

NESE: New York Denies Pipeline Water Permit; What Comes Next?

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The New York State Department of Environmental Conservation's (NYSDEC) second denial of Williams' (WMB) Northeast Supply Enhancement, as we expected, highlights the ongoing difficulties of building pipelines in the Empire State and forecasts a similarly difficult review by neighboring New Jersey officials that concludes June 20. Today's decision further reduces our odds that the project ever goes forward, and more denials in New Jersey and by the New York State Department may follow. However, though it does not change our base case, with FERC overruling three decisions concerning denials of Clean Water Act (CWA) Section 401 Water Quality Certifications (WQCs), plus the recent [*Hoopa Valley v. FERC \(2019\)*](#) court decision that tightens the review windows for projects, it is worth highlighting that denials are being resisted and the odds of successful appeals are rising.

Specifically, the NYSDEC decision states, in part, [the following](#):

"As currently conceived in the application, construction of the NESE pipeline project is projected to result in water quality violations and fails to meet New York State's rigorous water quality standards," the DEC said in a release.

DEC said construction of the proposed project "would result in significant water quality impacts from the re-suspension of sediments and other contaminants, including mercury and copper. In addition, the proposed project would cause impacts to habitats due to the disturbance of shellfish beds and other benthic resources."

Language in the reported denial suggests that this decision may be without prejudice, meaning that Williams may be able to refile. Whether the firm will do so remains unclear.

A few more things to consider:

- **New Jersey decision due June 20.** The state's Department of Environmental Protection has found deficiencies with the project's Coastal Zone Management Act (CZMA) application (see below), WQC application, and land use permits. The deadline for a decision by the Garden State is June 20.
- **Consistency determinations are an additional hurdle.** Pipelines that run through coastal lands must receive consistency determinations under the CZMA. The certificate makes clear that neither the New Jersey Department of Environmental Protection (NJDEP) nor the New York State Department of State (NYDOS) have issued consistency determinations to allow passage through the Madison and Raritan Bay Loops between the southern portion of New Jersey and New York. The CZMA provision has been successfully invoked to block several liquefied natural gas (LNG) terminals. In the event of a denial,

Williams would retain the ability to appeal this determination to the federal Department of Commerce, where Secretary Wilbur Ross would have the ability to overturn a denial for this provision. However, that will not matter if the WQC is never issued.

Finally, a history of denied projects and how they turned out in New York:

Project	Location	Company	Date	Statute	Circumstances	Did the project ever get done?
Broadwater LNG , floating LNG terminal	Long Island Sound	Shell(RDS)/TransCanada (TRP)	April 2008	Sec. 307(c) of the CZMA	Then-Gov. David Paterson (D) rejected the project, wanting to protect the integrity of the Long Island Sound. The New York State Department determined the proposal was inconsistent with the state's coastal zone management program.	No. An appeal to the Commerce Department was denied by Secretary Gary Locke in June 2009.
Constitution pipeline	Binghamton	Williams (WMB), Cabot (COG)	April 2016	CWA WQC	NYSDEC blocked the project after it declined to issue permits to cross 250 streams and 80 acres of wetlands. Decision was later upheld by both the Second Circuit Court of Appeals and FERC.	TBD. The permit denial was remanded back to FERC earlier this year. The Commission accepted comments until May 1. The odds of Constitution going forward are higher than at any point prior to the denial, but New York officials may seek to revoke other permits, and so we remain bearish on this pipeline.
Seneca Lake Liquefied Petroleum Gas facility	Schuyler County	Crestwood Energy Partners (CEQP)	July 2018	Environmental Conservation Law Sec. 23-1301 underground storage permit	Environmental administrator Basil Seggos wrote a 31-page denial order expressing concerns over	No.

					the potential for leaks from the underground storage facility.	
Erie-NYC pipeline	Orange County	Millennium Pipeline LLC [DTE(DTE),TransCanada(TRP)]	May 2002	Sec. 307(c) of the CZMA	Gov. George Pataki (R) concurred with New York state officials that the pipeline proposal was inconsistent with the state's coastal management program, particularly concerning a section under the Hudson River.	No. Millennium subsequently appealed to the Commerce Department. The denial was upheld in December 2003.
Northern Access pipeline	Allegany County	National Fuel Gas(NFG)	April 2017	CWA WQC	NYSDEC refused permits to the pipeline for its adverse effects on the state's wetlands. Appeals are pending before both the Second Circuit Court of Appeals and FERC. Note that NYSDEC did extend its review beyond the one-year CWA deadline, but that it entered into an agreement with NFG to allow the agency additional time.	TBD. A unanimous decision by the Second Circuit Court of Appeals vacating and remanding NYSDEC's denial order for the pipeline gives NYSDEC enough leeway to resubmit a stronger denial order in the coming months to satisfy legal requirements. Beyond that issue, Northern Access's future construction depends in equal part on NYSDEC's pending rehearing request before FERC on whether the state agency waived its reviewing authority by negotiating a 30-day extension of its review

						time before issuing its denial order.
Port Ambrose LNG import terminal	Jones Beach	Liberty Natural Gas	November 2015	The Deepwater Port Act (33 U.S. Code § 1508)	Gov. Andrew Cuomo's (D) office rejected the project under shared authority contained in the Deepwater Port Act, whereby "adjacent coastal states" have a 45-day window to approve or reject offshore LNG facilities.	No.
Valley Lateral pipeline	Wawayanda	Millennium Pipeline LLC [DTE(DTE),TransCanada(TRP)]	July 2017	CWA WQC	NYSDEC rejected this project on the grounds of insufficient greenhouse gas emissions analysis, only to be overruled by both FERC and the Second Circuit Court of Appeals. This case is notable because it has established some additional guidelines for the state review clocks.	Yes. The permits were deemed to be waived by FERC and the project began service last year.