the EPA to promulgate regulations concerning the filtration and disinfection of public water systems.<sup>14</sup> Accordingly, the EPA created the Surface Water Treatment Rule,<sup>15</sup> which, in relevant part, requires the following:

A public water system that uses a surface water source . . . and does not meet all of the criteria in § 141.71 (a) and (b) for avoiding filtration, must provide treatment consisting of both disinfection . . . and filtration treatment . . . by June 29, 1993, or within 18 months of the failure to meet any one of the criteria for avoiding filtration . . . whichever is later.<sup>16</sup>

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OF ENVTL. PROTECTION, FINAL GENERIC ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED WATERSHED REGULATIONS FOR THE PROTECTION FROM CONTAMINATION, DEGRADATION, AND POLLUTION OF NEW YORK CITY WATER SUPPLY AND ITS SOURCES, app. I-V, at 13 (1993) [hereinafter FGEIS app. I-V].

8. Boehlert, *supra* note 6, at 35.

9. *Id.*

10. *Id.*

11. Ryan, *supra* note 4, at 2 (citing NEW YORK STATE DEPT OF HEALTH, PROPOSED SURFACE WATER FILTRATION AND DISINFECTION REQUIREMENTS IMPACT DOCUMENT 10 (1989)).

12. Public Health Service (Safe Drinking Water) Act §§ 1401-1465, 42 U.S.C. § 300f to 300j-26 (1988 & Supp. IV 1992).

13. Ryan, *supra* note 4, at 2-3.

14. *Id.* at 3.

15. 40 C.F.R. §§ 141.70-141.75 (1994).

16. 40 C.F.R. § 141.73 (1994). Section 141.71(a) constitutes the primary drinking water regulations. It "establishes criteria under which filtration is required as a treatment technique for public water systems . . ." *Id.* § 141.71(a). Section 141.71(b) sets forth the requirements of a public water system, using a

This rule, however, allows New York State water suppliers to circumvent the filtration requirements if an effective watershed control program, acceptable to the New York State Department of Health (NYSDOH),<sup>17</sup> is established, provided several other criteria are met.<sup>18</sup> Such a watershed control program must "characterize the watershed hydrology and land ownership, identify watershed characteristics and activities which may adversely impact source water quality, and monitor and control the activities which may have an adverse effect on source water quality."<sup>19</sup>

Since 1990, the New York City Department of Environmental Protection (DEP) has attempted to develop "a multifaceted, comprehensive watershed protection program to ensure a safe drinking water supply for New York City."<sup>20</sup> In the development of a control program, the DEP has sought to revise and modernize the City's outdated 1953 watershed regulations (Existing Regulations).<sup>21</sup> In July of 1993, the DEP released a proposed set of regulations to replace the existing watershed regulations.<sup>22</sup> In response to numerous public comments and hearings, the DEP has since released two revisions, the most recent issued in December of 1994 (Proposed Regulations).<sup>23</sup> By electing to regulate, rather

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surface water source or a ground water source, under direct influence of surface water. *Id.* § 141.71(b).

17. Ryan, *supra* note 4, at 4. See also 40 C.F.R. § 141.71(b)(2) (1994).

18. The other criteria which must be met in order to avoid treatment requirements include: "(1) Source water turbidity may not exceed specified levels. Turbidity is a measure of suspended matter in water; (2) Source water fecal coliform or total coliform concentrations must be equal to or less than specified levels; [and] (3) Adequate primary, entry point and distribution disinfection residuals must be maintained." Ryan, *supra* note 4, at 4; 40 C.F.R. § 141.71(a) (1994).

19. Ryan, *supra* note 4, at 5. See also 40 C.F.R. § 141.71(b)(2) (1994).

20. DIV. OF STRATEGIC PLANNING & DEV., BUREAU OF WATER SUPPLY & WASTEWATER COLLECTION, NEW YORK CITY DEP'T OF ENVTL. PROTECTION, WATERSHED, at 1 (July 1993) [hereinafter WATERSHED July 1993].

21. *Id.* See N.Y. COMP. CODES R. & REGS., tit. 10, § 128.1 (1962).

22. NEW YORK CITY DEP'T OF ENVTL. PROTECTION, REVISED DISCUSSION DRAFT REGULATIONS FOR THE PROTECTION FROM CONTAMINATION, DEGRADATION AND POLLUTION OF THE NEW YORK CITY WATER SUPPLY AND ITS SOURCES, § 128-1.1(b) (1993) [hereinafter DEIS] (on file with author).

23. See DEC. 1994 PROPOSED REGULATIONS, *supra* note 3; NEW YORK CITY DEP'T OF ENVTL. PROTECTION, RULES AND REGULATIONS FOR THE PROTECTION

than to filter, New York City has attempted to parry the strict filtration requirements, thereby avoiding the enormous expense of filtering the water from the Catskill and Delaware reservoir systems.<sup>24</sup> As a result, however, the quality of the water may inevitably suffer.

To address these recent developments, Part II of this article will analyze the background of the existing, but outdated, regulations. It will discuss the historical problems of supplying fresh water to New York City and how the current regulations deal with these problems. Part III will take an in depth look at the Proposed Regulations, as well as a discussion of the impact the Proposed Regulations will have on the upstate counties. Finally, Part IV will consider whether the Proposed Regulations will solve the problems left over from the Existing Regulations and whether they create new problems of their own.

## II. Background

### A. Problems Necessitating the Proposed Regulations

The Proposed Regulations are the result of laws which are ineffective in protecting the watershed and the increasing concerns about the quality of the New York City drinking water. The first area of ineffectiveness concerns the Existing Regulations. The main purpose of the Existing Regulations is to prevent unwanted materials from being deposited in the springs, marshes, watercourses, and reservoirs, which make-up the New York City watershed.<sup>25</sup> These regulations con-

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FROM CONTAMINATION, DEGRADATION AND POLLUTION OF NEW YORK CITY WATER SUPPLY AND ITS SOURCES, § 18-11 - § 18-91 (Aug. 1994) [hereinafter AUG. 1994 PROPOSED REGULATIONS].

24. WATERSHED July 1993, *supra* note 20, at 1.

25. N.Y. COMP. CODES R. & REGS., tit. 10, § 128.1. Specifically, the Existing Regulations prohibit human excreta from being deposited in or within 250 feet of any spring, marsh, watercourse or reservoir. *Id.* § 128.1(c)(2). In addition, no discharge except water from flushed toilets connected by a suitable watertight pipe, can be constructed, located, or maintained within 50 feet of any spring, marsh, watercourse or reservoir. *Id.* § 128.1(c)(3). Another restriction provides that no house slop, sink, laundry, garbage or stable wastes, swimming pool discharges, or any other polluted liquid, can be thrown or discharged into any spring marsh, watercourse, or reservoir. *Id.* § 128.1(d). Furthermore, no dead

tain a general clause which requires all persons living on or visiting a watershed to refrain from any action which could result in the "contamination of any portion of the water supply of the City of New York."<sup>26</sup> Under the Existing Regulations, violation or non-compliance carries a penalty ranging from ten to fifty dollars per violation.<sup>27</sup> However, it is apparent from the reading of these regulations that most of the provisions are rudimentary and do not address today's concerns of urbanization and technological advancements.

