

New Hampshire Department of Environmental Services
Response to Comments
Water Quality Certification No. 2022-404P-001
U.S. Army Corps of Engineers General Permit No: NAE-2022-00849 for New Hampshire
August 2, 2022

From June 23, 2022 to 4pm on July 28, 2022, the New Hampshire Department of Environmental Services (NHDES) posted for public comment draft Water Quality Certification No. 2022-404P-001 (the Certification) for the general permits described in U.S. Army Corps of Engineers (USACE) General Permit No: NAE-2022-00849 for New Hampshire (the General Permits). The Certification is required under NH RSA 485-A:12, III to provide assurance that discharges to surface waters that may result from activities authorized by the General Permits would comply with applicable surface water quality standards. On August 2, 2022, NHDES issued with conditions the final Certification to USACE for the General Permits. During the public comment period, NHDES only received comments from the New Hampshire Department of Transportation (NHDOT). In this document, NHDES lists the comments that NHDES received and provides responses to those comments. In some cases, NHDES has paraphrased the comments it received. In addition, NHDES describes changes that NHDES made to the Certification because of some of those comments and other changes that NHDES made to the Certification after the public comment period.

A copy of the original comments and a marked-up version of the draft Certification showing all changes to the Certification may be obtained from NHDES upon request by contacting James Tilley, Supervisor of the NHDES Water Quality Certification Program, at (603) 271-0699 or james.w.tilley@des.nh.gov.

Responses To Comments

A. Comments from the NHDOT

Comment A.1:

B. DECISION

40 CFR 121.7(a) and (b) outline a certifying authority's actions with respect to a request for Section 401 certification ("Grant," "Grant with Conditions," "Waive," or "Deny"). The WQC does not use any of these terms when identifying the Department of Environmental Services' (NHDES) action. While seemingly minor, the WQC uses the term "issues," which could introduce uncertainty as NHDES "issues" permits in other program areas; and the WQC is not a permit. A more accurate description of the WQC would be: "*...NHDES hereby grants with conditions this Certification...*".

Changes made: NHDES replaced "issues" with "grants" in the following sentence of section B. DECISION of the Certification [changes to the Certification are shown in ***bold italics***]: "Accordingly, NHDES hereby ***issues grants*** this Certification subject to the conditions in section E of this Certification, in accordance with section 401 of the CWA [Clean Water Act] (33 U.S.C. 1341) and NH RSA 485-A:12, III."

NHDES Response: On July 13, 2020, the U.S. Environmental Protection Agency (EPA) published [40 Code of Federal Regulations \(CFR\) Part 121 - State Certification of Activities Requiring a Federal License or Permit](#) to update and clarify the substantive and procedural requirements for water quality certification under section 401 of the Clean Water Act.¹ The rule became effective on

¹ U.S. National Archives website address: <https://www.ecfr.gov/current/title-40/chapter-I/subchapter-D/part-121>.

New Hampshire Department of Environmental Services
Response to Comments
Water Quality Certification No. 2022-404P-001
U.S. Army Corps of Engineers General Permit No: NAE-2022-00849 for New Hampshire
August 2, 2022

September 11, 2020. Under 40 CFR §121.7, EPA more often uses the term “grant” (used five times) instead of “issue” (used one time) when referring to approval of a request for certification.

Comment A.2

C. FACTS AND LAWS, Federal Certification Law, and Regulations

The DRAFT WQC 2022-404P-001 fails to cite 40 CFR Part 121 (the ‘2020 Rule’ which is now in effect). The 2020 Rule is the enabling regulation that implements Section 401 of the Clean Water Act (CWA) and must be followed for a federal license or permit to be authorized. Citing it, and referencing its requirements for certification, are fundamental to issuance and implementation of the WQC.

Changes made: NHDES added the following paragraph at C-3 of section C. FACTS AND LAWS of the Certification: “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 these regulations in the Federal Register (Vol. 85, No. 134, pages 42210 to 42287), which became effective on September 11, 2020.”

NHDES Response: Neither 40 CFR 121 nor [NH RSA 485-A:12](#), III require NHDES to reference provisions of 40 CFR 121 in the Certification.^{1, 2} NHDES acknowledges that 40 CFR 121 nor NH RSA 485-A:12, III require NHDES to include certain information in the Certification. NHDES agrees with the commenter that it is appropriate for NHDES to reference 40 CFR Part 121 in the Certification and, therefore, made changes to the Certification to generally reference 40 CFR 121 in the Certification. NHDES chose not to reference specific requirements of 40 CFR Part 121 to avoid inconsistencies and confusion that may result from adoption of [proposed changes to 40 CFR 121 that EPA published in the Federal Register on June 9, 2022](#) (Volume 87, Number 111, pages 35318 to 35381) during the effective period of the General Permits.³ The Certification will be incorporated into the General Permits, which, as proposed by USACE, will be effective for approximately five years from the date the General Permits are issued. If EPA publishes final revisions to 40 CFR 121 during the effective period of the General Permits, then the Certification would not conflict with specific requirements of 40 CFR 121 because the Certification does not reference specific requirements of 40 CFR 121.

Comment A.3

E. CERTIFICATION CONDITIONS

Conditions E-1, E-2, portions of E-3, E-4 and E-5 are more accurately described as statements of compliance with existing laws and regulations, are independent of implementation of this WQC, and as such are more appropriately located in the **FINDINGS** section of the WQC.

² General Court of New Hampshire website address: <http://www.gencourt.state.nh.us/rsa/html/L/485-A/485-A-12.htm>.

³ U.S. National Archives website address: <https://www.federalregister.gov/documents/2022/06/09/2022-12209/clean-water-act-section-401-water-quality-certification-improvement-rule>.

