

**New Hampshire Department of Environmental Services
WATER QUALITY CERTIFICATION
In Fulfillment of
NH RSA 485-A:12, III**

Certification Number	WQC 2021-404I-005
Activity Name	Hampton Harbor North Jetty Repair and Reconstruction Project
Activity Location	Hampton, New Hampshire Rockingham County
Potentially Affected Surface Waters Near the Activity (Assessment Unit ID)	Atlantic Ocean (NHOCN000000000-02-18); Atlantic Ocean – Hampton Beach State Park (NHOCN000000000-02-10); Atlantic Ocean – Seabrook Wastewater Treatment Plant Outfall (NHOCN000000000-08-01); Hampton/Seabrook Harbor (NHEST600031004-09-09); Atlantic Ocean -Sun Valley Beach (NHOCN000000000-08-03); Hampton River Marina SZ (NHEST600031004-09-08);
Owner/Applicant	U.S. Army Corps of Engineers, New England District
Agent Filing Application on Behalf of Owner/Applicant	Coral Siligato Project Manager U.S. Army Corps of Engineers, New England District 696 Virginia Road Concord, MA 01742-2751
Applicable Federal License or Permit Requiring Section 401 water quality certification	See Facts C-11, C-12, C-13, and C-14 regarding federal law and regulations requiring the U.S. Army Corps of Engineers to obtain a Section 401 water quality certification.
Decision (subject to Conditions below)	Granted with Conditions
Date of Issuance	May 18, 2022

A. INTRODUCTION

On March 18, 2022, the New Hampshire Department of Environmental Services (NHDES) received an Application for Water Quality Certification (Application) from the U.S. Army Corps of Engineers, New England District (Applicant), for the following project (Activity or Project):

US Army Corps of Engineers Hampton Harbor North Jetty Repair and Reconstruction Project in Hampton, New Hampshire.

The Application included a cover letter and a complete NHDES Application form. On January 20, 2022, NHDES received a copy of a draft Environmental Assessment (EA) for the Project that the Applicant references in the Application. In the Application, the Applicant requested a Water Quality Certification for the Project from NHDES in accordance with Section 401 of the Clean Water Act (§ 401 Water Quality Certification or Certification). The

purpose of the Certification is to provide reasonable assurance that discharges from the proposed Project will comply with New Hampshire surface water quality standards (NH RSA 485-A:8 and NH Code of Administrative Rules Env-Wq 1700).

In the draft EA, the Applicant describes, among other things, anticipated temporary or minor impacts to water quality associated with the Project’s repair and widening of a jetty that was damaged by coastal storms and a vessel collision in 2016. The jetty is located in Hampton, New Hampshire at the southern section of Hampton Beach State Park, and extends approximately 1,000 feet into the Atlantic Ocean on the northern side of Hampton Harbor Inlet (the North Jetty). A more complete description of the Project is provided in Findings D-2 and D-3 of this Certification.

This Certification includes the following:

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B. DECISION

Based on the facts, laws, findings, and conditions included herein, NHDES has determined that there is reasonable assurance that construction and operation of the proposed Project will be conducted in a manner which will comply with New Hampshire surface water quality standards (RSA 485-A:8 and Env-Wq 1700)¹. NHDES hereby issues this Certification in accordance with RSA 485-A:12, III, subject to the conditions in Section E of this Certification.

C. FACTS AND LAWS

Federal 401 Certification Laws and Regulations

C-1. Section 401(a)(1) of the federal Clean Water Act (CWA) (33 U.S.C. §1341(a)(1)) requires 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 the CWA. The CWA provision most applicable for this project is compliance with state surface water quality standards. CWA section 303 (33 U.S.C § 1313).

C-2. Section 401(d) (33 U.S.C §1341(d)), of the CWA provides that: “Any certification provided under this

¹ This language is required by federal regulations. See Fact C-4.

section [401] shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to ensure 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.”

- C-3. Federal regulations regarding Section 401 water quality certification may be found in the Code of Federal Regulations (CFR), Title 40, PART 121 (40 CFR 121) titled “State Certification of Activities Requiring a Federal License or Permit”. On July 13, 2020, the U.S. Environmental Protection Agency (EPA) published final revisions to this rule in the Federal Register (Vol. 85, No. 134, pages 42210 to 42287), which became effective on September 11, 2020 ([2020 Rule](#)). On October 21, 2021, the U.S. District Court for the Northern District of California issued an order² remanding and vacating EPA’s 2020 Rule. The vacatur was nationwide, and the order required a temporary return to [EPA’s 1971 Rule](#) until EPA finalized a new certification rule. However, on April 6, 2022, the U.S. Supreme Court reinstated the 2020 Rule.³
- C-4. 40 CFR §121.7(c) requires the following: “Any grant of certification shall be in writing and shall include a statement that the discharge from the proposed project will comply with water quality requirements.”
- C-5. 40 CFR §121.1(f) defines “discharge”, for the purposes of 40 CFR 121, as “a discharge from a point source into a water of the United States.”
- C-6. The CWA Section 502(14) (33 U.S.C. §1362(14)) 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.” In CWA Section 404 context (see Fact C-11), point sources include bulldozers, mechanized land clearing equipment, dredging equipment, and the like.⁴
- C-7. 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.”⁵
- C-8. 40 CFR §232.2 defines “discharge of fill material”, in relevant part, as “the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt,

² In re Clean Water Act Rulemaking, No. 20-cv-4636, et al. (Oct. 21, 2021)

³ The Supreme Court case that is referred to is *Louisiana, et al., Applicants v. American Rivers, et al.*, 596 U.S. No. 21A539 (2022)

⁴ From footnote 34 on page 42234 of the preamble for the 2020 Rule (see Federal Register, Vol. 85, No. 134/ Monday, July 13, 2020/ Rules and Regulations) which references *Avoyelles Sportsmen’s League, Inc. vs Marsh*, 715 F.2d 897, 922 (5th Cir. 1983).

⁵ 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).

or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials;" after the words "utility lines; and artificial reefs;" and defines "fill material" as

"(1) Except as specified in paragraph (3) of this definition, the term fill material means material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage."

C-9. The CWA Section 502(7) (33 U.S.C. §1362(7)) defines "navigable waters," as "waters of the United States".

C-10. Waters of the United States are defined in 40 CFR § 122.2.

C-11. Section 404(t) of the CWA regarding "Navigable waters within State jurisdiction" states the following: "Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation."

C-12. 33 CFR § 338.2(c) states the following with regards to fill activities in waters of the United States conducted by the U.S. Army Corps of Engineers for operation and maintenance activities: "Water quality certifications should be requested and, if applicable, coastal zone consistency determinations should be provided using the procedures of § 336.1(b) (8) and (9) of this chapter [Chapter II of Title 33]."

C-13. 33 CFR 336.1(a)(1) states the following: "The CWA requires the Corps to seek state water quality certification for discharges of dredged or fill material into waters of the U.S."

C-14. 33 CFR § 336.1(b)(8)(i) states the following, among other things, with regards to required procedures of the U.S. Army Corps of Engineers to request a water quality certification from the state: "In addition to the Corps section 404 public notice, information and data demonstrating compliance with state water quality standards will be provided to the state water quality certifying agency along with the request for water quality certification. The information and data may be included within the 404(b)(1) evaluation. The district engineer will request water quality certification to be consistent with the maintenance dredging schedule for the project. Submission of the public notice, including information and data demonstrating compliance with the state water quality standards, will constitute a valid water quality certification request pursuant to section 401 of the CWA."