Second, in 1972, Congress enacted the Clean Water Act (CWA),<sup>28</sup> a comprehensive set of water-quality laws. Since then, the enforcement of CWA provisions has significantly reduced the discharge of pollutants from point sources.<sup>29</sup> However, nonpoint sources, also known as polluted runoffs, remain a major source of concern.<sup>30</sup> For instance, to prevent nonpoint source pollutants from entering a river, natural landscapes along the riverbanks, known as riparian zones, need to be protected.<sup>31</sup> Watersheds consist of riparian zones, and thus, also need to be protected.

Third, according to the 1986 Amendments to the SDWA,<sup>32</sup> filtration is required for all surface water sources of

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animals, manure or garbage can be deposited within 100 feet of any spring, marsh, watercourse, or reservoir. *Id.* § 128.1(e). A section of the Existing Regulations specifically affects the farming industry. Any place where excretions may accumulate, e.g., stables, pigsties, poultry yards, barnyards, or slaughterhouses, etc., must be arranged and maintained so that no washings or drainage could flow into any spring, marsh, watercourse, or reservoir. *Id.* § 128.1(f). Another section specifically affects manufacturers: no filth, toxic substances, waste product, liquid, or trade waste from any industrial, commercial, or institutional plant can be discharged, drained, or washed into any spring, marsh, watercourse, or reservoir, unless such discharge was previously purified. *Id.* § 128.1(g).

26. *Id.* § 128.1(j).

27. *Id.* § 128.1(k)(1)-(2).

28. Clean Water Act §§ 101-607, 33 U.S.C. §§ 1251-1387 (1988).

29. "Point source means any discernible, confined, and discrete conveyance including but not limited to any pipe, ditch, channel, funnel, conduit, well, discrete fissure, container rolling stock, or vessel or other floating craft, . . . from which pollutants are or may be discharged." FGEIS app. I-V, *supra* note 7, at 15.

30. Parfit, *New Ideas*, *supra* note 1, at 113.

31. *Id.*

32. Safe Drinking Water Act § 1412, 42 U.S.C. § 300g-1 (1988).



drinking water.<sup>33</sup> However, filtering the upstate water sources, which provide more than ninety percent of New York City's drinking water, would create an operating cost of at least \$300 million per year.<sup>34</sup> Despite the staggering costs, something must be done to protect the watershed which harbors the New York City water supply.

Lastly, although water can appear as clear as glass, it can often carry serious diseases such as typhoid, dysentery, and hepatitis.<sup>35</sup> For example, pathogens,<sup>36</sup> such as giardia<sup>37</sup> and cryptosporidium,<sup>38</sup> have been found in drinking water and their source has been traced to the Catskill/Delaware watershed.<sup>39</sup> The major problem is the nature of water itself; a vast number of substances are dissolved into solution and those that are not dissolved are pushed along or are ground finely enough to be carried in suspension.<sup>40</sup>

Cryptosporidiosis, resulting from ingestion of cryptosporidium, can be fatal to immune-compromised persons, such as young children, people undergoing radiation or chemotherapy, and HIV-positive people.<sup>41</sup> However, the

33. Daniel Okun, *Filter the City's Supply Now*, N.Y. NEWSDAY, Jan. 3, 1994, at 30.

34. Keith S. Porter, *New York City: Case of Threatened Watershed, Pollution Prevention Could Save Huge Filter Costs*, EPA J., Summer 1994, at 24; see also Mandell, *supra* note 3, at 15.

35. Michael Parfit, *Troubled Waters Run Deep*, NAT'L GEOGRAPHIC, SPECIAL ED., Nov. 1993, at 78.

36. Pathogens are any viruses, microorganisms or other substances causing disease. STEDMAN'S MEDICAL DICTIONARY 1040 (5th Unabridged Law ed. 1982).

37. Giardia is a type of flagellates that parasitize the small intestine of many mammals, including man, and causes diarrhea. *Id.* at 583-84. Giardia "are found as cysts in some surface water supplies . . . [D]uring the past fifteen years, [NYSDOH] has confirmed seven New York State waterborne giardiasis outbreaks. . . . All seven involved unfiltered surface sources." 1 NEW YORK CITY DEP'T OF ENVTL. PROTECTION, FINAL GENERIC ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED WATERSHED REGULATIONS FOR THE PROTECTION FROM CONTAMINATION, DEGRADATION, AND POLLUTION OF NEW YORK CITY WATER SUPPLY AND ITS SOURCES, at IV-5 (1993) [hereinafter 1 FGEIS].

38. Cryptosporidium is an organism which causes cryptosporidiosis, a disease that causes severe abdominal pain and diarrhea. William Murphy, *Filtering Water Kills Parasite*, NEWSDAY, Jan. 31, 1990, at 4.

39. Okun, *supra* note 33, at 30.

40. Parfit, *Troubled Waters Run Deep*, *supra* note 35, at 80.

41. Okun, *supra* note 33, at 30.

symptoms of cryptosporidiosis, such as abdomen pain and diarrhea, are so common that even if 1,000 cases occurred during a single week in New York City, the disease would most likely go undetected and its waterborne source would remain undiscovered.<sup>42</sup> This problem is compounded by the fact that New York City currently uses the water treatment method known as chlorination, as opposed to filtration.<sup>43</sup> Chlorination cannot inactivate cryptosporidium, while filtration can.<sup>44</sup>

## B. The Chronology of the Proposed Regulations

The watershed system as a whole is fairly clean, and it is not beyond our efforts to save it from future degradation and contamination.<sup>45</sup> Programs, however, are needed to upgrade and relocate sewage-treatment plants, as well as to improve farming practices that eliminate the introduction of nutrients, such as phosphorous, from the protected watershed areas.<sup>46</sup>

Since the Existing Regulations were first promulgated, many changes have occurred throughout the watershed region.<sup>47</sup> For example, the population has increased substantially, especially in Westchester and Putnam counties,<sup>48</sup> and the traditional economic activities have been supplanted with more urban and suburban activities.<sup>49</sup> Also, regions once primarily occupied by summer and winter residences have become year-round communities.<sup>50</sup> These factors, combined with the continued development of the natural environment,

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42. *Id.* at 32 (citing Dr. Dennis Juranek, an epidemiologist with the U.S. Centers for Disease Control in Atlanta, who has demonstrated the above facts).

43. Okun, *supra* note 33, at 30.

44. *Id.* "A filtration plant must be operated and maintained properly to achieve peak pathogen removal efficiencies. Data suggests that filtration, when not done properly, can increase the risk of waterborne diseases." 1 FGEIS, *supra* note 37, at IV-5.

45. Lucia Mouat, *New York City Counts the Cost of Pure Water*, CHRISTIAN SCI. MONITOR, June 22, 1993, at 8.

46. *Id.*

47. 1 FGEIS, *supra* note 37, at IV-1.

