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## WATER QUALITY CERTIFICATION

In Fulfillment of

Section 401 of the United States Clean Water Act (33 U.S.C 1341)  
and RSA 485-A:12, III

WQC # 2017-404P-001

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Activity Name	Activities covered under General Permits issued by the U.S. Army Corps of Engineers in accordance with Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act
Activity Location	State of New Hampshire
Owner/Applicant	Regulatory Division U.S. Army Corps of Engineers 696 Virginia Road Concord, MA 01742-2751
DATE OF APPROVAL (subject to Conditions below)	August 17, 2017

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### **A. INTRODUCTION**

The U.S. Army Corps of Engineers New England District (Applicant) seeks a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC or Certification) from the New Hampshire Department of Environmental Services (NHDES) for issuance of 23 General Permits (GPs) under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, that will cover projects involving minimal wetland impacts in coastal and inland waters and wetlands in New Hampshire (Activity). The intent of the GPs is to expedite the review of these Activities and to simplify the permit application review processes for the Applicant and NHDES Wetlands Bureau, as the permit review processes are very similar relative to federal and state statutory authority. The GPs will replace the existing New Hampshire (NH) State Programmatic General Permit (PGP) issued in 2012 that is due to expire on August 8, 2017.

This 401 Certification documents laws, regulations, determinations and conditions related to the GPs for the attainment and maintenance of NH surface water quality

standards, including the provisions of NH RSA 485-A:8 and NH Code of Administrative Rules Env-Wq 1700, for the support of designated uses identified in the standards.

### **B. WATER QUALITY CERTIFICATION APPROVAL**

Based on the facts, findings and conditions noted below, NHDES has determined that there is reasonable assurance that construction and operation of activities covered by the GPs will not violate surface water quality standards. Accordingly, NHDES hereby issues this 401 Certification subject to the conditions in Section E of this 401 Certification, in accordance with Section 401 of the United States Clean Water Act (33 U.S.C. 1341) and RSA 485-A:12, III.

### **C. STATEMENT OF FACTS AND LAW**

- C-1. Section 401 of the United States Clean Water Act (CWA, 33 U.S.C. 1341) states, in part: "Any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate...that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title....No license or permit shall be granted until the certification required by this section has been obtained or has been waived...No license or permit shall be granted if certification has been denied by the State..."
- C-2. §401(d) of the CWA provides that: "Any certification provided under this section [401] shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with [enumerated provisions of the CWA]...and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section."

According to EPA 401 Guidance<sup>1</sup>, "Under § 401(d) the water quality concerns to consider and the range of potential conditions available to address those concerns, extend to any provision of state or tribal law relating to the aquatic resource. Considerations can be quite broad so long as they relate to water quality. The U.S. Supreme Court has stated that, once the threshold of a discharge is reached (necessary for § 401 certification to be applicable), the conditions and limitations in the certification may address the permitted activity as a whole."<sup>2</sup>

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<sup>1</sup> *Clean Water Action Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*. U.S. Environmental Protection Agency, Office of Wetlands, Oceans and Watersheds. 2010.

<sup>2</sup> *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 712 (1994).

**Final 401 Certification 2017-404P-001**

August 17, 2017

Page 3 of 9

- C-3. RSA 485-A:12, III states " No activity, including construction and operation of facilities, that requires certification under section 401 of the Clean Water Act and that may result in a discharge, as that term is applied under section 401 of the Clean Water Act, to surface waters of the state may commence unless the department certifies that any such discharge complies with the state surface water quality standards applicable to the classification for the receiving surface water body. The department shall provide its response to a request for certification to the federal agency or authority responsible for issuing the license, permit, or registration that requires the certification under section 401 of the Clean Water Act. Certification shall include any conditions on, modifications to, or monitoring of the proposed activity necessary to provide assurance that the proposed discharge complies with applicable surface water quality standards. The department may enforce compliance with any such conditions, modifications, or monitoring requirements as provided in RSA 485-A:22."
- C-4. 485-A:12, I , Enforcement of Classification, states the following: " After adoption of a given classification for a stream, lake, pond, tidal water, or section of such water, the department shall enforce such classification by appropriate action in the courts of the state, and it shall be unlawful for any person or persons to dispose of any sewage, industrial, or other wastes, either alone or in conjunction with any other person or persons, in such a manner as will lower the quality of the waters of the stream, lake, pond, tidal water, or section of such water below the minimum requirements of the adopted classification. If the department shall set a time limit for abatement of pollution under paragraph II, and it becomes apparent at any time during the compliance period that full compliance with the adopted classification will not be attained by the end of such period due to the failure of any person to take action reasonably calculated to secure abatement of the pollution within the time specified, the department shall notify such person or persons in writing. If such person or persons shall fail or neglect to take appropriate steps to comply with the classification requirements within a period of 30 days after such notice, the department shall seek appropriate action in the courts of the state."
- C-5. RSA 485-A:8 and Env-Wq 1700 (Surface Water Quality Standards, effective December 1, 2016) together fulfill the requirements of Section 303 of the Clean Water Act that the State of New Hampshire adopt water quality standards consistent with the provisions of the CWA. Further, RSA 485-A:8 establishes two classes of surface waters in New Hampshire for the purposes of classification: Class A and Class B.
- C-6. Env-Wq 1700 (Surface Water Quality Standards) include designated uses (see C-9), narrative and numeric water quality criteria to protect the designated uses, and antidegradation provisions to minimize lowering of water quality in high quality waters. Among other purposes, Env-Wq 1700 is used by NHDES for evaluating applications for 401 Water Quality Certification.
- C-7. Env-Wq 1701.02, entitled "Applicability", states that these rules shall apply to:

