

New Hampshire Department of Environmental Services
Responses to Comments and Substantive Revisions
Water Quality Certification No. 2022-404I-003
NH Rt. 16 Realignment in Cambridge
December 19, 2022

From October 28, 2022, to November 27, 2022, the New Hampshire Department of Environmental Services (NHDES) posted for public comment a draft version of Water Quality Certification No. 2022-404I-003 (Certification) for the New Hampshire Department of Transportation's NHDOT proposed activity to realign, reconstruct, and operate an approximately 1.3-mile segment of New Hampshire Route 16 (NH Rt 16) in the town of Cambridge, New Hampshire (the Activity). The Certification is required under section 401 of the federal Clean Water Act (CWA) and NH RSA 485-A:12, III to provide assurance that discharges to surface waters that may result from the Activity would comply with New Hampshire surface water quality standards, which are specified under NH RSA 485-A:8 and NH Code of Administrative Rules Env-Wq 1700 (Surface Water Quality Standards). On December 2, 2022, NHDES granted the Certification with conditions for the Activity and the federal permit that requires the Certification.

During the public comment period, NHDES received comments from NHDOT and the New England District of the U.S. Army Corps of Engineers (USACE), which is federal agency to which NHDOT submitted an application for a federal license or permit that is subject to section 401 of the CWA and triggered certification requirements under section 401 of the CWA and RSA 485-A:12, III. In this document, NHDES lists the comments that NHDES received and provides responses to those comments. In some cases, NHDES has paraphrased the comments it received. In addition, NHDES describes revisions that NHDES made to the Certification because of some of those comments. NHDES also describes other substantive and minor changes that NHDES made to the Certification after the public comment period.

Prior to the public comment period, NHDES provided a "courtesy" draft Certification to NHDOT and USACE to solicit comments on the "courtesy" draft Certification so that NHDES could revise the draft Certification, where applicable, prior to publishing it for public comment. Since NHDES received relatively numerous comments from NHDOT on the "courtesy" draft Certification and because some of those comments were not submitted during the formal public comment period, NHDES is not responding to those comments from NHDOT in this document. Instead, any person may request a copy of the "courtesy" draft Certification that includes both NHDOT's comments and NHDES' responses to those comments. If NHDOT's comments in the "courtesy" draft are the same or similar to those described in this document, NHDES referenced the appropriate response in this document to respond to the comment.

To obtain a copy of NHDOT's comments and NHDES' responses for the "courtesy" draft Certification, a copy of the original comments from NHDOT or USACE, or a marked-up version of the draft Certification showing all changes to the Certification, please contact James Tilley, Supervisor of the NHDES Water Quality Certification Program, at [603\) 271-0699](tel:6032710699) or james.w.tilley@des.nh.gov.

Responses To Comments

Comments from NHDOT

1. **Comment A.1:** NHDOT requested that NHDES remove Condition E-1 from the Certification and stated the following:

"WQCs do not have 'effective dates.' The WQCs [water quality certifications] are granted within a reasonable period of time (40 CFR § 121.7(a)), to a specific federal license or permit, which have

effective dates. The subject permit is expected to have [a] 5-year duration but will be terminated once there is no longer potential for a discharge associated therewith. The draft WQC extends the effective term of the certification in perpetuity. Section 401 regulations do not enable the enforcement of the WQC beyond the effective date of the federal license or permit. If the federal authorization to discharge is denied, WQC conditions are never incorporated into an authorization to discharge, and therefore never become effective. The Department of the Army, Army Corps of Engineers (ACOE) is unable to extend the reasonable period of time once the WQC is issued.”

NHDES Response: When comparing the scope of certification authorized and required under RSA 485-A:12, III (i.e., state law) versus section 401 of the CWA and 40 CFR Part 121 (i.e., federal law and regulation), NHDES understands that certification conditions under RSA 485-A:12, III are not limited in the following ways:

- Expiration: conditions required under RSA 485-A:12, III may not expire with the federal permit;
- Modification: NHDES or other state authority (e.g., NH Water Council) may modify conditions as necessary; and
- Enforcement: NHDES may enforce certification conditions under RSA 485-A:22 as provided under RSA 485-A:12, III.

Therefore, when NHDES grants a certification with conditions, some conditions should be considered “state-only” conditions that would be required under state law and would be independent of federal law or regulation and, therefore, may not be incorporated into a federal permit. Considering the concerns NHDOT has raised about NHDES’ authority for certain conditions in the draft WQC for the Activity, NHDES clearly identified “State-Only Certification Conditions” and “Certification Conditions to the Federal Agency” in the Certification for the Project. The most common difference between “State-Only Certification Conditions” and “Certification Conditions to the Federal Agency” is the term and expiration date of a condition. “State-Only Certification Conditions” may apply as long as the Activity is operated whereas “Certification Conditions to the Federal Agency”, if incorporated into a federal permit, may expire with the federal permit. Note that “Certification Conditions to the Federal Agency” are still conditions authorized, required, and enforced by NHDES under RSA 485-A:12, III. Therefore, all conditions of the Certification are sometimes referred to as “State Conditions” in this document.

When EPA published 40 CFR Part 121 in the Federal Register, on page 42225 EPA stated the following, among other things, about state authority: “The final rule does not ‘usurp’ State authority. [...] This final rule neither directs the functioning of the States nor commands States how to legislate or regulate.”¹

NHDES considers Condition E-1 to be a “state-only” certification that is required under RSA 485-A:12, III and not limited to federal law and regulation.

¹ US EPA. (2020). *40 CFR Part 121: Clean Water Act Section 401 Certification Rule*. Federal Register, Vol. 85, No. 134, 42210-42287. U.S. National Archives website address: <https://www.federalregister.gov/documents/2020/07/13/2020-12081/clean-water-act-section-401-certification-rule>.

Condition E-1 specifies that the Certification becomes effective on the date it is granted and remains in effect for the effective term of the associated permit and for as long as the Activity is operated. If USACE denies the permit, the Certification becomes null and void. Condition E-1 is necessary so that NHDOT, NHDES, and any other person can be aware of when NHDOT is subject to State Conditions of the Certification, including periods before USACE issues the associated federal permit and after that permit expires. For example, NHDOT may be able to begin certain staging of the Activity that may result in discharges to surface waters of the state that may cause noncompliance with Surface Water Quality Standards prior to issuance of the federal permit. In addition, NHDOT will likely operate the Activity after expiration of the federal permit, and such operation of the Activity may result in discharges that may cause noncompliance with Surface Water Quality Standards if NHDOT does not comply with certain conditions (e.g., Condition E-9, which requires, among other things, inspection and maintenance of the vegetated buffer that would be constructed to control stormwater runoff from the Activity).