48. *Id.*

49. *Id.*

50. *Id.* at IV-1.

have resulted in consequences that the drafters of the 1953 regulations never contemplated.<sup>51</sup>

The first action the DEP took to revise the existing Regulations was to issue a Discussion Draft for new watershed regulations.<sup>52</sup> Albert Appleton, former Commissioner of the DEP, met with many interested parties to discuss this proposal.<sup>53</sup> Among the parties in attendance were representatives of the Coalition of Watershed Towns, the agricultural and business communities, environmental and angler's groups, various federal and state agencies, and local and county governments.<sup>54</sup> These meetings resulted in a revision of the Discussion Draft, called the Proposed Action.<sup>55</sup>

On July 1, 1993, the DEP released a preliminary Draft Generic Environmental Impact Statement (PDGEIS).<sup>56</sup> The PDGEIS analyzed the potential impact of the Proposed Action on the approximately nine million residents living in New York City and the watershed counties.<sup>57</sup> Since the PDGEIS was a preliminary study, only those provisions that went beyond existing state and federal regulations were considered.<sup>58</sup>

Following the release of the PDGEIS, a public review and comment period was held.<sup>59</sup> During this public comment period, private citizens, businesses, government officials, and interested organizations were urged to submit comments concerning the findings of the PDGEIS and the Proposed Action.<sup>60</sup> Public hearings were held in each of the eight watershed counties and in New York City.<sup>61</sup> On August 15,

51. 1 FGEIS, *supra* note 37, at IV-1.

52. WATERSHED July 1993, *supra* note 20, at 1.

53. *Id.* at 1.

54. *Id.*

55. *Id.* at 1-2.

56. WATERSHED July 1993, *supra* note 20, at 6. An environmental impact statement (EIS) is a full disclosure document about an environmentally significant governmental action. A generic or overall EIS is prepared when a sweeping environmental action . . . is being considered." *Id.*

57. *Id.* at 4.

58. *Id.*

59. *Id.* at 12.

60. WATERSHED July 1993, *supra* note 20, at 12.

61. *Id.*

1993, a completed Draft Generic Environmental Impact Statement (DGEIS), analyzing the potential impact of the Proposed Action, was released.<sup>62</sup> Data from the Croton, Catskill, and Delaware watersheds were analyzed and contained in the DGEIS.<sup>63</sup>

At the close of the public comment period, the DEP considered the information gathered from the public hearings, submitted comments, and compiled a Final Generic Environmental Impact Statement (FGEIS).<sup>64</sup> The FGEIS summarized the substantive comments on the DGEIS and supplied the DEP's answer to said comments.<sup>65</sup> Finally, in August of 1994, the DEP released a set of proposed regulations regarding protection of the watershed, which were a revised version of the Proposed Action.<sup>66</sup> Then, in December of 1994, the DEP issued a revised version of these proposed regulations.<sup>67</sup> The last of these revised proposed regulations are the focus of this article.

### C. A Discussion of Selected Sections of the Proposed Regulations<sup>68</sup>

"The basic premise of [New York] City's watershed protection strategy is antidegradation — to act to protect present water quality levels, to stabilize those levels and then to improve quality by attacking pollution trends and environmental threats."<sup>69</sup> Thus, the Proposed Regulations begin by finding that the "quality of the drinking water supplied to the City and upstate communities which draw from the New York City water supply depends primarily on the quality of

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62. *Id.* at 7. On the same day, the required Notice of Completion and the Notice of Public Hearings were released with the DGEIS. *Id.*

63. *Id.* at 7.

64. WATERSHED July 1993, *supra* note 20, at 7. The final GEIS was a revised compilation of the DGEIS, and a summary of all substantive comments and the DEP's responses to those comments. *Id.*

65. *Id.* at 7.

66. AUG. 1994 PROPOSED REGULATIONS, *supra* note 23, §§ 18-11 - 18-91.

67. DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, §§ 18-11 - 18-91.

68. This section addresses the December 1994 regulations only.

69. 1 FGEIS, *supra* note 37, at IV-3.

the source waters which feed the reservoirs."<sup>70</sup> With this in mind, the Proposed Regulations seek to ensure the quality and safety of the drinking water of the New York City watershed.

### 1. Enforcement of Violations

The Existing Regulations levy penalties ranging from a minimum of ten dollars to a maximum of fifty dollars for violations or noncompliance with the applicable sections.<sup>71</sup> The Proposed Regulations are less concerned with the amounts of the fines and enforcement of penalties, and instead focus more attention on the process of detecting a violation.<sup>72</sup> The enforcement section<sup>73</sup> identifies several statutes which may afford remedies for violations of the Proposed Regulations. Some of these statutes include the CWA,<sup>74</sup> the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),<sup>75</sup> the Resource Conservation and Recovery Act (RCRA),<sup>76</sup> New York State Public Health Law (PHL), and New York State Penal Law.<sup>77</sup> The enforcement section of the Proposed Regulations preserves these remedies by declaring that "[n]othing contained in these rules and regulations shall be construed as limiting the City's ability to exercise any of its rights and remedies under any other law, statute, rule, regulation, or order."<sup>78</sup>

For instance, under section 1103 of the PHL, each violation of the Proposed Regulations would be a misdemeanor.<sup>79</sup> In addition, upon conviction, the punishment shall be "a fine not exceeding two hundred dollars, or imprisonment not exceeding one year, or both."<sup>80</sup> This represents a significant

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70. DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-12(a).

71. N.Y. COMP. CODES R. & REGS. tit. 10, § 128.1(k).

72. See DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-51.

73. *Id.* § 18-51.

74. 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993).

75. 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

76. 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993).

77. DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-51(c).

78. *Id.*

79. N.Y. PUB. HEALTH LAW § 1103(1) (McKinney 1990).

80. *Id.*

change from the Existing Regulations. First, the Existing Regulations do not designate non-compliance as a crime,<sup>81</sup> whereas under the PHL, non-compliance is a misdemeanor.<sup>82</sup> Second, the Existing Regulations do not contemplate a jail term for non-compliance,<sup>83</sup> whereas under the PHL, a violator could serve up to one year in jail for a violation.<sup>84</sup> Third, the Existing Regulations have a maximum fine of fifty dollars<sup>85</sup> rather than the two hundred dollar maximum fine in the PHL.<sup>86</sup> Despite these changes, these penalties are of minimal deterrent value considering that contamination of the New York City water supply could affect the health and well-being of millions of people.<sup>87</sup>

## 2. Regulated Activities

Under the Proposed Regulations, many activities would be regulated with increased specificity.<sup>88</sup> For instance, all new wastewater treatment plants<sup>89</sup> are subject to review and approval by the DEP.<sup>90</sup> The Proposed Regulations also place many restrictions on the design, operation, and maintenance

81. N.Y. COMP. CODES R. & REGS., tit. 10, § 128.1(k) (1962).

82. N.Y. PUB. HEALTH LAW § 1103(1) (McKinney 1990).

83. N.Y. COMP. CODES R. & REGS., tit. 10, § 128.1(k) (1962).

84. N.Y. PUB. HEALTH LAW § 1103(1) (McKinney 1990).

85. N.Y. COMP. CODES R. & REGS., tit. 10, § 128.1(k) (1962).

86. N.Y. PUB. HEALTH LAW § 1103(1) (McKinney 1990).

87. See generally Boehlert, *supra* note 6, at 35 (noting that treatment problems can effect 10 million people).

88. There are several sections in the new regulations which simply state that the activity is prohibited if it violates state or federal law. Those sections involve regulation of pathogenic materials, radioactive materials, petroleum products, and discharges from industrial facilities. DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, §§ 18-31, 18-33, 18-34, 18-40.