- “ (a) All surface waters; and
- (b) Any person who:
  - (1) Causes any point or nonpoint source discharge of any pollutant to surface waters;
  - (2) Undertakes hydrologic modifications, such as dam construction or water withdrawals; or
  - (3) Undertakes any other activity that affects the beneficial uses or the water quality of surface waters.”

C-8. Env-Wq 1703.01 entitled “Water Use Classifications; Designated Uses”, states the following:

- “(a) All surface waters shall be classified as provided in RSA 485-A:8, based on the standards established therein for class A and class B waters. Each classification shall identify the most sensitive use it is intended to protect.
- (b) All 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.
- (c) All surface waters shall provide, wherever attainable, for the protection and propagation of fish, shellfish and wildlife, and for recreation in and on the surface waters.
- (d) Unless high or low flows are caused by naturally-occurring conditions, surface water quantity shall be maintained at levels that protect existing uses and designated uses.”

C-9. Env-Wq 1702.17 states that ““Designated uses” means those uses specified in water quality standards for each water body or segment whether or not such uses are presently occurring. The term includes the following:

- (a) Swimming and other recreation in and on the water, meaning the surface water is suitable for swimming, wading, boating of all types, fishing, surfing, and similar activities;
- (b) Fish consumption, meaning the surface water can support a population of fish free from toxicants and pathogens that could pose a human health risk to consumers;
- (c) Shellfish consumption, meaning the tidal surface water can support a population of shellfish free from toxicants and pathogens that could pose a human health risk to consumers;

- (d) Aquatic life integrity, meaning the surface water can support aquatic life, including a balanced, integrated, and adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of similar natural habitats of the region;
- (e) Wildlife, meaning the surface water can provide habitat capable of supporting any life stage or activity of undomesticated fauna on a regular or periodic basis; and
- (f) Potential drinking water supply, meaning the surface water could be suitable for human intake and meet state and federal drinking water requirements after adequate treatment."

C-10. Env-Wq 1702.44 defines surface waters as "surface waters of the state" as defined in NH RSA 485-A:2, XIV and waters of the United States as defined in 40 CFR 122.2.

NH RSA 485-A:2, XIV defines "surface waters of the state" as "perennial and seasonal streams, lakes, ponds and tidal waters within the jurisdiction of the state, including all streams, lakes, or ponds bordering on the state, marshes, water courses and other bodies of water, natural or artificial."

40 CFR 122.2 defines "waters of the United States.

C-11. NH RSA 482-A:2, X. defines "Wetlands" as "[a]n area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal conditions does support, a prevalence of vegetation typically adapted for life in saturated soil conditions."

C-12. Env-Wq 1702.18 states that ""Discharge" means

- (a) The addition, introduction, leaking, spilling, or emitting of a pollutant to surface waters, either directly or indirectly through the groundwater, whether done intentionally, unintentionally, negligently or otherwise; or
- (b) The placing of a pollutant in a location where the pollutant is likely to enter surface waters."

C-13. The term "discharge", as applied under section 401 of the Clean Water Act 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. 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

"[w]hen it applies to water, 'discharge' commonly means a 'flowing or issuing out'" and an addition of a pollutant is not "fundamental to any discharge"<sup>3</sup>.

- C-14. Env-Wq 1702.38 states that "'Pollutant' means 'pollutant' as defined in 40 CFR 122.2." According to 40 CFR 122.2, "pollutant" means "dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water."
- C-15. The GPs are federal permits under Section 404 of the federal Clean Water Act and under Section 10 of the Rivers and Harbors Act.
- C-16. The Applicant provided public notice for the GPs on November 1, 2016. The public notice included drafts of the GPs and a request for public comments.
- C-17. On November 4, 2016, NHDES received an application dated November 1, 2016 from the Applicant for a Section 401 Water Quality Certification for the GPs.
- C-18. In response to comments received on the draft GPs, the Applicant submitted revised draft GPs to NHDES for review on June 30, 2017 and August 16, 2017
- C-19. NHDES issued a draft Certification for public comment from July 6, 2017 to August 11, 2017. Comments were received from the New Hampshire Rivers Council. A copy of the final certification and DES' response to comments was posted on the DES website at [http://www.des.nh.gov/organization/divisions/water/wmb/section401/coe\\_ind.htm](http://www.des.nh.gov/organization/divisions/water/wmb/section401/coe_ind.htm).

