

New York's Legal Maneuvers Cause Energy Vulnerability

By Daniel Markind

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As the clock struck midnight on Jan. 1, 2026, what has come to be known as New York City Local Law 154 rather quietly took effect. For those who may not be familiar with this ordinance, and as part of the city's commitment to help fight climate change, the new law generally prohibits fossil fuel heating and cooking systems from being used anywhere in New York City. Meanwhile, the New York State All-Electric Buildings Act, which basically tries to do the same thing statewide, was also scheduled to take effect at the same time, but it has been stayed due to legal challenges that are still pending.

First enacted in 2021, Local Law 154 generally prohibits "the combustion of any substance that emits 25 kilograms or more of carbon dioxide per million British thermal units of energy" although there are certain exemptions given for hospitals, laboratories, laundromats, and other uses.

The legality of Local Law 154 was upheld in March 2025 when the federal District Court for the Southern District of New York granted a motion to dismiss the case of *Association of Contracting Plumbers of the City of New York, Inc. et al. v. City of New York*, with prejudice, No. 1:2023cv11292 – Document 51 (S.D.N.Y. 2025). In that case, Judge Ronnie Abrams ruled that as the law does not directly regulate energy use, it is not preempted by the federal Energy Policy and Conservation Act of 1975, Pub. L. 94-164.



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The impact of the *Plumbers Association* case dismissal puts more pressure on New York City as it deals with what already is a cold, snowy winter. While gas prices are currently low and expected to go lower, New York City has no secure supply of sufficient fossil fuels, nuclear, or renewable energy to meet expected demand. Thus, as the rest of the country may look forward to seeing energy price relief, the situation in New York could turn out to be quite different.

The reason for this lack of secure supply goes back to legal maneuverings taken over a decade ago by then New York Governor Andrew Cuomo, which put not only New York State, but also all of New England, at risk of energy supply shortfalls. This is especially surprising given that some of the world's most prolific natural gas wells—i.e., the Marcellus Shale wells in Northeastern Pennsylvania—are less than 100 miles away from New York City.

The story begins with the creation of the Federal Energy Regulatory Commission, known as “FERC,” in 1977. Created in the aftermath of the 1973 Arab Oil Embargo, FERC was given authority to regulate interstate transmission and wholesale sale of electricity and natural gas. It also was put in charge of reviewing proposals to build interstate natural gas pipelines, among other things. This authority was given to FERC pursuant to Section 7 of the Natural Gas Act. (Act of June 21, 1938, Chapter 556, as amended through P.L. 109-58, Enacted Aug. 6, 2025).

As with many other interstate infrastructure projects, through FERC, Congress took the siting of interstate natural gas pipelines out of local hands so that local priorities and politics would not interfere with federal or interstate needs. The concept is not limited to gas and energy.

Other examples of federal involvement in interstate infrastructure projects include the Office of Public Roads, created in 1905, which became the Federal Highway Administration, and the National Advisory Committee for Aeronautics, created in 1915, which later became NASA.

While Congress tried to limit the authority of state and local agencies to disrupt fossil fuel pipelines through FERC, there was always one large loophole. That involved any crossing by such a pipeline of something known as “Waters of the United States.”

Under Section 401 of the Clean Water Act, 33 USC §1251 et seq., no federal agency may issue a permit to conduct any activity into the Waters of the United States unless a Section 401 water quality certification is issued, or the certification requirement is waived. Importantly, States are generally responsible for issuing these Section 401 Water Quality Certifications.

Throughout most of its history, the Section 401 Certifications have been viewed as basically administrative in nature. That is, if the proposed encasing of the pipeline was acceptable from an engineering standpoint, the state agency would almost automatically issue the Certification. That changed, however, in 2016 when New

York Governor Andrew Cuomo decided to use this process to implement his environmental policies, regardless of the interstate consequences.

Specifically, Cuomo refused to issue a Section 401 Certification to Williams Energy that would up preventing the company from completing the Constitution Pipeline, which had it been built, would have transported natural gas from the NEPA Marcellus Shale fields to Schoharie County in upstate New York. From there, the Constitution Pipeline would have connected with the existing Tennessee Pipeline, which flows into New England. This New York State refusal was despite FERC having approved the Constitution project in 2014.