89. "Wastewater treatment plants (WWTPs) are significant point sources of pollution in the New York City . . . watershed. The major sources of wastewater to WWTPs are [NYC's] domestic (household) and industrial discharges. Waters from groundwater infiltration and stormwater entering the sewer systems can also be a source of wastewater to the WWTPs." 2 NEW YORK CITY DEP'T OF ENVTL. PROTECTION, FINAL GENERIC ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED WATERSHED REGULATION FOR THE PROTECTION FROM CONTAMINATION, DEGRADATION, AND POLLUTION OF NEW YORK CITY WATER SUPPLY AND ITS SOURCES, at VIII.D-1 (1993) [hereinafter 2 FGEIS].

90. DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-36(a)(2).

of these plants.<sup>91</sup> The Existing Regulations only refer to "all sewage disposal systems" and require the operation and maintenance of these systems to be approved by the DEP.<sup>92</sup> Outside of this general prohibition, the Existing Regulations offer little guidance with respect to the treatment facilities. Subsurface sewage treatment systems, or septic systems,<sup>93</sup> and plans for sewer systems,<sup>94</sup> will remain subject to DEP review and approval.<sup>95</sup> However, the Proposed Regulations will further control "the siting, design, construction, maintenance, and operation of [these] sewer systems and service connections."<sup>96</sup> Particularly, the Proposed Regulations seek to "ensure that infiltration, inflow and exfiltration are minimized and that sew[age] systems . . . are properly installed,"<sup>97</sup> a concern nominally addressed by the Existing Regulations.<sup>98</sup>

Not all non-complying existing activities,<sup>99</sup> are regulated by the Proposed Regulations. Rather than prohibiting those uses which do not meet the new requirements, the Proposed Regulations instead, provide that virtually all non-complying activities may continue to operate.<sup>100</sup> For example, a properly functioning septic system<sup>101</sup> within a buffer zone, may

91. 2 FGEIS, at VIII. D-1; DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-36(a)(1)-(13).

92. N.Y. COMP. CODES R. & REGS., tit. 10, § 128.1(c)(7) (1962).

93. The new regulations identify three types of subsurface sewage treatment: 1) Individual Systems - serve residential properties and receive sewage in quantities of less than 1,000 gallons per day; 2) Intermediate Systems - these are systems which receive sewage in excess of 1,000 gallons per, or are industrial systems of any size; 3) Other Systems - these systems receive less than 1,000 gallons per day, but are provided for a non-residential or non-industrial use. 2 FGEIS, *supra* note 89, at VIII.F-1 to F-2.

94. WATERSHED July 1993, *supra* note 20, at 3.

95. DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-37.

96. WATERSHED July 1993, *supra* note 20, at 3.

97. 2 FGEIS, *supra* note 89, at VIII.E-1.

98. N.Y. COMP. CODES R. & REGS., tit. 10, § 128.1(c)(7) (1990).

99. DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-16(a)(57).

100. WATERSHED July 1993, *supra* note 20, at 2; DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-27(a)(1).

101. Septic systems are systems which contain septic tanks. Septic tanks are defined as "watertight sedimentation tank[s] for sewage in which solids settle and are decomposed anaerobically. The liquid effluent may be passed from this tank into the ground or into a seepage tank in which it is filtered through

operate until it fails.<sup>102</sup> However, the replacement septic system must comply with the regulations.<sup>103</sup>

Ironically, one of the most comprehensive sections in the Existing Regulations, involving human excreta,<sup>104</sup> is much less comprehensive in the Proposed Regulations. This section of the Proposed Regulations begins by prohibiting discharge or storage of human excreta if it violates state or federal law.<sup>105</sup> In addition, it prohibits emptying, discharging, or transferring the contents of a sewage vault or other sewage receptacle into the watershed.<sup>106</sup> The shift in focus represented by this change may be the result of the changing times and techniques. The Existing Regulations seem to focus on outdated methods of human sewage disposal while the Proposed Regulations focus on modern methods such as wastewater treatment and sewage treatment facilities.

#### a. Regulation of Hazardous and Solid Waste

Unlike the Existing Regulations, which generally prohibits manufacturing wastes,<sup>107</sup> the Proposed Regulations oversee the dumping of hazardous substances and wastes.<sup>108</sup> In general, the Proposed Regulations declare that discharge or storage of hazardous wastes must comply with state and federal law.<sup>109</sup> Specifically, the Proposed Regulations proscribe storage of hazardous substances in: aboveground tanks of 185 gallons or more; non-stationary tanks of 1000 kg or more, for ninety days or more; and underground tanks of any size,

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sand or gravel before release. A well-designed septic tank rarely requires emptying." *DICTIONARY OF THE ENVIRONMENT* 347 (3d ed. 1989).

102. *WATERSHED* July 1993, *supra* note 20, at 2.

103. *Id.*

104. N.Y. COMP. CODES R. & REGS., tit. 10, § 128.1(c) (1962).

105. DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-35(a).

106. *Id.* § 18-35(b).

107. N.Y. COMP. CODES R. & REGS., tit. 10, § 128.1(g) (1962).

108. DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-32.

109. *Id.* § 18-32(a).



within 500 feet of a watercourse or wetland,<sup>110</sup> or within 1000 feet of a reservoir or controlled lake.<sup>111</sup>

Another regulated activity pertains to solid waste and junkyards.<sup>112</sup> Generally, siting or expanding a junkyard within the New York City watershed is prohibited.<sup>113</sup> However, there are several exceptions to this rule. Recycling facilities "that handle non-putrescible<sup>114</sup> solid waste, such as newspapers, magazines, corrugated boxes, glass, cans and plastic" are not prohibited.<sup>115</sup> In addition, the Proposed Regulations dictate that only "construction and demolition debris that is recognizable uncontaminated concrete, asphalt pavement, brick, soil, stone, trees or stumps, wood chips, or yard waste may be used as fill in the watershed."<sup>116</sup> The Proposed Regulations show an improvement in this area whereas the Existing Regulations are primarily concerned with animal, household and human waste and only peripherally mention manufacturing waste.<sup>117</sup> This shift in emphasis reflects a population that is more suburban than rural or agricultural. Consequently, the sources of pollution are industrial as opposed to agricultural and domestic.

#### b. Controlling Stormwater Runoff

The Existing Regulations do not contain any provisions regarding impervious<sup>118</sup> surfaces or stormwater pollution prevention. "Stormwater is a nonpoint source of pollution

110. A wetland is defined as an area covered either "permanently, occasionally or periodically by fresh or salt water up to a depth of 6 meters." *DICTIONARY OF THE ENVIRONMENT* 411 (3d ed. 1989).

111. DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-32(b).

112. *Id.* § 18-41.

113. *Id.* § 18-41(a).

114. The term putrefy means to cause to decay offensively. *WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY* 1850 (3d ed. 1976). The term putrescible means to be capable of being putrefied. *Id.* Thus, the term non-putrescible means to be incapable of decaying offensively.

115. DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-41(a)(1).

116. *Id.* § 18-41(c).

117. N.Y. COMP. CODES R. & REGS., tit. 10, § 128.1(c)-(i) (1962).

118. Impervious is defined as "resistant to penetration by moisture." DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-16(a)(41). Examples of impervious materials are "paving, concrete, asphalt, roofs, or other hard surfacing material." *Id.*

which [has the potential to] contribute a significant" amount of pollutants to surface water sources.<sup>119</sup> Some of the pollutants associated with stormwater include: fecal coliform bacteria; phosphorous; nitrogen; oil and grease; and heavy metals such as copper, zinc, and lead.<sup>120</sup>

The Proposed Regulations prohibit the building of any impervious surface within 100 feet of a watercourse, or within 300 feet of a reservoir or controlled lake.<sup>121</sup> Although new roads may not be built within the limiting distances, a significant loophole allows existing roads to be expanded.<sup>122</sup> An exception to this general rule would allow the construction of bridges or crossings over watercourses if a valid permit is acquired.<sup>123</sup> There are, however, certain activities outside of constructing impervious surfaces, which also require stormwater pollution prevention plans. These include: 1) development that results in the disturbance of five or more acres of land area; 2) construction of a realty subdivision; 3) construction of new industrial, municipal, or multi-family residential projects which will create an impervious surface over 10,000 square feet in size; and 4) land clearing or land grading involving two or more acres, located within 100 feet of a watercourse or wetland, or within 300 feet of a reservoir or controlled lake.<sup>124</sup>

### c. Regulation of Pesticides and Fertilizers

Another area where the Proposed Regulations have extended the reach of the DEP is in the area of pesticides and fertilizers.<sup>125</sup> The Existing Regulations fail to address the

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119. 2 FGEIS, *supra* note 89, at VIII.G-1.

120. *Id.*

121. DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-39(a)(1).

122. *Id.* § 18-39(a)(2).

123. *Id.* § 18-39(a)(5)(i).

124. *Id.* § 18-39(b)(3).

125. Pesticides are defined as chemical agents that are used to kill unwanted plants, animal pests or disease causing fungi. *DICTIONARY OF THE ENVIRONMENT* 297 (3d ed. 1989). Because pesticides are used to kill vegetation and animals, they are inherently toxic to the environment. 2 FGEIS, *supra* note 89, at VIII.I-2. Fertilizers "[a]re any substance that is applied to land as a source of nutrients for plant growth." *DICTIONARY OF THE ENVIRONMENT* 158 (3d ed. 1989).

problem these pollutants cause. However, the Proposed Regulations seek to control some pesticide and fertilizer pollution. Generally, application of pesticides is prohibited if it violates state or federal law.<sup>126</sup> Application of fertilizers, if for an agricultural activity authorized by state and federal law, is outside of the realm of these regulations.<sup>127</sup> Any discharge into any watercourse, wetland, or reservoir, resulting from washing equipment used for fertilization, is prohibited.<sup>128</sup> Using water from a reservoir or controlled lake for fertilizer make-up is also prohibited.<sup>129</sup> Additionally, using water from a watercourse is prohibited if an anti-siphon device<sup>130</sup> is not employed.<sup>131</sup> Although fertilizers are generally not considered to be inherently toxic to the environment, they often contain the pollutants nitrogen and phosphorus,<sup>132</sup> which may pose a significant danger to rivers and lakes.

### 3. Whole Community Planning

The Proposed Regulations also contain a section for Whole Community Planning (WCP).<sup>133</sup> WCP gives watershed communities the opportunity to develop local watershed protection plans which supplant some regulatory requirements.<sup>134</sup> This process permits a municipality to take control

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126. DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-43(a).

127. *Id.* § 18-44(a).

128. *Id.* § 18-44(c).

129. *Id.* § 18-44(d).

130. A siphon device is a "pipe or tube . . . deployed in an inverted U shape and filled until atmospheric pressure is sufficient to force a liquid from a reservoir in one end of the tube over a barrier higher than the reservoir and out the other end." THE AMERICAN HERITAGE DICTIONARY 1144 (2d ed. 1982).

131. DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-44(e).

132. 2 FGEIS, *supra* note 89, at VIII.J-1. "Nitrogen and phosphorus supply nutrients which make the soil more productive for plant development and growth. However, they can also accelerate the eutrophication of lakes and reservoirs." *Id.* Eutrophication is the process of enriching a body of water with plant nutrients. This may happen naturally, but it is often a form of pollution. "It leads to an increase in the growth of aquatic plants and often to algal blooms, which may smother higher plants, reduce light intensity, [and,] produce toxins which kill fish." DICTIONARY OF THE ENVIRONMENT 150 (3d ed. 1989) (emphasis omitted).

133. FGEIS app. I-V, *supra* note 7, § 128-8.1.

134. WATERSHED July 1993, *supra* note 20, at 2.

of and be accountable for their own watershed problems, rather than being regulated by New York City.<sup>135</sup> First, the municipality must submit a letter of intent to the DEP, outlining its proposal.<sup>136</sup> Following that, the DEP reviews the proposal and, if approved, acknowledges such approval in writing.<sup>137</sup> Once the DEP acknowledges its approval, the municipality goes through a two stage Memorandum of Agreement process to gain approval of its plan.<sup>138</sup>

Six towns in the watershed counties have begun their own WCP's.<sup>139</sup> Citizen Advisory Committees have been formed by each town serving to identify and assess town priorities.<sup>140</sup> Major priorities for these towns are "[o]n-site wastewater disposal, stormwater and drainage, and land-use management."<sup>141</sup> Streambed and streambank management are also concerns for the towns in the Catskill/Delaware region.<sup>142</sup> For example, Denning and Neversink have proposed a joint Watershed Council for the Neversink Reservoir.<sup>143</sup>

Additionally, several towns in Westchester appear to be considering WCP. Westchester county and twelve of its towns and villages, in cooperation with New York City, are considering the advantages regional alliances and long-range planning offer.<sup>144</sup> Their plan, which they have named "Watershed Protection Planning,"<sup>145</sup> attempts to create a "re-

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135. All watershed protection plans must be at least as protective as the Proposed Regulations. WATERSHED July 1993, *supra* note 20, at 2. Also, the Proposed Regulations allow for delegation of administration and enforcement of the regulations of the municipality. *Id.*

136. DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-82(a).

137. *Id.* § 18-82(b).

138. *Id.* §§ 18-83, 18-84.