State 401 Certification Law

- C-15. NH 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.”

State Surface Water Quality Standards⁶

- C-16. NH RSA 485-A:8 and Env-Wq 1700 (Surface Water Quality Standards), together fulfill the requirements of Section 303 of the Clean Water Act (CWA) (33 U.S.C 1313) that the State of New Hampshire adopt water quality standards consistent with the provisions of the CWA.
- C-17. Env-Wq 1701.01 Purpose. “The purpose of these rules is to establish water quality standards for the state’s surface water uses as set forth in RSA 485-A:8, I, II, III and V. These standards are intended to protect public health and welfare, enhance the quality of water, and serve the purposes of the federal Clean Water Act, 33 U.S.C. 1251 et seq., and RSA 485-A. These standards provide for the protection and propagation of fish, shellfish, and wildlife, and provide for such uses as recreational activities in and on the surface waters, public water supplies, agricultural and industrial uses, and navigation in accord with RSA 485-A:8, I and II.”
- C-18. Env-Wq 1701.02, titled “Applicability,” states that these rules [Env-Wq 1700] 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-19. 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.”
- NH RSA 482-A:2, X. defines "wetlands" as “an 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.”

⁶ All New Hampshire surface water quality standards apply to the Activity. The standards specifically called out in the Certification should not be interpreted as the only standards that may apply.

- C-20. Env-Wq 1702.05 defines “benthic community” as “the community of plants and animals that live on, over, or in the substrate of the surface water.”
- C-21. Env-Wq 1702.06 defines “benthic deposit” as “any sludge, sediment, or other organic or inorganic accumulations on the bottom of the surface water.”
- C-22. Env-Wq 1702.07 defines “best management practices” as “those practices that are determined, after problem assessment and examination of all alternative practices and technological, economic and institutional considerations, to be the most effective practicable means of preventing or reducing the amount of pollution generated by point or nonpoint sources to a level compatible with water quality goals.”
- C-23. Env-Wq 1702.08 defines “biological integrity” as “the ability of an aquatic ecosystem to support and maintain a balanced, integrated, adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of similar natural habitats of a region.”
- C-24. Env-Wq 1702.17 defines “designated uses” as “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-25. Env-Wq 1702.18 defines “discharge” as:
- “(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-26. Env-Wq 1702.22 defines “existing uses” as “those uses, other than assimilation waste transport, that actually occurred in the waterbody on or after November 28, 1975, whether or not they are included in the water quality standards.”
- C-27. Env-Wq 1702.26 defines “mixing zone” as “a defined area or volume of the surface water surrounding or adjacent to a wastewater discharge where the surface water, as a result of the discharge, might not meet all applicable water quality standards.”

- C-28. Env-Wq 1702.31 defines “nonpoint source” as “any source other than a point source.”
- C-29. Env-Wq 1702.33 defines “nuisance species” as “any species of flora or fauna living in or near the water whose noxious characteristics or presence in sufficient number or mass prevent or interfere with a designated use of those surface waters.”
- C-30. Env-Wq 1702.37 defines “point source” as “a discernible, confined, and discrete conveyance from which pollutants are or might be discharged, excluding return flows from irrigated agriculture or agricultural stormwater runoff. The term includes, but is not limited to, a pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft.”
- C-31. Env-Wq 1702.38 defines “pollutant” as “‘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-32. Env-Wq 1703.01 titled “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-33. Env-Wq 1703.03(c) titled “General Water Quality” includes the following:
“Unless otherwise specifically allowed by a statute, rule, order, or permit, the following physical, chemical, and biological criteria shall apply to all surface waters: (1) All surface waters shall be free from substances in kind or quantity that:
a. Settle to form harmful benthic deposits;
b. Float as foam, debris, scum or other visible substances;
c. Produce odor, color, taste or turbidity that is not naturally occurring and would render the surface water unsuitable for its designated uses;
d. Result in the dominance of nuisance species; or
e. Interfere with recreational activities. [..]”
- C-34. Env-Wq 1703.06 titled “Bacteria” states the following:
“(a) Uses and criteria associated with bacteria shall be as set forth in RSA 485-A:8, I, II, and V, as summarized in Appendix E.
(b) Subject to (c), below, the bacteria criteria shall be applied at the end of a wastewater treatment facility’s discharge pipe.
(c) For any combined sewer overflow that discharges into non-tidal surface waters, a bacteria criteria of 1,000 Escherichia coli per 100 milliliters shall apply at the end of the combined sewer overflow’s

discharge pipe.”

- C-35. RSA 485-A:8, V specifies that “Tidal waters utilized for swimming purposes shall contain not more than either a geometric mean based on at least 3 samples obtained over a 60-day period of 35 enterococci per 100 milliliters, or 104 enterococci per 100 milliliters in any one sample, unless naturally occurring. Those tidal waters used for growing or taking of shellfish for human consumption shall, not exceed a geometric mean most probable number (MPN) of 14 organisms per 100 ml for fecal coliform, nor shall more than 10 percent of the samples exceed an MPN of 28 per 100 ml for fecal coliform, or other values of equivalent protection based on sampling and analytical methods used by the department of environmental services shellfish program and approved in the latest revision of the National Shellfish Sanitation Program, Guide For The Control of Molluscan Shellfish.”
- C-36. Env-Wq 1703.08 titled “Benthic Deposits” states the following:
“(a) Class A waters shall contain no benthic deposits, unless naturally occurring.
(b) Class B waters shall contain no benthic deposits that have a detrimental impact on the benthic community, unless naturally occurring.”
- C-37. Env-Wq, 1703.09, 1703.10 and 1703.12 include water quality criteria for oil and grease, color and slicks, odors, and surface floating solids, respectively.
- C-38. RSA 146-A:2, III defines “oil” as “petroleum products and their by-products of any kind, and in any form including, but not limited to, petroleum, fuel, sludge, crude, oil refuse or oil mixed with wastes and all other liquid hydrocarbons regardless of specific gravity and which are used as motor fuel, lubricating oil, or any oil used for heating or processing. The term ‘oil’ shall not include natural gas, liquified petroleum gas or synthetic natural gas regardless of derivation or source.”
- C-39. RSA 146-A:3 specifies, among other things, that “[t]he discharge or spillage of oil into the surface water or groundwater of this state, or in a land area where the oil will ultimately seep into surface water or groundwater is prohibited.”
- C-40. Env-Wq 1703.11 titled “Turbidity” states the following:
“(a) Class A waters shall contain no turbidity, unless naturally occurring.
(b) Class B waters shall not exceed naturally occurring conditions by more than 10 NTUs.
(c) Turbidity in waters identified in RSA 485-A:8, III shall comply with the applicable long-term combined sewer overflow plan prepared in accordance with Env-Wq 1703.05(c).
(d) For purposes of state enforcement actions, if a discharge causes or contributes to an increase in turbidity of 10 NTUs or more above the turbidity of the receiving water upstream of the discharge or otherwise outside of the visible discharge, a violation of the turbidity standard shall be deemed to have occurred.”
- C-41. Env-Wq 1703.19 titled “Biological and Aquatic Community Integrity” states the following:
“(a) All surface waters shall support and maintain a balanced, integrated and adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of similar natural habitats of a region.
(b) Differences from naturally-occurring conditions shall be limited to non-detrimental differences in community structure and function.”
- C-42. Env-Wq 1703.21 titled “Water Quality Criteria for Toxic Substances” states the following:

- “(a) Unless naturally occurring or allowed under part Env-Wq 1707, all surface waters shall be free from toxic substances or chemical constituents in concentrations or combinations that:
- (1) Injure or are inimical to plants, animals, humans or aquatic life; or
 - (2) Persist in the environment or accumulate in aquatic organisms to levels that result in harmful concentrations in:
 - a. Edible portions of fish, shellfish, or other aquatic life; or
 - b. Wildlife that might consume aquatic life.”