NHDES may enforce State Conditions of the Certification as provided under RSA 485-A:22 and authorized under RSA 485-A:12, III (i.e., under state law). NHDES acknowledges that it cannot enforce State Conditions of the Certification under federal law or regulation because EPA specified the following under 40 CFR §121.11(c): “The Federal agency shall be responsible for enforcing certification conditions that are incorporated into a federal license or permit.”

Revisions Made: NHDES added paragraph C-11 to the Certification to describe NHDES’ authority under RSA 485-A:12, III, and why that authority is not limited by any federal law and regulation, except in certain ways.

NHDES divided section E. Certification Conditions into two sections to identify which conditions of the Certification were included only under the authority of state law (i.e., RSA 485-A:12, III and which conditions were included under the authority of both state and federal law: 1) “State-Only Certification Conditions”; and 2) “Certification Conditions to the Federal Agency”

NHDES made the following edits to Condition E-1 to clarify the condition (edits shown in ***bold italics***):

Effective Date and Expiration of Certification: This certification shall become effective on the date ***of this certification is granted*** ~~ing~~ and shall remain effective for the term of the associated federal permit and as long as the Applicant operates the Activity (i.e., operates the portion of NH Rt 16 that involves the Activity). ***State-only certification conditions and certification conditions to the federal agency that are specified under Condition E-5 shall be applicable as long as the Applicant operates the Activity.*** Should the federal ~~authority~~ ***agency*** deny the permit, this certification becomes null and void.”

NHDES identified the following, additional conditions as “state-only” certification conditions that are required under RSA 485-A:12, III and not limited to federal law and regulation: E-2 Proposed Modifications to Activity (see NHDES’ response to Comment A.2 of this document for more information about how NHDES revised this condition); E-3 Compliance Inspections (previously labelled as condition E-6 in the draft Certification); E-4 Water Quality Improvement Plan (see NHDES’ response to Comment A.10 for more information about how NHDES revised this condition).

NHDES also added Condition E-5 to clarify which Certification Conditions to the Federal Agency also apply before and after the effective date of USACE's federal permit. Condition E-5 states the following:

"The Applicant shall comply with conditions E-7, E-8.b, and E-9, of this certification, when applicable, during the effective term of this certification as provided under Condition E-1, including prior to when the federal agency issues the federal permit that is associated with this certification and after the expiration of that permit."

2. **Comment A.2:** NHDOT requested that NHDES remove Condition E-4 and Condition E-5 from the Certification and stated the following (NHDES moved a portion of Condition E-4 is to Condition E-2, and deleted Condition E-5, in the final Certification):

"The WQC indicates that the certifying authority may impose additional WQC conditions on the DOT after issuance of the WQC. A 'reopener clause' as such, is inconsistent with 40 CFR § 121.7(a) requiring that the WQC '*... be completed within the reasonable period of time...*' The rationale as to why this cannot be included in any WQC condition is described in the Summary of Final Rule Rationale and Public Comment in section 2.L.1 of the 2020 Rule (p. 42278), which states, in part: '*...the final rule does not authorize or include any procedure for certifying authorities to modify certifications after issuance...[and] there are other established procedures that certifying authorities may rely on to address modifications, should the need arise...[and Section] 401 does not provide authority for a certifying authority to unilaterally modify a certification, either through certification conditions that purport to authorize the certification in the future or through any other mechanism.*' In addition, the Environmental Protection Agency (EPA) and ACOE issued joint guidance limiting the reasonable period of time. The ACOE is unable to extend the reasonable period of time once the WQC is issued."

NHDES Response: Please see NHDES' response to comment A.1 for a discussion of NHDES' authority to grant a certification with "state-only" conditions. NHDES' authority under state law to modify the Certification is not limited by section 401 of the CWA or 40 CFR Part 121.

As previously described under comment A.1., NHDES may be required to modify State Conditions to comply with RSA 485-A:12, III. In addition, a response to a certification request under RSA 485-A:12, III is a NHDES decision (i.e., a department decision) that may be appealed to the New Hampshire Water Council under RSA 21-O:14 by any person aggrieved by the decision. During an appeal, if the New Hampshire Water Council determines that a certification must be modified to comply with RSA 485-A:12, III, it may modify the certification or direct NHDES to modify the certification to achieve compliance. A decision of the New Hampshire Water Council may be appealed to the New Hampshire Supreme Court. The New Hampshire Supreme Court may modify the certification or direct NHDES to modify the certification to achieve compliance with RSA 485-A:12, III. Modifications of State Conditions of the Certification under state authority would not result in the modification of the conditions of the Certification that have been incorporated into the federal permit.

NHDES acknowledges that neither section 401 of the CWA nor 40 CFR Part 121 authorizes NHDES to modify a Certification to Federal Agency, including conditions that have been incorporated into a federal license or permit. If NHDES wanted to modify a certification condition that had been incorporated into a federal license or permit because an activity has changed or data shows an activity is violation Surface Water Quality Standards, NHDES would need to request that the federal agency

make that modification to the federal license or permit consistent with the regulations of the federal agency. For example, USACE may modify conditions of its individual permits under the authority of 33 CFR 325.7(b), including certification conditions. However, neither federal law nor regulation usurp NHDES authority to modify, remove, or add State Conditions, including modifying or deleting conditions that were also incorporated into a federal license or permit, as necessary to protect Surface Water Quality Standards. In addition, neither federal law nor regulation usurp a person's authority to appeal a certification to the New Hampshire Water Council, and for the Water Council to take whatever action it deems necessary on a state certification to address an appeal. RSA 485-A:12, III provides NHDES with the authority to make necessary modifications to State Conditions to provide assurance that discharges from an activity comply with Surface Water Quality Standards.

Revisions Made: NHDES determined that the authority to modify the Certification, including State Conditions, is a fact and, therefore, it is not necessary for NHDES to make that fact a condition of the Certification. Instead, if modification of the Certification became necessary and required under RSA 485-A:12, III, NHDES would notify NHDOT and USACE and follow NHDES' standard procedures for implementing the modification.