139. These towns include Denning, Middletown, Neversink, Kent, Patterson and Southeast. Porter, *supra* note 34, at 26.

140. *Id.* These committees receive technical support from the County Health and Planning Departments, Cornell Cooperative Extension, the New York State Water Resources Institute and the New York City Department of Environmental Protection. *Id.*

141. *Id.* at 26.

142. *Id.*

143. *Id.*

144. Elsa Brenner, *When Communities Are No Longer Islands*, N.Y. TIMES, Mar. 13, 1994, § 13, at 1, 22.

145. *Id.* at 22.

gional strategy to replace [the] sewer and wastewater measures proposed by New York City."<sup>146</sup> Thus, although many watershed county residents are resisting the Proposed Regulations, many other residents have recognized the threat posed by contaminated water and are attempting to comply with the Proposed Regulations, while retaining their own autonomy.

### III. Analysis

#### A. Concerns Surrounding the Proposed Regulations

The DEP is required to maintain high quality for those waters from which New York City draws its drinking water.<sup>147</sup> In addition, the DEP is required to prevent the degradation of these waters in order to protect the public health and general welfare of those consuming this supply.<sup>148</sup> In 1992, the EPA offered former New York City Mayor David Dinkins two options to achieve this goal of antidegradation.<sup>149</sup> The first option called for spending a few hundred million dollars to protect the region supplying New York City with the 1.5 billion gallons of water it consumes daily.<sup>150</sup> This was to be accompanied by halting future development in the region, purchasing potentially valuable land, stopping soil erosion, and repairing and updating sewage plants and bridges controlled by the City.<sup>151</sup> The alternative was to build a filtration plant which would cost up to \$6 billion to construct and \$300 million a year to operate.<sup>152</sup> Yet, armed with the knowledge of the ineffectiveness of the current water treatment system against the spread of cryptosporidium, New York City chose to establish and implement an effective watershed control program.

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146. *Id.*

147. DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-11(a).

148. *Id.*

149. Michael Specter, *New York City Feels Pressure to Protect Precious Watershed*, N.Y. TIMES, Dec. 20, 1992, § 1, at 46.

150. *Id.*

151. *Id.*

152. *Id.*

Although the City's choice was largely based on economic reasons, filtration may not be avoided because New York City has yet to establish an effective water control program. The DEP must develop a viable watershed protection plan in order to avoid the filtration requirement.<sup>153</sup> In December of 1993, the EPA postponed the deadline for requiring New York City to filter the Catskill/Delaware Water Supply for three years.<sup>154</sup> In order to avoid filtration, the City must demonstrate that the watershed control measures will maintain the quality of the City's drinking water.<sup>155</sup> Thus, the DEP has until December of 1996 to deliver to the NYSDOH an acceptable version of the Proposed Regulations. Moreover, New York City is also required to have completed a preliminary design of the filters for the filtration plants by December, 1996.<sup>156</sup>

Despite the DEP's efforts, some environmentalists feel that the new regulations are not acceptable and that further drafting is necessary.<sup>157</sup> Those environmentalists perceive that the City's gutting of the entire section dealing with pesticide control, as well as allowing farming regulations to be voluntary, has severely weakened the Proposed Regulations and will, therefore, do little to protect water quality.<sup>158</sup> Additionally, environmentalists believe that the Proposed Regulations are further weakened because, not only do they allow 105 sewage plants to remain in existence, they also relax the previously proposed treatment standards, and may even allow new sewage plants.<sup>159</sup>

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153. Porter, *supra* note 34, at 24.

154. *Id.*; *Save the Watershed*, N.Y. TIMES, May 15, 1994, § 4 (Editorial Desk), at 14.

155. Porter, *supra* note 34, at 24; *Save the Watershed*, *supra* note 154, at 14.

156. Porter, *supra* note 34, at 24.

157. William Bunch, *City Lags on Land*, N.Y. NEWSDAY, Oct. 23, 1994, at A27.

158. *Id.* Farming has been cited as a leading pollution source. *Id.*

159. *Id.*

## B. New York City's Authority and Duty to Enact the Proposed Regulations

Although the prospect of over-regulating upstate residents as a measure to secure better drinking water for New York City residents seems unfair, legally, the City has the authority to make these changes.<sup>160</sup> According to Section 1100 of the PHL:

the commissioner of environmental protection of the [C]ity of New York and the board of water supply of the [C]ity of New York *may* make such rules and regulations subject to the approval of the department [NYSDOH] for the protection from contamination of any or all public supplies of potable waters and their sources within the state where the same constitute a part of the source of the public water supply of said [C]ity.<sup>161</sup>

Based on this relevant section of the PHL, New York City has the authority to promulgate these Proposed Regulations in order to ensure safe drinking water for its residents.<sup>162</sup> Even if it chose not to exercise that authority, the SDWA still requires a redrafting of the Existing Regulations.<sup>163</sup> The 1986 amendments to the SDWA "require that public water supplies be filtered or meet a series of standards, called avoidance criteria, which minimize the potential for various disease pathogens."<sup>164</sup> As discussed previously, the EPA "adopted the Surface Water Treatment Rule, which specifies the filtration avoidance requirements."<sup>165</sup> "Among them is an effective watershed control program."<sup>166</sup> Thus, both state and federal regulations authorize and compel New York City to enact the Proposed Regulations.

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160. N.Y. PUB. HEALTH LAW § 1100 (McKinney 1990); Mark A. Chertok & Michael D. Zarin, *Land Use Conflict Between City and Watershed Area Heats Up*, N.Y. L.J., June 14, 1993, at S1.

161. N.Y. PUB. HEALTH LAW § 1100(1) (McKinney 1990) (emphasis added).

162. See *supra* text accompanying notes 69, 70.

163. Chertok & Zarin, *supra* note 160, at S10.

164. *Id.*

165. *Id.*

166. *Id.*

C. Effect of the Proposed Regulations upon the Upstate Counties of New York State

1. Effect on Industry

"Unfortunately for farmers and developers, the number of streams that are considered reservoir feeders is huge, especially during the spring thaw."<sup>167</sup> Approximately one-half of the Catskill Region drains into New York City reservoirs and would be regulated by the Proposed Regulations.<sup>168</sup> Ronald Roth, Director of the Greene County Planning Board, believes that it is the farmers in the watershed who will have the biggest problem.<sup>169</sup> Under the Proposed Regulations, farmers would be required to control the rainwater runoff on their lands if they are within 500 feet to 1,000 feet of any stream.<sup>170</sup> Thus, "[i]t would become very difficult and expensive for those farms to operate."<sup>171</sup>

The Proposed Regulations could also have a potential impact on the Catskill ski industry. Orville Slutzky, general manager of the Hunter Mountain Ski Bowl, predicts that the proposed watershed regulations could hinder the growth of the business.<sup>172</sup> Slutzky stated that "the proposals could halt or limit expansion of the ski center and construction of condominiums once the housing market picks up."<sup>173</sup> The reason for the industry's fear is that the Proposed Regulations seek to limit expansion and as Slutzky states, "you can't live with zero growth in today's world."<sup>174</sup>

In addition to the impacts that the Proposed Regulations could cause on farmers and the ski industry, New York City has already begun tightening the standards regarding new construction in the watershed area. For example, a developer in Putnam County, after receiving local approval to build

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167. Kevin Curran, *Rules May Affect Farms, Development in Catskills*, CAP. DIST. BUS. REV., Jan. 21-27, 1991, § 1, at 21.