C-43. Env-Wq 1707.01 titled “Designation of Mixing Zones” states the following:

- “(a) Because RSA 485-A:8, I prohibits the discharge of any sewage or other wastes into class A waters, mixing zones shall be prohibited in such waters.
- (b) For class B waters, the department shall designate a limited area or volume of the surface water as a mixing zone if the applicant provides sufficient scientifically valid documentation to allow the department to independently determine that all criteria in Env-Wq 1707.02 have been met.”

C-44. Env-Wq 1707.02 titled “Criteria for Approval of Mixing Zones” states the following:

“ The department shall not approve a mixing zone unless the proposed mixing zone:

- (a) Meets the criteria in Env-Wq 1703.03(c)(1);
- (b) Does not interfere with biological communities or populations of indigenous species;
- (c) Does not result in the accumulation of pollutants in the sediments or biota;
- (d) Allows a zone of passage for swimming and drifting organisms;
- (e) Does not interfere with existing and designated uses of the surface water;
- (f) Does not impinge upon spawning grounds or nursery areas, or both, of any indigenous aquatic species;
- (g) Does not result in the mortality of any plants, animals, humans, or aquatic life within the mixing zone;
- (h) Does not exceed the chronic toxicity value of 1.0 TUc at the mixing zone boundary; and
- (i) Does not result in an overlap with another mixing zone.”

C-45. Antidegradation provisions are included in Env-Wq 1702 and Env-Wq 1708.

- a. Env-Wq 1702.03 defines “antidegradation” as “a provision of the water quality standards that maintains and protects existing water quality and uses.”
- b. Env-Wq 1708.02 states that “Antidegradation shall apply to: (a) Any proposed new or increased activity, including point source and nonpoint source discharges of pollutants, that would lower water quality or adversely affect the existing or designated uses; (b) Any proposed increase in loadings to a waterbody when the proposal is associated with existing activities; (c) Any increase in flow alteration over an existing alteration; and (d) Any hydrologic modifications, such as dam construction and water withdrawals.”
- c. Antidegradation applies to all parameters as evidenced by Env-Wq 1708.08 (Assessing Waterbodies) which states “The applicant shall characterize the existing water quality and determine if there is remaining assimilative capacity for each parameter in question.”
- d. According to Env-Wq 1708.03 (b), “A proposed discharge or activity shall not eliminate any existing uses or the water quality needed to maintain and protect those uses.”
- e. Env-Wq 1702.04 states that ““Assimilative capacity” means the amount of a pollutant or combination of pollutants that can safely be released to a waterbody without causing violations of applicable water quality criteria or negatively impacting uses.”
- f. Env-Wq 1708.08 describes the process for assessing waterbodies to determine if there is remaining assimilative capacity for each parameter in question.
- g. Env-Wq 1708.09 titled “Significant or Insignificant Determination” states the following: “(a)

Any discharge or activity that is projected to use 20% or more of the remaining assimilative capacity for a water quality parameter, in terms of either concentration or mass of pollutants, or volume or flow rate for water quantity, shall be considered a significant lowering of water quality. (b) The department shall not approve a discharge or activity that will cause a significant lowering of water quality unless the applicant demonstrates, in accordance with Env-Wq 1708.10, that the proposed lowering of water quality is necessary to achieve important economic or social development in the area where the waterbody is located. (c) [...] any applicant proposing an activity that will cause an insignificant lowering of water quality shall not be required to demonstrate that the activity is necessary to provide important economic or social development, provided the applicant implements best management practices to minimize degradation.”

- h. Env-Wq 1708.01(b)(1), in general, states that: For significant changes in water quality, where the quality of the surface waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife, and recreation in and on the water, that quality shall be maintained and protected unless the department finds, after full satisfaction of the intergovernmental coordination and public participation provisions and the analysis required by Env-Wq 1708.10, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the surface waters are located. In allowing such degradation or lower water quality, the department shall ensure water quality adequate to fully protect existing uses. Further, the department shall ensure that the highest statutory and regulatory requirements shall be achieved for all new and existing point sources and that all cost effective and reasonable best management practices for nonpoint source control shall be implemented.
- i. Env-Wq 1708.01(b)(2) states the following: “The department shall not approve any proposed discharge or activity that might cause degradation or lower water quality, without such conditions as are necessary to ensure that: a. Water quality will be adequate to protect existing uses; b. The highest statutory and regulatory requirements will be achieved for all new and existing point sources; and c. All cost effective and reasonable best management practices for nonpoint source control will be implemented.”

C-46. Env-Wq 1708.04 titled “Protection of Water Quality in ORW” states the following:

- “(a) Surface waters of national forests and surface waters designated as natural under NH RSA 483:7-a, I, shall be considered outstanding resource waters (ORW).
- (b) Subject to (c), below, water quality shall be maintained and protected in surface waters that constitute ORW.
- (c) The department shall allow a limited point or nonpoint source discharge to an ORW only if:
 - (1) The discharge will result in no more than temporary and short-term changes in water quality, wherein “temporary and short-term” means that degradation is limited to the shortest possible time;
 - (2) The discharge will not permanently degrade water quality or result at any time in water quality lower than that necessary to protect the existing and designated uses in the ORW; and
 - (3) All practical means of minimizing water quality degradation are implemented.”

C-47. Env-Wq 1708.06 titled “Protection of Water Quality in High Quality Waters” states the following:

- “(a) Subject to (b) through (d) below, high quality waters shall be maintained and protected.
- (b) The department shall evaluate and authorize insignificant changes in water quality as specified in Env-Wq 1708.09.
- (c) The department shall allow degradation of significant increments of water quality, as

determined in accordance with Env-Wq 1708.09, in high quality waters only if the applicant can demonstrate to the department, in accordance with Env-Wq 1708.10, that allowing the water quality degradation is necessary to accommodate important economic or social development in the area in which the receiving water is located.

(d) If the waterbody is Class A Water, the requirements of Env-Wq 1708.05 shall also apply.”