NHDES revised Condition E-4, which is labelled as Condition E-2 in the final Certification, by deleting the reference to modifications of the Certification and only require NHDOT to obtain approval from NHDES prior to modifying an activity that could have a material effect on the findings or conditions of a certification is necessary so that NHDES may amend a certification, if necessary, to provide assurance that the Activity, if substantially modified, will comply with Surface Water Quality Standards:

"The Applicant shall consult with and receive prior written approval from NHDES regarding any proposed modifications to the Activity that could have a significant or material effect on the findings or conditions of this certification, including any changes to operation of the Activity."

NHDES identified this condition as a "state-only" condition.

NHDES revised paragraph D-8 of the Certification to further explain why Condition E-2 is necessary.

NHDES also added paragraph C-11 to the Certification to describe, in part, NHDES' authority to modify the certification under RSA 485-A:12, III, and why that authority is not limited by any federal law and regulation, except in certain ways.

NHDES deleted Condition E-5 of the draft Certification (i.e., Condition E-5 in the final Certification is different than the Condition E-5 of the draft Certification).

3. **Comment A.3:** NHDOT requested that NHDES remove Condition E-8, which NHDES relabeled as Condition E-7 in the final Certification, from the Certification and stated the following:

"Although important for a certifying authority to examine all point source and non-point source discharges (material, pollutants, flow) when making the decision to grant, grant with conditions, deny, or waive the WQC, it is unable to require the federal licensor or permitting authority to definitively ensure compliance with activities not within their authority. Federal agencies authorize different types of point source discharges outlined in the federal regulations (e.g., Sections 404, 402, & FERC, etc.). Inclusion of any WQC condition that requires compliance with

non-point source discharges is contrary to 40 CFR § 121.1(f), *'Discharge for purposes of this part means a discharge from a point source into a water of the United States'.*"

NHDES Response: NHDES does not agree with NHDOT's comments regarding Condition E-8, which is Condition E-7 in the final Certification.

Condition E-7 requires NHDOT to comply with all permits and agreements applicable to the Activity, including the following: section 404 permit from USACE; EPA's 2022 National Discharge Elimination System (NPDES) Construction General Permit (CGP); a memorandum of agreement, dated March 1, 2022, that was entered into by and between NHDES and NHDOT in accordance with RSA 485-A:17, III (NHDOT/NHDES AoT MOA); NHDES Shoreland Permit; and NHDES Wetlands Permit.

For NHDES to be able to provide assurance that discharges from the proposed Activity will comply with Surface Water Quality Standards, it is necessary that NHDOT obtain and comply with applicable permits for the Activity and comply with the NHDOT/NHDES AoT MOA because those permits or agreements, in part, help ensure compliance with Surface Water Quality Standards as described in the Certification. Therefore, a condition requiring NHDOT's compliance with those permits and the NHDOT/NHDES Aot MOA is necessary under section 401 of the CWA, 40 CFR Part 121, and RSA 485-A:12, III.

Neither section 401 of the CWA, 40 CFR Part 121, nor RSA 485-A:12, III limits NHDES' authority to include a condition that requires compliance with permitting authorities or agreements as long as the condition does not conflict with those authorities or agreements. Including a condition in the Certification that requires compliance with permitting authorities or an agreement that does not conflict with those authorities or agreements.

40 CFR §121.10(a) requires the following: "All certification conditions that satisfy the requirements of § 121.7(d) shall be incorporated into the license or permit." Once the federal agency determines that NHDES has included a statement explaining why a condition of certification is necessary to assure that the discharge from the proposed project will comply with water quality requirements, and NHDES has provided a citation to a federal, state, or tribal law that authorizes the condition, the federal agency is required to incorporate those conditions into the license or permit. Under 40 CFR §121.11(c), EPA specified the following: "The Federal agency shall be responsible for enforcing certification conditions that are incorporated into a federal license or permit." Therefore, the condition provides USACE with the authority to enforce applicable permits and agreements under federal law (i.e., USACE's permit and other enforcement mechanisms available to USACE), which NHDES determined is necessary to provide assurance that discharges from the proposed Activity will comply with Surface Water Quality Standards. Neither section 401 of the CWA, 40 CFR Part 121, nor RSA 485-A:12, III limits USACE's authority to enforce conditions of a certification that are incorporated into its permit.

Under 40 CFR §121.1(f), EPA defines "discharge" as "a discharge from a point source into a water of the United States."

Section 502, paragraph 14, of the CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture."

The term “discharge,” as applied under section 401 of the CWA means the potential for a discharge. It does not need to be a certainty, only that it may occur should the federal license or permit be granted. On page 42237 of the Federal Register for 40 CFR Part 121, EPA affirmed this when it stated the following: “Based on the text, structure, and legislative history of the CWA, the EPA is affirming under this final rule that a certifying authority’s review and action under section 401 must be limited to water quality impacts from the potential discharge associated with a proposed federally licensed or permitted project;” and “[i]n section 401 and under the final rule, the presence of, or potential for, a discharge is a key element of when a water quality certification is required. Consistent with the text of the statute, under the final rule section 401 is triggered by the potential for a discharge to occur, rather than the presence of an actual discharge.”

Further, the discharge does not need to involve the addition of pollutants (such as water released from the tailrace of a dam). As the U.S. Supreme Court has stated: “When it applies to water, ‘discharge’ commonly means a ‘flowing or issuing out’” and an addition of a pollutant is not “fundamental to any discharge.”² On page 42237 and 42238 of the Federal Register for 40 CFR Part 121, EPA affirmed this when it stated the following: “The EPA has concluded that unlike other CWA regulatory provisions, section 401 is triggered by the potential for any unqualified discharge, rather than by a discharge of pollutants. This interpretation, reflected in both the proposal and this final rule, is consistent with the text of the statute. [...] Consistent with the proposal, [EPA] has concluded that a discharge need not involve pollutants in order to trigger section 401.”

On page 42240 of the Federal Register for 40 CFR Part 121, EPA stated the following:

"The EPA believes that defining “point source” in the final rule is unnecessary in light of the statutory definition (33 U.S.C. 1362(14)) [i.e., Section 502, paragraph 14, of the CWA] and court decisions concluding that bulldozers, mechanized land clearing machinery, and similar types of equipment used for discharging dredge or fill material are “point sources.”

Therefore, under section 401 of the CWA, NHDES interprets the term “point source” to be defined as “point source” under Section 502, paragraph 14, of the CWA with the following term removed: “from which pollutants are or may be discharged.” This results in the following definition of “point source” under section 401 of the CWA: “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, ~~from which pollutants are or may be discharged~~. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.”