168. *Id.*

169. *Id.*

170. *Id.*

171. Kevin Curran, *supra* note 166, at 21.

172. *Id.*

173. *Id.*

174. *Id.*



sixty homes in Patterson, New York, encountered interference from New York City.<sup>175</sup> New York City objected to the development on the ground that the land was too steep to accommodate the septic system that the builder was planning.<sup>176</sup> The City feared that inadequately treated water would reach the streams feeding the watershed.<sup>177</sup> Hence, the developer who had invested more than \$1 million in anticipation of building sixty homes, has lost hope of building even ten homes.<sup>178</sup>

## 2. Effect on Landowners

New York City has only two choices in order to come into compliance with the 1986 amendments to the 1974 Safe Drinking Water Act.<sup>179</sup> It can either create a new filtration system to purify the water, or it can impose strict new controls on the Catskill landowners, who are polluting the reservoirs.<sup>180</sup> New York City chose to pass the burden onto the Catskill landowners, for "[t]o give in to filtration is to concede that New Yorkers cannot strike a sensible compromise between man and nature."<sup>181</sup>

One consequence of New York City's choice is the regulation of land use, which is traditionally a local concern, in an attempt to protect the quality of its reservoirs and to avoid expenditures of billions of dollars for filtration.<sup>182</sup>

The [C]ity's water supply is situated outside of its geographic borders. Consequently, when the [C]ity exercises control over the watershed, it is regulating land use in other municipalities. This extraterritorial jurisdiction is quite unusual in the state and is the primary reason for

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175. Joseph Berger, *Life as a Watershed Irks Putnam County: New York City Tightens Regulations, and 46 Developers Fire Back by Filing Suit*, N.Y. TIMES, May 5, 1994, at B1.

176. *Id.*

177. *Id.*

178. *Id.*

179. Margaret Kriz, *Pollution - The Source Spots*, NAT'L J., July 17, 1993, at 1806.

180. *Id.*

181. *Save the Watershed*, *supra* note 153, at 14.

182. Chertok & Zarin, *supra* note 160, at S1.

the controversy that has enveloped the [C]ity's proposed . . . regulations for the watershed.<sup>183</sup>

Upstate residents fear that the City is not only regulating the land upon which they live, but in many instances, the City is acquiring land by condemnation and appropriation.<sup>184</sup> In 1992 and 1993, the EPA required New York City to commit \$47 million to acquire land in the watersheds of the Kensico and West Branch reservoirs.<sup>185</sup> In addition, the EPA required the City "to prepare plans to acquire property, conservation easements, or to enter other agreements with landowners in critical areas of the watershed."<sup>186</sup> However, New York City "will buy land only from willing sellers and will pay taxes on what it does buy."<sup>187</sup>

Acquiring land around the watershed is an additional method which New York City plans to use to protect its drinking water. The City "has earmarked more than \$439 million . . . to acquire 80,000 acres of watershed land to create a buffer zone around the reservoirs and lakes that supply the water. These efforts by the City have [been] met with stiff resistance from residents of the watershed regions."<sup>188</sup>

The decision to adopt these regulations is based upon the need to protect the drinking water consumed by millions of residents. In New York City's effort to save billions of dollars, it chose not to implement a filtration process, even though filtration would eliminate cryptosporidium, a severe hazard to safe drinking water.<sup>189</sup> Thus, New York City residents may remain threatened.<sup>190</sup> Milwaukee recently had a devastating outbreak of cryptosporidiosis due to problems in one of

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183. *Id.*

184. Telephone Interview with Anthony C. Bucca, Member, Executive Committee of the Coalition of Watershed Towns (Jan. 17, 1993).

185. *Id.*

186. *Id.*

187. *Save the Watershed*, *supra* note 154, at 14.

188. Susan M. Campbell, *Watershed Regulations Cause Conflict; Upstate Residents Express Concern*, N.Y. L.J., Nov. 28, 1994, (Environmental Law & consultants directory) at S1, S8.

189. Okun, *supra* note 33, at 30.

190. *Id.*

their two filtration plants.<sup>191</sup> In one of the plants, through human error and poor operation, the cryptosporidium was not properly removed.<sup>192</sup> The other plant in Milwaukee was operated properly, and none of the residents served by that plant contracted cryptosporidiosis.<sup>193</sup> Despite the tragedy in Milwaukee, when New York City was faced with the option to regulate or to spend billions on a filtration system, the City chose to regulate.

If the execution of these regulations injures "any property[,] the municipality, corporation, state or state institution, park, reservation or post owning the waterworks benefitted thereby shall make just and adequate compensation for the property so taken or injured."<sup>194</sup> The concept of just compensation is related to the law of eminent domain. Section 1105(2)(a) of the PHL states that if a person seeks to pursue a cause of action against a municipality or corporation, certain provisions of the eminent domain procedure law are applicable.<sup>195</sup>

The law of eminent domain is rooted to the takings clause of the Fifth Amendment of the United States Constitution.<sup>196</sup> The Fifth Amendment states, in part: "nor shall private property be taken for public use, without just compensation."<sup>197</sup> At the turn of the twentieth century, the Fifth Amendment became relevant to the regulation of land.<sup>198</sup> At that time, judges and legal scholars popularized the idea that excessive regulation concerning the use of land could amount to a taking.<sup>199</sup>

Courts have adhered to the rule that if the government needs land for public use it has to either purchase it on the open market or exercise the power of condemnation, and

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191. *Id.* at 32.

192. *Id.*

193. Okun, *supra* note 33, at 32.

194. N.Y. PUB. HEALTH LAW § 1104(3) (McKinney 1990).

195. *Id.* § 1105(2)(a).

196. U.S. CONST. amend. V.

197. *Id.*

198. ROBERT R. WRIGHT & MORTON GITELMAN, *LAND USE, CASES AND MATERIALS* 377 (4th ed. 1991).

199. *Id.*

thus, pay the owner the fair market value for his land.<sup>200</sup> However, until recently, there was no clear rule regarding the definition of a taking. The general rule was that property could be regulated, however, if the regulation was excessive, it would be a taking.<sup>201</sup>

The United States Supreme Court expounded a distinct rule regarding the definition of a taking when it decided *Lucas v. South Carolina Coastal Council*.<sup>202</sup> In *Lucas*, "the Supreme Court pronounced that regulations may prevent all economic use of land without taking private property if the limitation is consistent with state property law concepts."<sup>203</sup> Generally, the Supreme Court has held that when the government regulation causes a physical invasion of land, or deprives the owner of its use, it is a taking and pursuant to eminent domain laws, just compensation must be made.<sup>204</sup> In *Lucas*, Justice Scalia, defined a taking to include circumstances where a regulation requires an owner of property to sacrifice all economically beneficial use in the property in the name of the common good.<sup>205</sup>

The Senate Judiciary Committee has recently considered regulatory reform action by introducing a property rights bill.<sup>206</sup> The bill would allow property owners to receive compensation for government actions causing a one-third reduction in the value of their property.<sup>207</sup> Also, the bill would compel federal agencies which enforce certain regulations to "provide administrative procedures to address the regulatory 'takings' claims."<sup>208</sup>

200. *Id.* at 378.