- C-48. The Atlantic Ocean and Hampton Harbor, which includes Seabrook Harbor and Hampton River, in the vicinity of the Project are Class B (NH Chapter Law 1967, 311:1, LIX; NH Chapter Law 1967, 311:1, LX; and NH Chapter Law 1967, 311:1, LVIII).
- C-49. A “Designated River” is a river that is managed and protected for its outstanding natural and cultural resources in accordance with the Rivers Management and Protection Act (RSA 483).
- C-50. Section 303(d) of the Clean Water Act (33 U.S.C. 1313(d)) and the regulations promulgated thereunder (40 C.F.R. 130.0 – 40 C.F.R. 130.11) require states to identify and list surface waters that are violating state water quality standards (i.e., Section 303(d) List) that do not have an approved Total Maximum Daily Load (TMDL) for the pollutants causing impairment. For these water quality-impaired waters, states must establish TMDLs for the pollutants causing the impairments and submit the list of impaired surface waters and TMDLs to the U.S. Environmental Protection Agency (EPA) for approval. TMDLs include source identification, determination of the allowable load and pollutant reductions (by source) necessary to meet the allowable load. Once a TMDL is conducted, the pollutant/surface water is transferred to the list of impaired waters with approved TMDLs (known as Category 4A waters). The Section 303(d) List is, therefore, a subset of all impaired waters. The most recent Section 303(d) list of impaired waters approved by EPA is the [2020/2022 Section 303\(d\) List](#). A list of all impaired waters is available through the [NHDES website](#).
- C-51. When a surface water does not meet water quality standards (i.e., when it is impaired), the addition of pollutants causing or contributing to impairment should be avoided as indicated in the following regulation and statute:

Env-Wq 1703.03(a) states that “The presence of pollutants in the surface waters shall not justify further introduction of pollutants from point or nonpoint sources, alone or in any combination.”

NH RSA 485-A:12, I (Enforcement of Classification) states that “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.”

Regulatory Natural Resource Agency Comments and Coordination

- C-52. *Natural Resource Agencies:* Natural Resource Agencies include, but are not limited to, NHDES, NHFGD, NMFS of the NOAA, and NHDNCR as defined in footnote 7.

⁷ NHDES means New Hampshire Department of Environmental Services; NHFGD means New Hampshire Fish and Game Department; NHDNCR means New Hampshire Department of Natural and Cultural Resources; NMFS means National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA).

- C-53. On December 14, 2021, NHFGD informed NHDES by email that land-based activities from September 1 to March 15 would be sufficient to avoid impacts to piping plover (see Findings D-21 and D-23).
- C-54. In a *Federal Interagency Comment Form*, dated December 15, 2021, NOAA notified the Applicant that Essential Fish Habitat (EFH) for 26 species, including juvenile Atlantic cod Habitat Areas of Particular Concern, may be adversely affected by the Project, threatened or endangered species under the jurisdiction of NMFS may be present in the Project area, and the Applicant should submit its determination of effects of the Project on threatened or endangered species to NOAA with a request for concurrence of that determination. NOAA also notified the Applicant that “[n]o greater than minimal sedimentation or turbidity producing repair or stone recovery activities should occur below mean high water from March 15 to June 30 to protect winter flounder early life stages. If this time of year restriction is not feasible, work between March 15 to June 30 should take place in the dry when the tide is waterward of the work site or behind turbidity controls.” In addition, NOAA notified the Applicant that “a distinct and further EFH consultation must be reinitiated pursuant to 50 CFR 600.920 (j) if new information becomes available, or if the project is revised in such a manner that affects the basis for the above EFH determination or EFH conservation recommendations.”
- C-55. On December 15, 2021, the Applicant informed NHDES by email that the Project would not impact a general area that is immediately north of the Project area where surf clams are harvested by the public and NHDES, and would not impact the seawater sampling location and an access point that are used by NHDES’ Shellfish Program and are in the vicinity of the Project area. However, the Applicant also informed NHDES that the southernmost access point of Hampton Beach State Park used by NHDES’ Shellfish Program would be impacted by the Project, but the Applicant could coordinate with NHDES if use of that access point becomes necessary during construction of the Project.
- C-56. On December 15, 2021, NHDES notified the Applicant that increased turbidity could correspond to elevated fecal coliform levels but does not anticipate that construction activities of the Project to cause elevated fecal coliform in the adjacent seawater; and that the NHDES Shellfish Program may make periodic visits to the Project area to collect water samples to verify low fecal coliform (see Facts C-34 and C-35).
- C-57. The Applicant submitted a *GARFO ESA* [Greater Atlantic Regional Fisheries Office Endangered Species Act] *Section 7: NLAA* [Not Likely to Adversely Affect] *Program Verification Form*, dated January 18, 2022, to NOAA with a determination that the Project complies with all applicable project design criteria listed in the form and is not likely to adversely affect Endangered Species Act-listed species or critical habitat. NOAA concurred with that determination on January 19, 2022 (see Fact C-54).
- C-58. On January 25, 2022, the Applicant submitted a Federal Coastal Zone Management Consistency Determination and supporting documentation for the Project to the New Hampshire Coastal Program (NHCP) of NHDES in accordance with Section 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C. §1456(c)(1) (CZMA), and requested from NHCP concurrence with the Applicant’s determination that the Project, as proposed, will be undertaken in a manner that is consistent with the New Hampshire’s federally approved coastal management program.
- C-59. *Section 404 Public Notice*: On January 25, 2022, The Applicant issued a 30-Day Public Notice for the Project. The comment period for the public notice closed on February 23, 2022 (see Fact C-14).
- C-60. On March 28, 2022, NOAA informed NHDES that the Applicant consulted with NOAA about temporarily storing stone for the Project in a 0.55-acre intertidal zone area between the North Jetty and an existing, smaller jetty that is adjacent to the North Jetty, and NOAA did not provide the Applicant with

additional EFH recommendations provided the Applicant returns that area to conditions that existed prior to starting the Project (see Facts C-54 and C-62).

State 401 Certification Application and Public Notice

- C-61. *Water Quality Certification Application and Meeting:* On January 20, 2022, NHDES received a draft Application for § 401 Water Quality Certification for the Project from the Applicant. The draft application included a draft cover letter, a draft NHDES Application form, and a copy of a draft EA for the Project that included a draft Finding of No Significant Impact. On February 4, 2022 a virtual meeting was held at which the Applicant presented the Project to representatives of various State agencies. On March 18, 2022, NHDES received a final Application for § 401 Water Quality Certification (i.e., the Application) from the Applicant. The record for this Certification decision includes the information provided in the Application and the references in this Certification.
- C-62. In the draft EA for the Project that NHDES received from the Applicant on January 20, 2022, the Applicant provided a plan titled “Real Estate Plan” that showed, among other things, primary and secondary staging and storing areas for the Project that did not show any stone stockpile areas in waters of the state. In emails that NHDES received on March 8, 2022 and March 25, 2022, the Applicant provided NHDES with revised Real Estate Plans showing a 0.55-acre temporary stone stockpile area that would be located in an intertidal zone between the North Jetty and an existing, smaller jetty that is adjacent to the North Jetty. In those emails, the Applicant stated that a temporary stone stockpile area in the intertidal zone would only be used to store existing and new stone for the Project’s land-based work, and that storing stone in that area would reduce the Project’s impacts, such as compaction, to the dunes and beach of Hampton Beach State Park Project when compared to the Real Estate Plan provided in the draft EA.
- C-63. *Project Authority and History:* A jetty on the northern side of Hampton Harbor Inlet and at the general location of the Project was initially constructed by the State of New Hampshire in 1934 (see Introduction A). In 1965, the North Jetty was extended to a length of 1,000 feet as part of the original Hampton Harbor Federal Navigation Project that was authorized in 1964 under the continuing authority of Section 107 of the Rivers and Harbor Act of 1960. Repairs to the North Jetty extension occurred in 1981, 1987, and 2016.
- C-64. *401 Certification Public Comment Period:* NHDES issued a draft section 401 Water Quality Certification for public comment from April 1, 2022 to 4 p.m. on May 2, 2022.