NHDES’ conditions must address actual and potential point source discharges from the Activity. A non-point source discharge from an Activity that is not properly managed could result in an erosion of land that would create ditch or channel that would, in turn, result in a point source discharge.

Revisions Made: NHDES made no substantive revisions to Condition E-7. However, NHDES revised Condition E-1 and added Condition E-5, a “state-only” condition, to clarify that Condition E-7 also applies before and after the effective date of USACE’s federal permit.

² The Supreme Court case that is referred to is *S.D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S. Ct. 1853 (2006).

NHDES also revised language of findings in paragraphs D-18, D-19, and D-20 (previously labelled as paragraphs D-19, D-20, and D-21, respectively, in the draft Certification) to further illustrate why Condition E-7 is necessary to provide assurance that proposed and potential point source discharges from the Activity will comply with Surface Water Quality Standards.

4. **Comment A.4:** NHDOT requested that NHDES remove Condition E-9.a of the draft Certification, which is Condition E-8.a in the final Certification, from the Certification and stated the following:

“As written, the draft WQC modifies the already issued WQC granted to the 2022 EPA Construction General Permit (CGP) applicable effluent limitations, which limits reporting to non-stormwater discharges and records on sampling with a reopener clause.

CGP Part 9.1.g. reads as follows:

‘To ensure compliance with RSA 485-C, RSA 485-A, RSA 485-A:13, I(a), Env-Wq 1700 and Env-Wq 302, the following information may be requested by NHDES. This information must be kept on site unless you receive a written request from NHDES that it be sent to the address shown below in 9.1.1.h.

- ii. A list of all non-stormwater discharges that occur at the facility, including their source locations and the control measures being used (see Part 1.2.2 of the CGP).*
- ii. Records of sampling and analysis required for construction dewatering and stormwater discharges (see 9.1.1.d above).’*

As noted above for conditions E-4 & E-5, reopeners are not allowed, and DOT will comply with all effluent limitations in the CGP.”

NHDES Response: NHDES is not modifying the 2022 NPDES CGP with the referenced condition. For the Activity, NHDOT is still subject to the requirements of Part 9.1.1.g of the 2022 NPDES CGP.

NHDES is required and has the authority under section 401 of the CWA, 40 CFR Part 121, and RSA 485-A:12, III to include conditions necessary to provide assurance that proposed or potential point source discharges from the Activity will comply with Surface Water Quality Standards. If NHDES determines that a reporting requirement from the 2022 EPA National Pollutant Discharge Elimination System (NPDES) Construction General Permit (CGP) is necessary, then NHDES is required to include that requirement as a condition of the Certification. NHDES determined that Condition E-9.a, which is Condition E-8.a in the final Certification, is necessary so that NHDES and other persons, including USACE, may know whether or not NHDOT is complying with certain requirements or benchmarks applicable to the Activity. If the reports identify or indicate discharges to surface waters that may cause noncompliance with Surface Water Quality Standards, NHDES, USACE, and other persons may respond to help ensure compliance with Surface Water Quality Standards, mitigate unauthorized degradation of surface water quality, or restore or maintain the chemical, physical, and biological integrity of surface waters.

Revisions Made: NHDES determined that it is not necessary to require reporting of monitoring, inspections, and corrective actions at a frequency higher than the frequency required under the 2022 EPA NPDES CGP. Therefore, NHDES revised Condition E-.8.a. to require the following:

“Within 24 hours of receiving a written request from NHDES, the Applicant shall provide NHDES with a copy of the following items that are required under the 2022 NPDES CGP: turbidity benchmark

monitoring results that the Applicant has submitted to EPA under Part 3 of the CGP; inspection reports required under Part 4 of the CGP; or corrective action log required under Part 5 of the CGP.”

NHDES revised paragraph C-54 of the Certification (previously labelled as paragraph C-51 in the draft Certification) to identify the corrective action log that NHDOT would be required to maintain under Part 5.4 of the 2022 EPA NPDES CGP.

5. **Comment A.5:** NHDOT requested that NHDES remove Condition E-9.b from the draft Certification and stated the following:

“The DOT meets its obligation under the Alteration of Terrain (AOT) portion of this condition through a ‘substantially equivalent’ process as outlined in our AOT Memorandum of Agreement (MOA) with DES. As noted in the regulation, DOT will retain a copy of the report on-site for review during site inspections by federal, state, and local officials for SWQS protective controls for point and non-point source stormwater discharges. There does not appear to be any reporting required for NH dredge and fill permit rules Env-Wt 307.03(b) and Env-Wt 527.05(b).”

NHDES Response: NHDES agrees with NHDOT’s comment that the NHDOT/NHDES AoT MOA authorizes NHDOT to develop a “substantially equivalent” process to comply with Alteration of Terrain rules under Env-Wq 1500. In addition, NHDES determined that the reporting required under Conditions E-8.a, E-8.b, and E-8.c are the sufficient reporting requirements to certify the Activity and, therefore, deleted Condition E-9.b of the draft Certification from the final Certification.

NHDES does not agree with NHDOT that certain reporting is not required under Env-Wt 307.03(b) and Env-Wt 527.05(b). Both Env-Wt 307.03(b) and Env-Wt 527.05(b) reference Env-Wq 1505.02, which, in turn, references the environmental monitor requirements of Env-Wq 1505.03 under Env-Wq 1505.02(e). Env-Wq 1505.03(d)(3), requires the environmental monitor to submit certain inspection reports to NHDES.

Revisions Made: NHDES deleted Condition E-9.b of the draft Certification.

NHDES revised paragraphs C-60, D-15, D-19 (previously labelled as paragraph C-57, D-16, and D-20, respectively, in the draft Certification) to further describe “substantial equivalence” to Env-Wq 1500 that is authorized and provided under the NHDOT/NHDES AoT MOA.

NHDES deleted paragraph C-61 of the draft Certification, which referenced environmental monitor requirements under Env-Wq 1505.03 in the draft Certification.

6. **Comment A.6:** NHDOT requested that NHDES remove Condition E-9.c of the draft Certification, which is Condition E-8.b in the final Certification, from the Certification and stated the following:

“Contrary to this condition, 40 CFR § 121.11 outlines a process that identifies that the certifying authority inspects and then notifies the DOT and the ACOE in writing with recommended remedial measures. The ACOE is then required to assess and enforce compliance the WQC conditions. There are no self-reporting mechanisms in Section 401.”

