

## NYSDEC Denies Water Quality Certification To NESE Pipeline

On May 15, 2019, the New York State Department of Environmental Conservation (“NYSDEC”) denied, without prejudice, Transcontinental Gas Pipe Line Company LLC’s (“Transco”) application for a Clean Water Act Section 401 Water Quality Certification (“WQC”) for the Northeast Supply Enhancement Project (the “NESE Project”).<sup>[1]</sup> This denial is the latest example of a number of pipeline projects that have either been delayed or halted by NYSDEC purporting to use its authority under Section 401 of the Clean Water Act.<sup>[2]</sup> Since 2016, NYSDEC has denied WQCs to Constitution Pipeline Company, LLC’s Constitution Pipeline, the National Fuel Gas Company’s Northern Access Project, and the Millennium Pipeline Company, LLC’s Valley Lateral Project.

The NESE Project is a proposed 26-inch diameter natural gas pipeline that would transport natural gas from Pennsylvania through New Jersey, beneath the Raritan Bay and Lower New York Bay where it would connect with an existing pipeline. NESE would provide 400,000 dekatherms per day of incremental capacity to National Grid to serve customers in Brooklyn, Queens, and Long Island.

NYSDEC first denied the NESE Project WQC in April 2018, without prejudice, stating that, at that time, there was insufficient information and the environmental review was ongoing. Transco submitted a new WQC application on May 16, 2018. On January 25, 2019, the Federal Energy Regulatory Commission (“FERC”) issued a Final Environmental Impact Statement for NESE and on January 30, 2019, NYSDEC issued a Notice of Complete Application to Transco for the WQC. On May 3, 2019, FERC issued a certificate of public convenience and necessity authorizing the NESE Project.

NYSDEC’s May 15, 2019 denial states that the NESE Project would result in “significant water quality impacts from the resuspension of sediments and other contaminants, including mercury and copper.”<sup>[3]</sup> The denial further states that Transco and NYSDEC “have not finalized appropriate requirements to mitigate for impacts to water quality, shellfish beds, other benthic resources, and other relevant environmental impacts.”<sup>[4]</sup> The NYSDEC denial also notes that NESE “would result in greenhouse gas (“GHG”) emissions, which cause climate change and thus indirectly impact water and coastal resources.”<sup>[5]</sup>

NYSDEC’s denial is without prejudice so Transco now must decide whether to reapply for the WQC (facing the specter of waiting another year to know the fate of the NESE Project while it attempts to address the issues raised by NYSDEC) or seek judicial review of NYSDEC’s denial.

*Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.*

If you have any questions regarding Section 401 of the Clean Water Act, please feel free to contact Brendan

Mooney at (516) 357-3757 or via email at [bmooney@cullenanddykman.com](mailto:bmooney@cullenanddykman.com).

[1] NYSDEC, Notice of Denial of Water Quality Certification to Transcontinental Gas Pipe Line Company, LLC (May 15, 2019)("DEC Letter").

[2] Pursuant to Section 401 of the Clean Water Act (33 U.S.C. § 1341(a)(1)), applicants seeking a federal permit for a project that may result in any discharge into the navigable waters must first seek certification from the states in which the project is proposed to be located that such discharge will comply with applicable state water quality standards.

[3] DEC Letter at 4.

[4] Id.

[5] Id. at 10.

## Practices

- Corporate
- Energy, Renewables and Utilities
- Environmental

## Industries

- Energy and Utilities

## Attorneys

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