D. FINDINGS

- D-1. The Applicant submitted an Application to NHDES for a §401 Water Quality Certification for the Project. The Application included a cover letter and references to a draft EA that NHDES received on January 20, 2022 (see Introduction A and Fact C-61).
- D-2. *Applicant’s Purpose for the Project:* The purpose of the Project is to restore full functionality of the North Jetty and increase the durability and longevity of the North Jetty by, among other reconstruction activities, widening the jetty, increasing armor stone size and thickness, and increasing the size of underlayer stone at certain locations of the North Jetty (see Introduction A and Fact C-61). The North Jetty reduces encroachment of sediment shoals into Hampton Harbor Inlet and provides protection for vessels entering and leaving Hampton Harbor and Seabrook Harbor, including vessels for commercial fishing, charter-fishing, and recreation (see Introduction A and Fact C-63). The North Jetty sustained damages from a vessel strike in 2016 and from various coastal storms, which have resulted in decreased

functionality of the jetty and an overall loss of protection of the navigation channels.

- D-3. *Applicant's Proposal:* The Project will involve repair and reconstruction of approximately 465 feet of the center section of the North Jetty, which is approximately 1,000 feet long. The Project will not alter existing crest height of the North Jetty, which is 12.3 feet at mean lower low water. The Project will increase the width at crest height from 5 feet or 8 feet to 10 feet using 6 ton to 10 ton armor stone with a side slopes of 1.5:1, increase the minimum thickness from one armor stone to two armor stones for an armor stone depth of approximately 9 feet, and include a 5-foot high toe constructed of underlayer stone that will extend the existing grade of seaward side of the North Jetty. The addition of stone on the seaward side of the North Jetty will result in the permanent conversion of approximately 6,576 square feet of sandy, subtidal habitat to stone; however approximately 2,600 square feet of this conversion has already occurred because of damage to the North Jetty (see Fact D-2). Work will take place from both land and water, and some of the work will occur below the surface of the water to the existing grade of the North Jetty and surrounding ocean floor. Work from the water will take place using a barge mounted crane or excavator, with stone being delivered from the mainland or by barge. Scouring equipment and barge anchoring spuds will impact the ocean floor and cause temporary increases in turbidity (see Finding D-17). The Applicant estimates that the Project will take approximately four months to complete, with marine-based work beginning no earlier than August 1, land-based work starting no earlier than September 15, and completion of all work by March 15.

CWA Section 401 WQC Required

- D-4. The surface waters where the Project will be located is the Atlantic Ocean. The surface waters in the vicinity of the Project are Hampton Harbor, Seabrook Harbor, and Hampton River. These surface waters are waters of the United States (see Facts C-8, C-10 and C-19).
- D-5. The Atlantic Ocean where the Project will be located, and Hampton Harbor, Seabrook Harbor, and Hampton River that will be in the vicinity of the Project, are surface waters of the state (see Fact C-19).
- D-6. The Project will or may include temporary and permanent discharges from point sources, including discharges of fill and discharges from mechanized equipment, to waters of the United States and surface waters of the state (see Facts C-5 through C-8, and Finding D-3).
- D-7. Because the Project will or may involve discharges from point sources, including discharges of fill and discharges from mechanized equipment, to waters of the United States and surface waters of New Hampshire, and because the U.S. Army Corps of Engineers is required to request a 401 Certification under 33 CFR § 338.2(c), citing 33 CFR § 336.1(b)(8), a 401 Certification is required from New Hampshire, (see Facts C-1, C-3, C-11, C-13, C-15 and Findings D-1, D-4, D-5, and D-6).
- D-8. NHDES is the authority (i.e., certifying authority) responsible for issuing 401 Certifications in New Hampshire (see Fact C-15).

State Authority for Certification Conditions, Modifications and Monitoring

- D-9. RSA 485-A:12,III (see Fact C-15) states the following: "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 [see Finding D-6]." Monitoring includes, but is not limited to, the following:
- Monitoring to determine compliance with conditions in this certification;
 - On-site inspections;

- Development, submission and implementation of monitoring plans;
- Analysis, preparation and submittal of reports summarizing monitoring results; and
- Notifying appropriate authorities in a timely manner when excursions from conditions in this certification occur.

Potentially Affected Surface Waters

D-10. NHDES has assigned Assessment Unit (AU) identification numbers to many, but not all, surface water waters in New Hampshire, with many surface waters divided into smaller segments based on their characteristics. The AUs for surface waters located within the vicinity of the Project are shown in the table below. Because these surface waters are located closest to the Project, the designated uses (see Fact C-24) in these surface waters have the most potential to be impacted by the Project.

Assessment Unit ID	Description
NHOCN000000000-02-18	Atlantic Ocean
NHOCN000000000-02-10	Atlantic Ocean – Hampton Beach State Park
NHOCN000000000-08-01	Atlantic Ocean – Seabrook Wastewater Treatment Plant Outfall
NHOCN000000000-08-03	Atlantic Ocean -Sun Valley Beach
NHEST600031004-09-09	Hampton/Seabrook Harbor
NHEST600031004-09-08	Hampton River Marina SZ

- D-11. New Hampshire surface water quality standards are summarized in Facts C-16 through C-48 and apply to all New Hampshire surface waters as defined in Fact C-19, including the potentially affected surface waters identified in Finding D-10.
- D-12. The surface waters potentially affected by the Project (Finding D-10) are classified as Class B (see Facts C-32 and C-48).
- D-13. The goal of Class B surface waters is to support the designated uses defined in Env-Wq 1702.17, which include swimming and recreation in and on the water, fish consumption, shellfish consumption (for tidal waters), aquatic life integrity, wildlife, and after adequate treatment as a water supply. Designated uses apply “...whether or not such uses are presently occurring” (Env-Wq 1702.17 –see Fact C-24).
- D-14. The Project is not within ¼ mile of a Designated River under the Designated Rivers Program (RSA 483, see Fact C-49). As such, the Project is not within the jurisdiction of the Designated Rivers Program.
- D-15. The surface waters in the vicinity of the Project are not an Outstanding Resource Water (Env-Wq 1708.04, see Fact C-46).

Existing Water Quality

D-16. *Current surface water quality assessment:* According to the 2020-2022 305(b)/303(d) lists of impaired

waters (Fact C-50), the following surface waters in the vicinity of the proposed Project are listed as impaired or marginally impaired for one or more of the following designated uses: aquatic life integrity; swimming and other recreation in an on the water; fish consumption; or shellfish consumption.

Assessment Unit (AU)	Waterbody Name	Cause of Impairment (Designated Use Impaired)
NHOCN000000000-02-18	Atlantic Ocean	Mercury (FC; SFC) Polychlorinated biphenyls (FC; SFC) Dioxin (SFC)
NHOCN000000000-02-10	Atlantic Ocean – Hampton Beach State Park	
NHOCN000000000-08-01	Atlantic Ocean – Seabrook Wastewater Treatment Plant Outfall	
NHOCN000000000-08-03	Atlantic Ocean -Sun Valley Beach	
NHEST600031004-09-09	Hampton/Seabrook Harbor	Mercury (FC; SFC) Polychlorinated biphenyls (FC; SFC) Dioxin (SFC) Fecal coliform (SFC) Aluminum (AL)* DDD (4,4') (AL)* Dieldrin (AL)* gamma-BHC (Lindane) (AL)* Trans-Nonachlor (AL)*
NHEST600031004-09-08	Hampton River Marina SZ	Mercury (FC; SFC) Polychlorinated biphenyls (FC; SFC) Dioxin (SFC) Fecal coliform (SFC) Enterococcus (PCR; SCR)
Notes: AL = Aquatic Life Integrity, PCR = Primary Contact Recreation, SCR = Secondary Contact Recreation, FC = Fish Consumption, SFC = Shellfish Consumption. Impairments and marginal impairments are on the Section 303(d) List. Bold font indicates that a Total Maximum Daily Load (TMDL) study has been conducted for that parameter. *Based on benthic sediment quality.		