NHDES Response: As described in NHDES’ response to Comment A.1., above, RSA 485-A:12, III authorizes NHDES to enforce State Conditions under RSA 485-A:22. This includes NHDES’ authority

to conduct inspections of the Activity to determine compliance with and enforce conditions of the Certification.

To provide assurance that discharges from the Activity will comply with Surface Water Quality Standards, NHDES determined that it is necessary for NHDOT to report noncompliance with conditions of the Certification within 48 hours of discovering noncompliance because it provides a mechanism by which NHDES, USACE, and others may know when NHDOT has not complied with conditions of the Certification and so NHDES, USACE, and other persons can respond.

NHDES determined that Condition E-9.c, which is Condition E-8.b in the final Certification, is necessary so that NHDES and other persons, including USACE, may know whether NHDOT is complying with conditions of the Certification. If the reports identify or indicate discharges to surface waters that may cause noncompliance with Surface Water Quality Standards, NHDES, USACE, and other persons may respond to help ensure compliance with Surface Water Quality Standards, mitigate unauthorized degradation of surface water quality, or restore or maintain the chemical, physical, and biological integrity of surface waters.

NHDES does not agree that this condition is contrary to 40 CFR § 121.11. Neither section 401 of the CWA, 40 CFR Part 121, nor RSA 485-A:12, III limits NHDES' authority to include a condition that requires reporting of noncompliance with conditions of the Certification.

NHDES does agree that the referenced condition requires USACE to assess and enforce compliance with conditions of the Certification. Instead, USACE may use enforcement discretion to determine whether or not to enforce compliance with conditions of the Certification. 40 CFR § 121.11 (c) states the following: "The Federal agency **shall be responsible for** enforcing certification conditions that are incorporated into a federal license or permit [emphasis added]." On page 42277 of the Federal Register for 40 CFR Part 121, EPA stated the following: "Enforcement plays an essential role in maintaining robust compliance with the CWA, and a critical part of any strong enforcement program is the appropriate use of enforcement discretion. [...]. Enforcement programs exercise discretion and make careful and informed choices about where to conduct investigations, identifying the most serious violations and reserving limited enforcement resources for the cases that can make the most difference. [...] It is important for enforcement programs to retain their enforcement discretion because federal agencies are in the best position to (1) determine whether a particular action is likely to succeed, (2) assess whether the action fits agency policies, and (3) determine whether there are enough agency resources to undertake and effectively prosecute the action, taking account of all other agency constraints and priorities."

Revisions Made: NHDES made no substantive revisions based on this comment. NHDES added Condition E-5 to clarify which State Conditions, including Condition E-8.b, also apply before and after the effective date of USACE's federal permit (see NHDES's response to Comment A.1, above).

7. **Comment A.7:** NHDOT requested that NHDES remove Condition E-9.d of the draft Certification, which is Condition E-8.c in the final Certification, from the Certification and stated the following:

"The reporting and use of flocculants for stormwater point and non-point source stormwater discharges occurring during construction are controlled by the state through AOT and by EPA through the CGP.

Env-Wq 1506.13 is under the control of DOT's AOT MOA with DES, and compliance is accomplished with a 'substantially equivalent' process. Compliance with these state stormwater regulations is independently enforced by the state does not involve the ACOE. Including it as a condition within the WQC has the effect of requiring the ACOE to regulate non-point source discharges, which is not allowable.

Reporting effluent limitations for the CGP are defined in the permit as previously certified by DES to meet SWQS. Any changes in the established reporting measures through this WQC would be a modification and is not allowable as noted in E-4 & E-5."

NHDES Response: NHDES determined that if NHDOT uses of flocculants during construction of the Activity, potential discharges of flocculants to surface waters may degrade or impair aquatic life in surface waters if NHDOT does not comply with provisions of Env-Wq 1506.13. Therefore, to provide assurance that potential point source discharges of flocculants from the Activity will not occur and NHDOT will comply with Surface Water Quality Standards if NHDOT decides to use flocculants, it is necessary to include a condition that requires NHDOT to comply with the reporting requirements of Env-Wq 1506.13(l). NHDES determined that Condition E-9.d, which is Condition E-8.c in the final Certification, is properly using flocculants so that NHDES and other persons, including USACE, may know whether or not NHDOT is complying with requirements of Env-Wq 1506.13. If the reports identify or indicate discharges of flocculants to surface waters that may cause noncompliance with Surface Water Quality Standards, NHDES, USACE, and other persons may respond to help ensure compliance with Surface Water Quality Standards, mitigate unauthorized degradation of surface water quality caused by the use of flocculants during construction of the Activity.

Revisions Made: Instead of referring to cationic treatment chemicals, NHDES revised paragraph D-22, Condition E-8.c, and Condition E-10 (previously labelled as paragraph D-23 and Condition E-9.d, and Condition E-12 in the draft Certification) to only refer to flocculants instead of cationic treatment chemicals. The requirements of Condition E-8.c and Condition E-10 were revised to only refer to flocculant-related requirements under Env-Wq 1513.16.

8. **Comment A.8:** NHDOT requested that NHDES remove Condition E-10 of the draft Certification, which is Condition E-9 of the final Certification, from the Certification and stated the following:

"Vegetated buffers are a non-point source stormwater treatment facility regulated by the state through the AOT program. The DOT has a substantially equivalent MOA that regulates the design, construction, and maintenance of such treatment facilities. Although the construction of such a facility supports the granting of this WQC as meeting SWQS, design, construction, and maintenance is regulated by the AOT rules."

NHDES Response: The Application for Water Quality Certification submitted by NHDOT included a pollutant loading analysis which accounted for treatment of stormwater discharges from the Activity by a vegetated buffer. The pollutant removal efficiencies in the pollutant loading analysis assumes that the proposed vegetated buffer for the activity designed, constructed, and maintained in accordance with Alteration of Terrain regulations (Env-Wq 1500) and the 2008 New Hampshire Stormwater Manual.³ NHDES determined that the Activity would not use 20% or more of the

³ NHDES. EPA. Comprehensive Environmental Inc. (December 2008). [New Hampshire Stormwater Manual \(Revision 1.0\)](https://www.des.nh.gov/resource-center/publications?keys=swvol&purpose=&subcategory=). Available from the NHDES website at the following address: <https://www.des.nh.gov/resource-center/publications?keys=swvol&purpose=&subcategory=>.