#### **D. FINDINGS**

- D-1. The GPs reviewed for this 401 Certification are the GPs the Applicant submitted to NHDES on August 16, 2017.
- D-2. The Applicant is responsible for the development and implementation of the GPs, including any amendments.
- D-3. The GPs are federal permits (see C-15).

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<sup>3</sup> Information in this paragraph is from page 4 of the following guidance document: *Clean Water Action Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*. U.S. Environmental Protection Agency, Office of Wetlands, Oceans and Watersheds. 2010. 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).



- D-4. Surface waters include navigable waters for the purposes of certification under Section 401 of the Clean Water Act. Surface waters include jurisdictional wetlands for the purposes of wetlands permitting under RSA 482-A.
- D-5. The named and unnamed surface waters, including rivers and streams, lakes and ponds, and wetlands, in New Hampshire, potentially affected by activities permitted under the GPs, are surface waters under Env-Wq 1702.44 (see C-10).
- D-6. Activities permitted under the GPs may result in a discharge (see C-12 and C-13) and may cause permanent or temporary impacts to surface waters in New Hampshire.
- D-7. Because Activities permitted under the GPs may result in a discharge (see D-6) to navigable surface waters (see D-4) and requires a federal permit (see D-3), a section 401 Water Quality Certification is required in accordance with section 401 of the Clean Water Act (see C-1) and RSA 485-A:12, III (see C-3). NHDES has received an application from the Applicant for 401 Water Quality Certification (see C-17).
- D-8. The GPs will be issued for projects that include dredge and fill of wetlands. The NHDES Wetlands Bureau permitting process addresses dredge and fill impacts to jurisdictional wetlands, including compensatory mitigation where required. This 401 Certification decision relies, in part, on an approved permit from the NHDES Wetlands Bureau for the potential construction and post construction-related impacts to jurisdictional wetlands and other affected surface waters.
- D-9. Projects that include dredge and fill of wetlands under the GPs may also require an NHDES Alteration of Terrain permit which addresses potential construction and operation- related impacts to surface waters from certain land alteration projects . For projects that require a NHDES Alteration of Terrain permit, this 401 Certification decision relies, in part, on an approved permit from the NHDES Alteration of Terrain Bureau.
- D-10. NHDES reviewed wetlands permit applications for projects covered under the former PGP and intends to do the same for projects covered under the new GPs to determine whether additional conditions or an individual 401 Certification application is necessary to ensure compliance with NH surface water quality standards.
- D-11. Most projects included under the GPs, if conducted in accordance with the conditions of the GPs, NHDES Wetlands Permit, and NHDES Alteration of Terrain Permit, are expected to comply with NH surface water quality standards.

**E. WATER QUALITY CERTIFICATION CONDITIONS**

Unless otherwise authorized by NHDES, the following conditions shall apply:

- E-1. **Compliance with Certification Conditions:** Construction and operation of all projects covered by the GPs shall comply with this Certification.
- E-2. **Compliance with Surface Water Quality Standards:** Construction and operation of all projects covered by the GPs shall comply with NH surface water quality standards (see C-5).
- E-3. **NHDES Review of Specific Projects and Modification of Certification:** Applications for projects included under the GPs shall be subject to NHDES review to determine if additional conditions are needed and if an individual 401 Certification application is necessary to ensure compliance with surface water quality standards. If NHDES determines that surface water quality standards are being violated by a specific project or there is reasonable potential to expect that water quality standards will be violated, NHDES may modify this 401 Certification or issue an individual 401 Certification for the specific project to include additional conditions to ensure compliance with surface water quality standards when authorized by law, and after notice and opportunity for hearing.
- E-4. **Obtain and Comply with all other Applicable Permits:** Construction of any specific project permitted under the GPs shall not commence until all other applicable permits and approvals have been granted, including, but not limited to, those permits issued by the NHDES Wetlands Bureau (which includes compensatory mitigation where required) and, if necessary, the NHDES Alteration of Terrain Bureau. Activities falling under the GPs shall comply with the GPs and all other applicable permits.
- E-5. **Compliance Inspections:** In accordance with applicable laws, NHDES reserves the right to inspect any project permitted under the GPs and the effects of the project on surface waters to monitor compliance with the conditions of this Certification.

## **F. APPEAL**

Any person aggrieved by this decision may appeal to the N.H. Water Council ("Council") by filing an appeal that meets the requirements specified in RSA 21-O:14 and the rules adopted by the Council, Env-WC 100-200. The appeal must be filed directly with the Council within 30 days of the date of this decision and must set forth fully every ground upon which it is claimed that the decision complained of is unlawful or unreasonable. Only those grounds set forth in the notice of appeal can be considered by the Council.

Information about the Council, including a link to the Council's rules, is available at <http://nhec.nh.gov/> (or more directly at <http://nhec.nh.gov/water/index.htm>). Copies of the rules also are available from the NHDES Public Information Center at (603) 271-2975.



**Final 401 Certification 2017-404P-001**

August 17, 2017

Page 9 of 9

If you have questions regarding this Certification, please contact Gregg Comstock at (603) 271-2983 or [Gregg.Comstock@des.nh.gov](mailto:Gregg.Comstock@des.nh.gov).



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