When a surface water does not meet water quality standards (i.e., when it is impaired), the addition of pollutants causing or contributing to impairment should be avoided (see Fact C-51). NHDES does not anticipate the Project will cause a discharge to surface waters that would contribute to the impairments or marginal impairments that are listed in the table of this Finding.

Potential Impacts of the Project to Water Quality Standards

D-17. *Turbidity*: In its draft EA (see Fact C-61 see Finding D-1), the Applicant stated that Project construction may cause temporary resuspension of sandy sediments in the immediate vicinity of the Project. This

turbidity would be caused by mechanically placing and repositioning stones from sections of the North Jetty, placing and removing stones that would be temporarily stockpiled in the intertidal zone between the North Jetty and an existing jetty owned by the State of New Hampshire, scouring by barge hulls skimming along the top of the sediments during low tide, and placement of barge anchoring spuds. These activities may result in short-term elevated water column turbidities directly adjacent to the construction activities. Applicable turbidity criteria for the protection of the aquatic life integrity designated use (see Fact C-24) are provided in Env-Wq 1703.11(b) and (d) (see Fact C-40) and criteria for visible plumes that can be caused by turbidity are provided in Env-Wq 1703(c) (see Fact C-33) and Env-Wq 1703.12 (see Fact C-37). New Hampshire surface water quality standards also allow for mixing zones in Class B waters provided the minimum criteria in Env-Wq 1707.02 are met (see Facts C-27, C-43, and C-44). Increased suspended sediment levels caused by construction of the Project are expected to be of relatively short duration and to decrease rapidly with distance from the work area because the sediment material that will likely be impacted is sand, which settles relatively quickly. NHDES does not anticipate that increased turbidity caused by the Project will result in increased fecal coliform in the Project area (see Facts C-34, C-35, and C-56).

Conditions E-10 and E-11 will help ensure that discharges from Project construction activities will comply with New Hampshire surface water quality standards (see Finding D-11), including, but not limited to, criteria for turbidity (see Fact C-40) and visible plumes (see Facts C-33 and C-37) which help protect the aquatic life integrity designated use (see Fact C-24).

- D-18. *Eelgrass (Zostera marina)*: In its draft EA (see Fact C-61 see Finding D-1), the Applicant stated that it determined that no eelgrass grows adjacent to the North Jetty.

Condition E-11 will help ensure eelgrass impacts are minimized and that discharges from Project construction activities comply with criteria to protect the aquatic life integrity designated use of the New Hampshire surface water quality standards (see Fact C-24 and Finding D-11), which includes, but is not limited to, criteria for "Biological and Aquatic Community Integrity" (see Fact C-41).

- D-19. *Essential Fish Habitat*: In its draft EA (see Fact C-61 see Finding D-1), the Applicant stated that all impacts of the Project to EFH will be avoided and minimized to the extent practicable. The Project will impact EFH by causing temporary displacement of organisms, increases to turbidity, noise impacts, and the mortality of intertidal benthic resources in areas where rock is placed on top of existing substrate (see Finding D-3). Except for rock being permanently placed on existing substrate, the Applicant stated that these impacts will be temporary, highly localized, and minimal. The Applicant does not expect spawning and nursery habitat to exist in the Project area given the depths and condition of area, which is continually influenced by waves and currents. The functions of the North Jetty as habitat will return following construction activities. The Applicant provided EFH designations for the following species in the Project area: Atlantic cod (*Gadus morhua*); haddock (*Melanogrammus aeglefinus*); pollock (*Pollachius virens*); whiting (*Merluccius bilinearis*); white hake (*Urophycis tenuis*); red hake (*Urophycis chuss*); winter flounder (*Pseudopleuronectes americanus*); windowpane flounder (*Scophthalmus aquosus*); Atlantic sea herring (*Clupea harengus*); Atlantic wolffish (*Anarhichas lupus*); yellowtail flounder (*Pleuronectes ferruginea*); bluefin tuna (*Thunnus thynnus*); longfin inshore squid (*Dorytheuthis pealeii*); northern shortfin squid (*Illex illecebrosus*); Atlantic mackerel (*Scomber scombrus*); Atlantic butterfish (*Pepilus triacanthus*); Atlantic surf clam (*Spisula solidissima*); American plaice (*Hippoglossoides platessoides*); ocean pout (*Zoarces americanus*); witch flounder (*Glyptocephalus cynoglossus*); monkfish (*Lophius*); Atlantic sea scallop (*Placopecten magellanicus*); bluefish (*Pomatomus saltatrix*); spiny dogfish (*Squalus acanthias*); little skate (*Leucoraja erinacea*); and winter skate (*Leucoraja ocellata*). Although the Applicant stated that the Project area is within the Habitat Area of Particular Concern designated for inshore juvenile cod, the Applicant does not expect the Project to affect inshore juvenile cod because

the Project area lacks structurally complex rocky-bottom habitat areas that support emergent epifauna.

Conditions E-10 and E-11 will help ensure EFH is protected and that discharges from Project construction activities comply with criteria to protect the aquatic life integrity designated use of the New Hampshire surface water quality standards (see Fact C-24 and Finding D-11) , which includes, but is not limited to, criteria for “Biological and Aquatic Community Integrity” (see Fact C-41).

- D-20. *Wildlife*: In its draft EA (see Fact C-61 see Finding D-1), the Applicant stated that noise from the Project would cause wildlife, including fish, seals, and birds to be temporarily displaced from the Project area. Although resting and foraging habitat may be temporarily impacted by the Project, suitable resting and foraging habitat exists adjacent to the Project area.

Conditions E-10 and E-11 will help ensure that wildlife that is dependent on the aquatic resource is protected and that discharges from Project construction activities will comply with the wildlife designated use of the New Hampshire surface water quality standards (see Fact C-24 and Finding D-11)

- D-21. *Threatened and Endangered Species*: In its draft EA (see Fact C-61 see Finding D-1), the Applicant listed the following threatened or endangered species⁸ that could occur in the vicinity of the Project area: piping plover (*Charadrius melodus*); green sea turtle (*Chelonia mydas*); Atlantic Sturgeon (*Acipenser oxyrinchus oxyrinchus*); northern long-eared bat (*Myotis septentrionalis*); red knot (*Calidris canutus rufa*); kemp’s ridley sea turtle (*Lepidochelys kempii*); leatherback sea turtle (*Dermochelys coriacea*); loggerhead sea turtle (*Caretta caretta*); North Atlantic right whale (*Eubalaena glacialis*); Shortnose sturgeon (*Acipenser brevirostrum*); roseate tern (*Sterna dougallii dougallii*); Atlantic salmon (*Salmo salar*); and fin whale (*Balaenoptera physalus*). Impacts to those species could be displacement caused by Project construction. However, the species would have foraging habitat available along the coastal area and beach proximate to the Project. The Applicant stated that because the Project’s construction equipment will be stationary, and stones will be moved to the North Jetty from land or barges located immediately adjacent to the North Jetty, it is unlikely the equipment will strike marine species. The Applicant stated that temporary increases to turbidity (see Finding D-17) will have limited to no effect on the species because the Applicant expects disturbed sand to settle rapidly. The Applicant plans to conduct land-based work from September 15 to March 15 to help protect piping plover (see Fact C-53 and Finding D-23), which return to their breeding grounds from late March and early April, and their nesting season may extend into late August.