remaining assimilative for a water quality parameter, in terms of either concentration or mass of pollutants and, therefore, would only cause an insignificant degradation of water quality if NHDOT, in part, designs and constructs the proposed vegetated buffer in accordance with requirements of Env-Wq 1508.09, or protective practices that are substantially equivalent in accordance with the NHDOT/NHDES AoT MOA, and maintains the vegetated buffer in accordance with the 2008 New Hampshire Stormwater Manual and the 2019 NHDOT Stormwater BMP Inspection and Maintenance Plan. If the proposed vegetated buffer is not properly designed, constructed, or maintained, then overland stormwater runoff or sheet flow of stormwater caused by impervious surfaces from the Activity could result in erosion of land that could cause channels or ditches to form within the boundary or vicinity of the Activity that would cause unplanned point source discharges to surface waters. Therefore, NHDES determined that it is necessary to include a condition that requires NHDOT to design, construct, and maintain the proposed vegetated buffer in accordance with Env-Wq 1508.09 or in accordance with the NHDOT/NHDES AoT MOA to provide assurance that discharges from the Activity will comply with Surface Water Quality Standards. If NHDOT chooses to design and construct the proposed vegetated buffer in accordance with the NHDOT/NHDES AoT MOA, then it is necessary to require NHDOT to provide the stormwater and other water quality analyses that demonstrate that the vegetated buffer is substantially equivalent to the design requirements of Env-Wq 1508.09 upon request from NHDES. Once the condition is incorporated into the federal permit, USACE will have the authority to ensure that NHDOT complies with requirements related to the design, construction, and maintenance of the proposed vegetated buffer, which is also necessary to assure that discharges from the Activity will comply with Surface Water Quality Standards.

Revisions Made: NHDES revised Condition E-10, which is Condition E-9 of the final Certification, to remove the specific methods to maintain a vegetated buffer that are specified under the 2008 New Hampshire Stormwater Manual and the 2019 NHDOT Stormwater BMP Inspection and Maintenance Plan, and, instead, only references the NHDOT/NHDES AoT MOA. NHDES determined that listing those specific methods is not necessary if NHDES references the NHDOT/NHDES AoT MOA because the 2008 New Hampshire Stormwater Manual and the 2019 NHDOT Stormwater BMP Inspection and Maintenance Plan are referenced in Appendix A of the NHDOT/NHDES AoT MOA.

NHDES also revised Condition E-9 to require NHDOT to submit, upon request from NHDES, the stormwater and other water quality analyses that demonstrate that the vegetated buffer is substantially equivalent to the design requirements of Env-Wq 1508.09 if NHDOT chooses to design and construct the proposed vegetated buffer in accordance with the NHDOT/NHDES AoT MOA. This is so NHDES and other persons may know how NHDOT was substantially equivalent to the design requirements of Env-Wq 1508.09.

NHDES revised paragraph C-60 (previously labelled as paragraph C-57 in the draft Certification) to further describe “substantial equivalence” to Env-Wq 1500 provided under the NHDOT/NHDES AoT MOA.

NHDES also revised language of findings in paragraphs D-18, D-19, and D-20 (previously labelled as paragraphs D-19, D-20, and D-21, respectively, in the draft Certification) to further illustrate why Condition E-9 is necessary to provide assurance that proposed and potential point source discharges from the Activity will comply with Surface Water Quality Standards.

9. **Comment A.9:** NHDOT requested that NHDES remove Condition E-11 from the draft Certification and stated the following:

“The application of deicers (salt) is a stormwater discharge not regulated by the ACOE but regulated by AOT within the entire state under certain conditions (impairments), and by EPA in the urbanized areas of the state. The project does not discharge to any Section 303(d) chloride impaired waterbody, so Env-Wq 1503.11(g) is not applicable, nor is the project within the urbanized areas of the state. In addition, as described in the request, there will be a decrease in the use of chloride deicers in the post construction condition. Further, the application of deicers will largely take place after construction, after expiration of the certified permit, and during operation, long after the effective period of the WQC.”

NHDES Response: NHDES determined that Condition E-11 of the draft Certification, which required certain reporting to NHDES of salt minimization items described in NHDOT’s Salt Management Plan, is not necessary because, in part, NHDES still requires NHDOT, under Condition E-4, to develop and implement a Water Quality Improvement Plan if chlorides from the Activity cause or contribute to violation of Surface Water Quality Standards at a magnitude, duration, and frequency that contributes to an impaired designated use.

Revisions Made: NHDES deleted Condition E-11 of the draft Certification.

NHDES deleted the last paragraph of the fact in paragraph C-61 and some sentences in paragraph D-21 of the final Certification (previously labelled as paragraphs C-58 and D-22, respectively, in the draft Certification) because those paragraphs had described salt minimization items described in NHDOT’s Salt Management Plan that NHDES would have required NHDOT to submit under the deleted condition.

NHDES revised the findings in paragraph D-21 of the final Certification to identify Condition E-4 as the necessary requirement to address impacts of potential point-source discharges, including pollutants such as chlorides, into surface waters.

Please see NHDES’ response to comment A.10 of this document for NHDES’ response to NHDOT’s comments regarding the condition that requires a Water Quality Improvement Plan if the Activity causes a violation of Surface Water Quality Standards.

10. **Comment A.10:** NHDOT requested that NHDES remove Condition E-13 from the draft Certification, which is Condition E-4 of the final Certification, and stated the following:

“The proposed Water Quality Improvement Plan [WQIP] is a requirement not related to the ACOE dredge and fill permit and involves additional action with the certifying authority after expiration of the certified permit. The DOT has provided the certifying authority a comprehensive review of the expected effluent quality, including expected loads for nutrients and chloride for point and non-points [sic] source discharges from the facility. All discharges are expected to meet eligibility requirements for authorization under the ACOE, AOT, NH Dredge and Fill program [i.e., NHDES Wetlands Program], Shoreland Water Quality Protection Act and CGP permit programs, all of which include requirements to meet SWQS.”

NHDOT also provided the following comment to summarize its comments and concerns about the draft Certification:

“The Scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from Federally licensed or permitted activity will comply with water quality requirements”. Many of the certification conditions do not relate to the discharge of dredge or fill material, but more so to stormwater discharges, and operation of the facility after construction, which exceed the expiration date of the certified permit. For this reason, in part, the DOT requests that the WQC be granted without stormwater-related conditions.”

NHDES Response: Please see NHDES’ response to comment A.1 in this document for NHDES’ discussion of NHDES’ authority to grant a certification with “state-only” conditions. NHDES revised Condition E-4, which requires the WQIP as necessary, to be a “state-only” Condition.