Cuomo and the New York State Department of Environmental Conservation took a maximalist position on numerous matters relating to the Constitution Pipeline.

While FERC required the Constitution Pipeline to cross 21 streams using trenchless crossing methods such as horizontal drilling, New York State demanded that Williams use pipeline trenchless methods for all 251 streams and wetlands along the proposed route. It then determined that Williams’ failure to provide full site investigations for each of the 251 crossings was a reason to deny the application. See *New York State Department of Environmental Conservation, Preliminary Comments on Notice of Application for Constitution Pipeline Company, LLC (July 17, 2013), Case No. CP13-499 at 3-4; Constitution Denial at 8-12.*

Meanwhile, Cuomo was not subtle in his approach relating to the Section 401 Certification process. In his 2017 State of the State message, the Governor stated that New York “must double down by investing in the fight against dirty fossil fuels and fracked gas from neighboring states to achieve the goals outlined in the Governor’s Clean Energy Standard.” Andrew M. Cuomo, 2017 State of the State at 57-58.

Since that time, there have been attempts to limit the authority of governors over the Section 401 Clean Water Certification process. Specifically, in April 2019, President Trump issued two executive

orders. One order called on the Environmental Protection Agency to streamline its process for awarding oil and gas permits and to expand the ability of the nation's railroads to transport liquid natural gas. The other order limited to the President personally the right to "issue, deny or amend" permits for infrastructure projects that cross international boundaries of the United States.

In 2020, during the first Trump Administration, the EPA issued a rule that would require states to rule on Section 401 Certification applications within one (1) year of the application or else the certification requirement would be deemed waived.

That one-year limit forced New York State to get creative, and many applicants alleged that New York required them to withdraw their applications and resubmit them to avoid the one-year rule. See 164 FERC ¶ 61,084 at ¶¶ 39-45 (finding that "agreement" between New York and applicant for the applicant to extend the one-year deadline by withdrawing and resubmitting the same application before the deadline ran was invalid); 162 FERC ¶ 61,014 at ¶¶ 18-23 (addressing Constitution Pipeline's claims that New York coerced it into withdrawing and resubmitting its application twice to avoid the statutory deadline).

As attorney Jim Wedeking noted in a piece for the Washington Legal Foundation, "practically speaking, New York converted the Clean Water Act into a tool to usurp FERC's authority over where and how natural gas pipelines are built or, at worst, one that ensures that no "fracked gas from neighboring states flows at all."

The Biden Presidency then attempted to restore to the states their full authority under Section 401. For example, in September 2023 the EPA published a final rule effective Nov. 27, 2023 that would allow states to consider water quality impacts from the "activity subject to the Federal license or permit", removing the words "as a whole" from the prior EPA rule. This means that the state agency may reject the application

based on "any aspect of the project activity with the potential to affect water quality." 88 Fed. Reg. at 66,599.

Eleven states eventually sued the EPA, asking the Western District of Louisiana to vacate this new rule as it exceeds the agency's statutory authority. In 2024 the Western District of Louisiana denied Louisiana's Motion for Summary Judgment.

Thus, the Section 401 bottleneck remains. During the summer of 2025 the House Transportation and Infrastructure Committee was trying to limit the scope of Section 401 by exempting "waste treatment systems, groundwater, and ephemeral streams from CWA regulations; set parameters to limit states' authority to deny Section 401 permits; require Section 404 permit applications to be fully reviewed before denial, and prohibit the withdrawal of a Section 404 permit once it has been approved; and establish a 60 day window to challenge Section 404 permit in court once it has been approved." It is still being debated in the United States Senate.

Thus, New York and New England now find themselves facing the winter of 2026 in an exposed position from an energy standpoint. Should gas and oil supplies become scarce, the Northeast may again have to import gas from places like Trinidad and Tobago, as it has had to do in the past. Importing from Russia, as was done as recently as 2018, is no longer an option.

As Zohran Mamdani takes office in New York City, he and the region have great hopes. Unfortunately, however, though New York's use (or abuse) of the Section 401 Clean Water Certification process, the new mayor now has few energy reserves to help him implement his new policies. For that he can thank his predecessor leaders in New York City and New York State, who have spent the last decade finding clever legal ways to dictate energy policy to the entire region, instead of the other way around.

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