Conditions E-10 and E-11 will help ensure that federal and state threatened and endangered species are protected and that discharges from Project construction activities comply with criteria to protect the aquatic life integrity and wildlife designated uses of the New Hampshire surface water quality standards (see Fact C-24 and Finding D-11) , which includes, but is not limited to, criteria for “Biological and Aquatic Community Integrity” (see Fact C-41).

- D-22. *Benthic Community and Shellfish*: In its draft EA (see Fact C-61 see Finding D-1), the Applicant stated that the sandy bottom habitat surrounding the North Jetty could contain the following species based on samples collect in areas of Seabrook Harbor and Hampton Harbor in 2018: *Acanthohaustorius intermedius*; *Ampelisca vadorum*; *Caprella* sp.; *Leptocheilia savigny*; *Oxyurostlus smithii*; *Macoma balthica*; *Tellina agilis*; *Aricidea catherinae*; Unidentified Oligochaete sp.; *Glycera americana*; *Nephtys ciliate*; *Paraonis fulgens*; *Scolecopsis squamata*; *Nassarius trivittatus*. In 2009, NHDES identified a population of surf clams (*Spisula solidissima*) immediately north of the Project area. Lobsters (*Homarus*

⁸ As designated under the federal Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*; or the New Hampshire Endangered Species Conservation Act of 1979, Title XVIII: Fish and Game, Chapter 212-A.

americanus) are known to be present in the vicinity of the Project area. The Applicant stated that benthic and shellfish resources will be minimally impacted by turbidity (see Finding D-17) during Project construction and could suffer mortality by movement and placement of stone on substrate and sandy bottom habitat (see Finding D-3). After construction is complete, benthic and shellfish resources are expected to return to pre-construction conditions. NHDES conducts shellfish monitoring in the vicinity of the Project. In the Application (see Fact C-61 see Finding D-1) and in an email to NHDES (see Fact C-55), the Applicant stated the Project would not impact NHDES' ability to access shellfish monitoring locations. The Applicant also stated that the Project would not impact a general area that is immediately north of the Project area where surf clams are harvested by the public and NHDES.

Conditions E-10 and E-11 will help ensure that the benthic community is adequately protected and that discharges from Project construction activities comply with criteria to protect the aquatic life integrity designated use of the New Hampshire surface water quality standards (see Fact C-24 and Finding D-11), which includes, but is not limited to, criteria for "Biological and Aquatic Community Integrity" and "Benthic Deposits" (see Facts C-34 and C-41).

D-23. *Actions Taken to Minimize Adverse Impacts:* In its draft EA (see Fact C-61 see Finding D-1), the Applicant stated the following actions, among others, will be taken to minimize impacts from the Project:

- Project equipment will remain within the area immediately adjacent to the North Jetty;
- Marine based work may begin August 1 while land-based work will be restricted to a September 15 to March 15 construction window in order to protect the Federally threatened piping plover and to minimize impacts to recreational activities that occur in the vicinity of the Project (see Fact C-53 and Finding D-21); and
- The contractor will be required to place compaction mats along the beach access route to the base of the jetty in order to prevent compaction of existing beach sand.

In the Application (see Fact C-61 see Finding D-1), the Applicant stated the Project will not limit navigation of vessels through established channels. In its draft EA (see Fact C-61 see Finding D-1), the Applicant stated that it when equipment is not in use, it would store that equipment outside of the intertidal zone.

Condition E-10 includes the actions in this Finding to help ensure that that discharges from Project construction activities comply with the swimming and other recreation in and on the water designated use (which includes boating) and criteria to protect the aquatic life integrity designated use of the New Hampshire surface water quality standards (see Fact C-24 and Finding D-11), which includes, but is not limited to, criteria for "Biological and Aquatic Community Integrity" (see Fact C-41).

D-24. *Antidegradation:* In the Application (see Fact C-61 see Finding D-1), the Applicant stated the Project will not contribute to pollutant loading and not adversely affect water quality. Given that implementation of the Project is short-term (i.e., estimated to take approximately four months), the Project involves repair and reconstruction of an existing jetty, and the area of surface water and sediment impacted is very small relative to the total area of the resource in the area, NHDES finds that the Project is "insignificant" in accordance with Env-Wq 1708.09(c) (See Fact C-45g). For insignificant determinations, Env-Wq 1708.01(b)(2)c. prohibits NHDES from approving "any proposed discharge or activity that might cause degradation or lower water quality, without such conditions as are necessary to ensure that:[..] All cost effective and reasonable best management practices for nonpoint source control will be implemented" (See Fact C-45i). Best management practices are defined in Env-Wq 1702.07 (see Fact C-22).

Pending information to suggest otherwise, the best management practices that are necessary to satisfy the conditions in section E of this certification are expected to be sufficient to satisfy the definition of

best management practices (see Fact C-22).

Notification Procedure Plan

D-25. The Applicant should develop a notification procedure plan that outlines the reporting process to NHDES for incidents related to the Project that may adversely impact surrounding resource areas beyond those temporary and permanent impacts described in the Application (see Finding D-1). Examples include observed dead or distressed fish or other aquatic organisms, loss or damage to eelgrass that was not anticipated by the Applicant in the draft EA (see Finding D-18), placement of sediment or stone outside of any areas described in the Application, observed oily sheens on the water surface, turbidity plumes observed beyond deployed best management practices or beyond the immediate vicinity of Project construction activities, and accidental spills associated with equipment failure. If at any time during implementation of the Project an incident creates environmental impacts such as those listed above, all site related activities impacting the water should cease until the source of the problem is identified and adequate mitigating measures are employed.

Condition E-11 addresses this Finding as it will help ensure that discharges from Project construction activities comply with criteria to protect the aquatic life integrity designated use of the New Hampshire surface water quality standards (see Fact C-24 and Finding D-11) , which includes, but is not limited to, criteria for “Biological and Aquatic Community Integrity” (see Fact C-41).

E. CERTIFICATION CONDITIONS

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

E-1. **Effective Date and Expiration of Certification:** This Certification shall become effective on the date of issuance and shall remain effective during the duration of the Project.

(For an explanation and citations, see Finding D-9.)

E-2. **Compliance with Water Quality Standards:** The Project shall not cause or contribute to a violation of New Hampshire surface water quality standards.

(For an explanation and citations, see Facts C-15 through C-48 and C-51 and Finding D-9.)

E-3. **Proposed Modifications to the Project:** The Applicant shall consult with and receive prior written approval from NHDES regarding any proposed modifications to the Project that could have a significant or material effect on the findings or conditions of this certification, including any changes to operation of the Project. If necessary, to ensure compliance with New Hampshire surface water quality standards and associated management objectives, NHDES may alter or amend this certification in accordance with condition E-4.