Please see NHDES’ response to comment A.3 of this document for NHDES’ discussion on the term “discharge” used in the Certification, and how NHDES determined that a condition that required compliance with other applicable permits and agreements is necessary.

According to Env-Wq 1703.01(b), “[a]ll surface waters shall be restored to meet the water quality criteria for their designated classification including existing and designated uses, and to maintain the chemical, physical, and biological integrity of surface waters.” To address any violations of Surface Water Quality Standards that may arise during construction and operation of the Activity at a magnitude, duration, and frequency that contributes to an impaired designated use, NHDES determined it would be necessary to require NHDOT to prepare and implement a WQIP. The purpose of a WQIP would be to restore surface waters to meet Surface Water Quality Standards in accordance with Env-Wq 1703.01(b) for parameters that are influenced by the Activity. If the stream or riverine segments immediately upstream and beyond the influence of the Activity is not meeting Surface Water Quality Standards, then the purpose of the WQIP would be to restore surface waters so that the parameters of water quality that are influenced by the Activity are not any worse than in the upstream segments. Parameters that may be influenced by the Activity include, but are not limited to, dissolved oxygen, temperature, pH, nutrients, chlorophyll-a, turbidity and benthic deposits. A WQIP would include measures to achieve the purpose of the WQIP; a schedule for implementing the measures; water quality monitoring and reporting to determine the effectiveness of the implemented measures; and recommendations for next steps.

NHDES disagrees with NHDOT that WQIP is a requirement not related to the ACOE dredge and fill permit.

RSA 485-A:12, III, specifies that no activity that that requires certification under section 401 of the CWA and that may result in a discharge to surface waters of the state may commence unless NHDES certifies that the discharge will comply with surface water quality standards, and specifically calls out construction and operation of facilities as an example of an activity.

Under 40 CFR § 121.1(k), EPA defines “proposed project” as “the activity or facility for which the project proponent has applied for a license or permit.”

Under 40 CFR § 121.3, EPA specifies the following: “The scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements.”

On page 42234 of the Federal Register for 40 CFR 121, EPA stated the following: “Based on the text, structure, and purpose of the Act, the history of the 1972 CWA amendments, relevant legislative history, and supporting case law, and informed by important policy considerations and the Agency’s expertise, the EPA has concluded that a certifying authority’s review and action under section 401 is limited to water quality impacts to waters of the United States resulting from a potential point source discharge from a proposed federally licensed or permitted project.”

In slides of a webinar that EPA provided on August 25, 2020, EPA provided the following hypothetical example of when certification is required:

“Hypothetical Example 1: A project proponent’s activity requires only one federal permit, but the project proponent does not know whether that federally permitted activity will have an actual discharge into a water of the United States. However, the project proponent knows that federally permitted activity has a potential to result in a discharge from a point source into a water of the United States.

- Does this project require a section 401 certification? **YES.”**⁴

Considering the aforementioned facts collectively, NHDES has determined that the terms “activity” and “facility” under RSA 485-A:12, III, and in the definition of “proposed project” under 40 CFR 121, are not limited to the specific condition that triggered the requirement for a federal license or permit. Instead, the entire proposed activity, facility, or project related to the condition that triggered the requirement for a federal license or permit must be considered when evaluating whether discharges from an activity, facility, or project will comply with surface water quality standards. NHDES provides the following examples to illustrate that point:

Example 1: Section 404 of the CWA requires a person to obtain a permit prior to discharging dredged or fill material into waters of the United States. When a person applies for a permit from the U.S. Army Corps of Engineers (USACE) under section 404 of the CWA, the applicant is required, under 33 CFR § 325.1(c), to provide a complete description of the project, including all features of the project and the project purpose, on the application form. If the applicant only identifies portions of project that involve proposed discharges of dredged or fill material into waters of the United States, the USACE is required to reject the application. This is because, according to EPA, “[t]he basic premise of the [permit program under CWA section 404] is that no discharge of dredged or fill material may be permitted if: (1) a practicable alternative exists that is less damaging to the aquatic environment or (2) the nation’s waters would be significantly degraded. In other words, when you apply for a permit, you must first show that steps have been taken to avoid impacts to wetlands, streams and other aquatic resources; that potential impacts have been minimized; and that compensation will be provided for all remaining unavoidable impacts.”⁵ USACE would be unable to determine if a person avoided or minimized impacts to waters of the United States if USACE was not able to evaluate the entire activity, facility, or project associated

⁴ US EPA Office of Water. (2020). *Clean Water Act Section 401 Certification Rule – State and Tribal Webinar 1*. p. 15. Accessed on December 2, 2022 at US EPA website address: https://www.epa.gov/sites/default/files/2020-08/documents/state_tribal_webinar_1_final_508.pdf from *US EPA Website: CWA Section 401 – 2020 Implementation Materials* at US EPA website address: <https://www.epa.gov/cwa-401/2020-rule-implementation-materials>

⁵ U.S. EPA. (updated April 20, 2022). *Permit Program under CWA Section 404*. EPA Section 404 of the Clean Water Act. <https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404> (accessed September 26, 2022).

with the proposed discharge. Similarly, NHDES is required to evaluate the entire proposed activity, facility, or project under RSA 485-A:12, III and section 401 of the CWA, not just the area of discharge(s) that triggered the requirement for the USACE permit.

Example 2: If a person wants to construct and operate a nuclear power, research, or test facility, the person must obtain a license from the Nuclear Regulatory Commission under Atomic Energy Act of 1954 or Section 202 of the Energy Reorganization Act of 1974. The person could propose a nuclear facility that is entirely constructed in uplands with no proposed discharges to waters of the United States. However, overland stormwater runoff or sheet flow of stormwater caused by impervious surfaces from the nuclear facility, if not properly managed, could result in erosion of land that could cause channels or ditches to form within the boundary or vicinity of the facility that could cause unplanned point source discharges to waters of the United States. If that potential exists, then the entire activity associated with the proposed nuclear facility would be subject to certification under RSA 485-A:12, III and section 401 of the CWA.

In its description of the Activity in applications submitted to NHDES and USACE for the Activity, NHDOT described the construction and operation of an approximately 1.3-mile segment of New Hampshire Route 16 (NH Rt 16) in the town of Cambridge. Therefore, under RSA 485-A:12, III, section 401 of the CWA, and 40 CFR Part 121, NHDES is required and authorized to include conditions in the Certification that are necessary to provide assurance that discharges from the entire Activity, not just the dredge or fill that triggered the federal permit requirement, will comply with Surface Water Quality Standards.