201. *Id.* at 378-79.

202. 112 S. Ct. 2886 (1992).

203. Jon A. Kusler, *The Lucas Decision - Avoiding "Taking" Problems With Wetland and Floodplain Regulations*, MD. J. CONTEMP. LEGAL ISSUES, Fall/Winter 1992-1993, at 74.

204. *Lucas*, 112 S. Ct. at 2893.

205. *Id.* at 2895.

206. *Congress, Senate to Take Up Regulatory Bill; House Turns to Term Limits Amendment*, DAILY EXEC. REP. (BNA) § F, at 58 (Mar. 27, 1995).

207. *Id.* at 58.

208. *Id.*

Therefore, if a litigant wishes to assert a takings argument, the litigant must prove that all economically beneficial use associated with the property is denied.<sup>209</sup> This author does not believe that the Proposed Regulations, or the land acquisition necessary to implement these regulations, amount to a taking.<sup>210</sup>

First, the Proposed Regulations do not deny economic use to the land owner, they merely regulate the manner in which waste may be disposed of, e.g., where septic tanks may be built.<sup>211</sup> In particular instances, the regulations may deny the owner a permit to build in a particular location because the construction may threaten the watershed. However, home owners are neither denied the use of their homes, nor are they prohibited from engaging in tasks such as cleaning the family car, or doing the laundry. If property owners want to assert a takings argument they need to point to specific facts which demonstrate the denial of *all* economically viable use of their property.

Second, if the land owner wants to assert that the land acquisition by the government is a taking, he must maintain that he has not received just compensation for his land. Again, the litigant needs to point to specific facts which prove that he did not receive just compensation for his land. It is this author's contention that based on the controversy surrounding this issue, New York City will not further antago-

209. See *Lucas*, 112 S. Ct. at 2895.

210. Denial of all economically beneficial use alone, may not create a taking. In *Lucas*, the Court stated that

it seems . . . that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers. . . . And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale.

*Lucas*, 112 S. Ct. at 2899. This statement makes it clear that the Court foresees certain situations where regulations by the state do not amount to a taking, and should actually be expected by the land owner.

211. DEC. 1994 PROPOSED REGULATIONS, *supra* note 3, § 18-38.

nize the upstate residents, and perhaps jeopardize the EPA's reprieve on the filtration requirement, by paying less than just compensation when it acquires land in the watershed counties.

#### D. Community Response

In response to New York City's rigid regulations, thirty-three upstate towns, who will be affected by the regulations, have formed the Coalition of Watershed Towns (Coalition).<sup>212</sup> The Coalition's policy is mitigate or litigate.<sup>213</sup> Its position is that "[t]he proposed rules would change the character of the watershed and affect the normal and legitimate growth patterns in the Catskills forever."<sup>214</sup>

For instance, on April 21, 1993, the Coalition requested a declaratory ruling from the NYSDOH that New York City "would be obligated to pay for capital, operation and maintenance expenses associated with the construction or modification of [WWTPs]."<sup>215</sup> Additionally, the Coalition pleaded for a declaratory judgment "requiring the [C]ity to pay sewage treatment costs in the watershed area, plus various rulings on upgrades of sewage treatment plants."<sup>216</sup>

In addition to the Coalition, other organizations have filed suits against New York City regarding the Proposed Regulations. For example, in April of 1994, a \$9 billion suit was filed by a group consisting of forty-five Putnam county developers and one Westchester county developer against New York City.<sup>217</sup> Their contention was that their property had been wrongfully devalued by the Proposed Regulations without fair compensation.<sup>218</sup> A similar suit was filed by thirty-four towns and five villages in the Catskill/Delaware

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212. Anthony C. Bucca, *Drinking Bitter Waters*, N.Y. NEWSDAY, Oct. 30, 1992, at 59.

213. *Id.*

214. *Id.*

215. Chertok & Zarin, *supra* note 160, at S10.

216. Maurice Carroll & Joe Claderone, *Battle Brews in the Bronx*, N.Y. NEWSDAY, Sept. 16, 1994, at A30.

217. Berger, *supra* note 174, at 1.

218. *Id.*

watershed.<sup>219</sup> This second suit alleged that as a result of the Proposed Regulations, they have suffered economic harm.<sup>220</sup> These responses to the Proposed Regulations illustrate a clear need to establish a system which will ensure the quality of water New Yorkers' have long enjoyed. The inevitable solution, it appears, despite its profound costs, is to develop a filtration system so as to protect the quality of the water and to prevent outbreaks of disease that may be detrimental to millions.

#### IV. Conclusion

Both the New York City residents and residents throughout New York consume water from the reservoirs of the upstate watersheds. This water, which is consumed daily by millions of people, is polluted by pathogens, including giardia and cryptosporidium. These pathogens pose a threat to all people, and are lethal to immune-compromised people, such as children, the elderly and people who are HIV-positive.

The precious watersheds which surround the reservoirs of New York City's drinking water must be protected. Simply debating the issue is not sufficient. The 1986 amendments to the SDWA, mandate that public water supplies meet certain standards. The New York Public Health Law gives New York City the authority to make rules and regulations to protect its drinking water from contamination. By drafting the Proposed Regulations, New York City is using its state authority to comply with the federal mandate. In essence, the City is using its power to protect the drinking water for its residents.

However, the upstate residents are being regulated for the benefit of New York City residents so that they may have clean drinking water. This illustrates the constant struggle between New York City and upstate residents. New York City feels that they are the state's life force and a huge financial contributor to the state. The upstate residents maintain that New York City receives more funding than they pay in taxes and that the City is a drain on the entire state's budget.

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219. *Id.*

220. *Id.*

The classic struggle between New York City residents and upstate residents will not be resolved in the near future. However, ensuring the safety of the City's drinking water is an issue which must be quickly resolved. One option which should be explored in the future is filtration. But, the construction and operation of a filtration plant of the magnitude necessary could financially cripple New York City, thereby affecting the entire state and all of its residents.

The only other viable option is creating new regulations for the preservation of the City's drinking water watershed. It is unfortunate that preservation of the watershed must come at the expense of regulating the upstate residents. However, the DEP has been fair in the Proposed Regulations in that they have included the Whole Community Planning option. By exercising this option, upstate communities may create their own regulations, subject to approval by the DEP. In the final analysis, when these competing interests are weighed against one another, it is clear that the health and welfare of all New York State's residents must be the primary concern. And in the words of one commentator, "[l]ove this river, stay by it, learn from it." . . . [W]hoever understood this river and its secrets, would understand much more, many secrets, all secrets."<sup>221</sup>

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221. Parfit, *New Ideas*, *supra* note 1, at 110.