(For an explanation and citations, see Fact C-15 and Finding D-9.)

E-4. **Modification of Certification:** The conditions of this certification may be altered or amended at any time by NHDES to ensure compliance with New Hampshire surface water quality standards and associated management objectives, when authorized by law, and, if necessary, after notice and opportunity for hearing.

(For an explanation and citations, see Fact C-15 and Finding D-9.)

- E-5. **Compliance Inspections:** In accordance with applicable laws, the Applicant shall allow NHDES to inspect the Project and affected surface water to monitor compliance with the conditions of this certification, including, but not limited to, collection of water samples to verify low fecal coliform in the Project area.

(For an explanation and citations, see Facts C-15 and C-56, and Findings D-9 and D-17.)

- E-6. **Transfer of Certification:** Should this certification be transferred to a new owner, contact information for the new owner (including name, address, phone number and email) shall be provided to NHDES within 30 days of the transfer.

(For an explanation and citations, see Fact C-15 and Finding D-9.)

- E-7. **EFH and ESA Consultation:** Unless otherwise authorized or directed by NOAA, the Applicant shall
- a. reinstate distinct and further consultation with NOAA regarding EFH if new information becomes available or the Project is revised in such a manner that affects the basis for NOAA's recommendations included in its Federal Interagency Comment Form, dated December 15, 2021; and
 - b. consult with NOAA pursuant to Section 7 of the Endangered Species Act (ESA) of 1973.

(For an explanation and citations, see Facts C-15, C-54 and C-57 and Findings D-9, D-19D-19, D-20, and D-21.)

- E-8. **CZMA Finding and Conditions:** Prior to implementing the Project, the Applicant shall obtain a written finding from NHDES NHCP that the Project, as proposed, complies with the enforceable policies of New Hampshire's approved coastal management program. If NHCP bases its decision on certain conditions, the Applicant shall comply with those conditions.

(For an explanation and citations, see Fact C-58 and Finding D-9)

- E-9. **Notification to Natural Resource Agencies:** Unless otherwise authorized or directed by NHDES, the Applicant shall notify NHDES, NHFGD, NHDNCR and NOAA via email at least 72 hours prior to when construction is scheduled to begin.

(For an explanation and citations, see Facts C-15 and C-52 and Finding D-9.)

- E-10. **Construction Activities:** Unless otherwise authorized or directed by NHDES in writing, the Applicant shall:
- a. implement the Project in accordance with information provided in the Application, including, but not limited to, starting marine-based work no earlier than August 1, starting land-based work no earlier than September 15, and completing all work by March 15;
 - b. ensure that construction activities do not interfere with vessel traffic;
 - c. not impact the general area that is immediately north of the Project area where surf clams are harvested by the public and NHDES, not impact the seawater sampling location and an access point that are used by NHDES' Shellfish Program and are in the vicinity of the Project area, and, as necessary, coordinate with NHDES for NHDES to use the southernmost access point of Hampton Beach State Park to access sampling locations;

- d. store Project equipment outside the intertidal zone when the equipment is not in use, and remove all project equipment from the Project area as soon as possible after completion of construction;
- e. implement the Project in accordance with the Real Estate Plan for the Project that the Applicant submitted to NHDES on March 25, 2022, including, but not limited to, using a 0.55-acre area that would be used for the Project's land-based work to temporarily stockpile stone, and returning that area to conditions that existed prior to starting the Project;
- f. not exceed turbidity criteria or cause persistent visible plumes that extend beyond the immediate vicinity of the Project construction activities, and shall minimize turbidity by limiting scouring by barge hulls and placement of barge anchoring spuds, and by limiting the movement of stone in the intertidal zone, to the extent practicable;
- g. maintain daily records of visual observations and photographs of any persistent visible plumes that extend beyond the immediate vicinity of the Project construction activities for submission to NHDES within 24 hours of receiving a request and, if directed by NHDES in writing because turbidity is considered excessive, cease all work that is causing the excessive turbidity until a plan is submitted to NHDES for approval that describes how turbidity can be further reduced and monitored, and the approved plan is implemented;
- h. ensure there is no discharge of oil to surface waters from equipment used during the Project; and
- i. properly contain any trash associated with the Project so as not to attract predatory gulls or result in litter in the surface water.

(For an explanation and citations, see Facts C-15, C-33, C-37 through C-40, C-53, C-55, and C-60 through C-62 and Findings D-1, D-6, D-9, D-17, D-22, and D-23.)

- E-11. **Notification Procedure for Adverse Impacts:** At least 15 days prior to start of the Project, the Applicant shall submit a notification procedure outlining the reporting process to NHDES for incidents related to the Project that may adversely impact surrounding resource areas and habitats including, but not limited to, observed dead or distressed fish or other aquatic organisms, loss or damage to eelgrass that was not anticipated by the Applicant in the draft EA, placement of sediment or stone outside of any areas described in the Application, observed oily sheens on the water surface, turbidity plumes observed beyond deployed best management practices or beyond the immediate vicinity of Project construction activities, and accidental spills associated with equipment failure. If at any time during implementation of the Project an incident creates environmental impacts such as those listed above, all site related activities impacting the water shall cease until the source of the problem is identified and adequate mitigating measures are employed to the satisfaction of NHDES.

(For an explanation and citations, see Fact C-15 and C-51 and Findings D-6, D-9, D-17 through D-22 and D-25.)

F. ENFORCEMENT

Certification conditions are subject to enforcement mechanisms available to the state of New Hampshire.

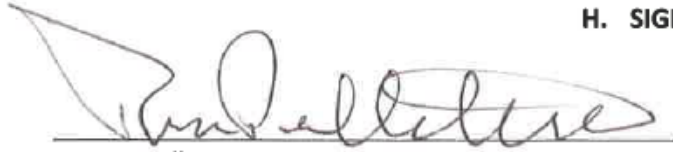
G. APPEAL PROCEDURE

Any person aggrieved by this decision may appeal to the N.H. Water Council ("Council"). An Environmental Fact Sheet with information on appealing a decision of the N.H. Department of Environmental Services can be found at the following link: [CO-7 \(nh.gov\)](https://www.nh.gov/CO-7). A link to the Council's rules, is available on the [New Hampshire](https://www.nh.gov/New-Hampshire)

[Environmental Council website](#) (or more directly at the [Water Council page](#)). Copies of the rules also are available from the NHDES Public Information Center at [\(603\) 271-2975](tel:603-271-2975).

If you have questions regarding this certification, please contact James Tilley at [\(603\) 271-0699](tel:603-271-0699) or james.tilley@des.nh.gov.

H. SIGNATURE & DATE



Rene J. Pelletier, P.G., Director
NHDES Water Division

5/18/22
Date

ec:

Elizabeth Waterhouse (USACE)
Coral Siligato (USACE)
Joseph Mackay (USACE)
Kaitlyn Shaw (NOAA)
Cheri Patterson (NHFGD)
Michael Dionne (NHFGD)
Brendan Clifford (NHFGD)

Seth Prescott (NHDNCR)
Phillip Bryce (NHDNCR)
Meredith Collins (NHDNCR)
Ted Diers (NHDES)
Gregg Comstock (NHDES)
Chris Williams (NHDES)
Chris Nash (NHDES)
Eben Lewis (NHDES)