Revisions Made: NHDES revised Condition E-4, which requires the WQIP as necessary, to be a “state-only” Condition.

11. **Comment A.11:** NHDOT also provided the following comment to summarize its comments and concerns about the draft Certification:

“The draft WQC does not include “a statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements...” in accordance with 40 CFR § 121.7(d)(1)(i). These statements are important when comparing the conditions included in this WQC to the WQCs granted for the same dredge and fill type of discharge authorized by the 2022 404 General Permit (GP). The WQC conditions for this 404 IP appear to be more related to stormwater discharges rather than discharges of dredged and fill material.”

NHDES Response: In the draft Certification, NHDES believed it had satisfied the requirements of 40 CFR 121.7(d)(1)(i) and (ii) by cross-referencing the relevant paragraphs of the WQC at the end of each condition. For example, under condition E-8 of the draft Certification, NHDES stated the following: “For an explanation and authority for this condition, see Facts C-2, C-8, and C-44 through C-82, and Findings D-8 and D-14 through D-19.” Those relevant paragraphs describe why each condition is necessary to assure that the discharges from the Activity will comply with Surface Water Quality Standards and provide the various authorities for each condition.

On March 10, 2021, NHDES asked EPA via email if that approach would satisfy the requirements of 40 CFR 121.7(d)(1)(i) and (ii). On March 11, 2021, EPA staff informed NHDES by email that: “This approach should generally work, as long as the CWA 401 certification document as a whole thoroughly and explicitly explains why each condition is necessary to assure that the discharge from the proposed

project will comply with water quality requirements and cites federal, state, or tribal law that authorizes the condition. If referencing back to the section of the certification that contains the relevant explanations and citations works better for NHDES' formatting, such an approach should be sufficient."

On May 10, 2021, NHDES provided EPA with an example, draft certification in which NHDES used that method and asked EPA to do confirm that the method would comply with 40 CFR 121.7(d)(1)(i) and (ii). NHDES explained that it had used that method to avoid having to repeat all of the conditions and citations that demonstrate compliance with that federal regulation. On May 11, 2021, EPA informed NHDES that the method in the draft certification met the requirements of 40 CFR 121.7(d)(1)(i) and (ii).

Regarding the certification that was granted for the general permits for New Hampshire that USACE issued under General Permit No: NAE-2022-00849 under section 404 of the CWA; NHDES was required to certify 23 general permits that are likely to authorize thousands of different kinds of projects in New Hampshire. When NHDES certified those permits, it was not just certifying the same type of discharges as the Activity, NHDES was also certifying impacts to relative to aids to navigation, moorings, fish and wildlife harvesting activities, oil spill cleanups, scientific measurement devices, etc. Therefore, NHDES was required to consider which conditions were necessary and applicable to a much larger suite of activity types, when compared to the Activity, to certify those activities and comply with RSA 485-A:12, III, section 401 of the CWA, and 40 CFR Part 121.

Please see NHDES' response to Comment A.10 of this document for a discussion on how NHDES addressed NHDOT's comment about stormwater discharges.

Revisions Made: Since both NHDOT and USACE provided similar comments about 40 CFR 121.7(d)(1)(i) and (ii), NHDES amended the format of Certification Conditions to Federally Agency by recapitulating at least one statement explaining why each condition is necessary to assure that any discharge authorized under the federal permit will comply Surface Water Quality Standards and one citation to state law that authorizes the condition. NHDES retained its reference to facts and findings in each condition, which also demonstrate compliance with 40 CFR 121.7(d)(1)(i) and (ii).

NHDES added paragraph C-6 to reference the requirements under 40 CFR 121.7(d)(1)(i) and (ii).

Comments from USACE

12. **Comment B.1:** USACE provided the following comment:

"[...P]er 40 CFR Part 121, for each condition include, at a minimum: (1) For certification conditions on an individual license or permit, (i) A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements; and (ii) A citation to federal, state, or tribal law that authorizes the condition, or that condition(s) may not be included as a Federal permit condition. Our recommendation, for clarity, would be to provide these two requirements right after 'each' condition."

NHDES Response: Please see NHDES' response to Comment A.11 of this document for a discussion on how NHDES addressed this comment.

Revisions Made: Please see the revisions that NHDES made in response to Comment A.11 of this document.

Other Substantive Revisions to the Certification

1. NHDES added the terms “construction and operation of” to the second sentence of the third paragraph of section “A. Introduction” to clarify the purpose of the Certification: “The purpose of the certification is to provide assurance that discharges from **construction and operation of** the proposed Activity will comply with New Hampshire surface water quality standards that are specified under RSA 485-A:8 and NH Code of Administrative Rules Env-Wq 1700 (Surface Water Quality Standards) [emphasis added].”
2. NHDES added paragraph C-7 to reference the requirements under 40 CFR 121.10 and reference that paragraph under Section E.11.II – *Certification Conditions to the Federal Agency*.
3. NHDES added paragraph C-75 to include the fact that NHDOT submitted a Shoreland Permit Application for the Activity on December 2, 2022.
4. NHDES revised paragraph C-85 (previously labelled as paragraph C-82 in the draft Certification) to correct and update facts related to NHDES’ processing of the NHDOT’s Application for a NHDES Wetlands Permit.
5. NHDES deleted Condition E-2 of the draft Certification that required conditions of the draft Certification to be incorporated into the federal license or permit as specified under 40 CFR Part 121. NHDES determined that this condition was not necessary because it is a fact.
6. NHDES deleted Condition E-7 of the draft Certification that required NHDOT to notify NHDES if the Certification was transferred to a new owner. NHDES determined that this condition was not necessary because NHDOT is unlikely to transfer control of a state highway.
7. NHDES added section F. NHDES Contact to the Certification to clearly identify where reports and other items that must be submitted to NHDES under a condition of the Certification should be sent. NHDES also moved the NHDES general contact information for questions or concerns about the Certification to this section.

Minor Changes to the Certification

In addition to the changes noted in the above, NHDES made other minor changes not considered substantive to the final Certification since the draft Certification was issued for public notice. Examples include minor format revisions, grammatical and spelling corrections, removing the word “DRAFT” in the header and watermark, changing the “Decision” status on the first page from “Pending” to the date granted, adding the decision type and date granted, updating cross-references to paragraphs due to substantive changes, etc.