New Hampshire Department of Environmental Services
Response to Comments
Water Quality Certification No. 2022-404P-001
U.S. Army Corps of Engineers General Permit No: NAE-2022-00849 for New Hampshire
August 2, 2022

Changes made: NHDES made the following change to Condition E-1 of the Certification (changes to the Certification are shown in **bold italics**): “Compliance with Certification Conditions: Construction and operation of all projects associated with Activities authorized by the GPs shall comply with **the conditions of** this Certification.”

NHDES Response: Although NHDES agrees with the commenter that some of the conditions of the Certification include statements of compliance with existing laws and regulations, which provide the basis for the conditions, NHDES does not agree that the conditions are independent of implementation of the Certification and more appropriately located in the section D. FINDINGS of the Certification.

NHDES provides the language of NH RSA 485-A:12, III in paragraph C-9 of section C. FACTS AND LAWS of the Certification: “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.”

Condition E-1 requires construction and operation of all projects associated with activities authorized by the General Permits to comply with the conditions of the Certification, and Condition E-5 authorizes NHDES to conduct inspections to monitor compliance with those conditions. NHDES included these conditions in the Certification because neither NH RSA 485-A:12, III nor any other state law or rule explicitly require compliance with conditions of a water quality certification or authorize NHDES to conduct inspections to monitor compliance with those conditions. Since NHDES determined that Conditions E-1 and E-5 are necessary to provide assurance that discharges that may or would result from Activities authorized by the General Permits, NHDES is obligated under NH RSA 485-A:12, III to include all portions of those conditions in section E. CERTIFICATION CONDITIONS rather than section D. FINDINGS of the Certification.

Under 40 CFR §121.10(a), “[a]ll certification conditions that satisfy the requirements of § 121.7(d) shall be incorporated into the license or permit.” By including Conditions E-1 through E-5 in the Certification, USACE may enforce conditions of the Certification subject to 40 CFR §121.10(a) under the authority of 40 CFR §121.11(c), which states, “[t]he Federal agency shall be responsible for enforcing certification conditions that are incorporated into a federal license or permit.” If NHDES relocated portions of those conditions from section E. CERTIFICATION CONDITIONS to D. FINDINGS of the Certification, USACE would not have the authority to enforce those conditions under 40 CFR §121.11(c). For example, USACE would not be able to enforce compliance with New Hampshire’s

New Hampshire Department of Environmental Services
Response to Comments
Water Quality Certification No. 2022-404P-001
U.S. Army Corps of Engineers General Permit No: NAE-2022-00849 for New Hampshire
August 2, 2022

surface water quality standards if NHDES did not include Condition E-2 in the Certification. Although certain conditions of the Certification may include statements of compliance with existing laws and regulations that are subject to enforcement by NHDES or other regulatory agencies, conditions that are incorporated into USACE's permit provide USACE with a separate authority to enforce the conditions under 40 CFR 121.11(c) that is independent of the laws or regulations that provide the basis for those conditions. Therefore, NHDES asserts that all portions of Conditions E-1 through E-5 are more appropriately included in section E. CERTIFICATION CONDITIONS rather than section D. FINDINGS of the Certification.

NH RSA 485-A:12, III provides NHDES with the authority to enforce the Certification under RSA 485-A:22. Although NHDES is required to provide its response for certification to the Federal agency responsible for issuing the permit, and the Federal agency is required to incorporate certain conditions of the certification into license or permit under 40 CFR §121.10(a) and the Federal agency is responsible for enforcing the license or permit under 40 CFR §121.11(c), NHDES may separately enforce the Certification under NH RSA 485-A:12, III. NHDES acknowledges that it cannot enforce conditions of the Certification under federal law, regulation, license, or permit. When EPA published [final revisions to 40 CFR 121 in the Federal Register](#) (Vol. 85, No. 134, pages 42210 to 42287) on July 13, 2020, EPA asserted 40 CFR 121 does not preclude or preempt a State's enforcement authority.⁴

For example, under section III.K.2.a of that publication (page 42276), EPA stated the following:

"The Agency recognizes that some States have enacted State laws authorizing State enforcement of certifications or certification conditions in State court. State enforcement under State authorities may be lawful where State authority is not preempted by federal law. **Nothing in this final rule prohibits States from exercising their enforcement authority under enacted State laws**; however, the legality of such enforcement actions may be subject to review by a court of competent jurisdiction. Therefore, today's rule does not implicate, let alone violate, the reservation of state authority contained in section 510 of the Act. [emphasis added]"

EPA also stated the following under II.F.6.a of that publication (page 42225):

"Some commenters asserted the proposed rule would violate the Tenth Amendment, citing the sovereignty that States have over waters of the United States. One commenter asserted that jurisdictional power over waters of the State was reserved for the States and not delegated to Congress. Another commenter asserted that the proposal would constitute a [']usurping['] of State authority and overstepping the Tenth Amendment rights of the States. The EPA disagrees with these commenters. For the reasons set forth in section II.F.1 of this notice and in the following paragraph, the Agency considers this final rule to be a careful and thoughtful clarification of State and Tribal involvement in federal licensing or permitting proceedings, including those in which State and Tribal authority may otherwise be preempted by federal law. **The final rule does not "usurp" State authority.** As discussed, the EPA's final rule is consistent with section 401, strikes the appropriate balance Congress intended between federal and State authority, and does

⁴ U.S. National Archives website address: <https://www.federalregister.gov/documents/2020/07/13/2020-12081/clean-water-act-section-401-certification-rule>.

New Hampshire Department of Environmental Services
Response to Comments
Water Quality Certification No. 2022-404P-001
U.S. Army Corps of Engineers General Permit No: NAE-2022-00849 for New Hampshire
August 2, 2022

not limit State authority any more than Congress intended under section 401. [...] ***This final rule neither directs the functioning of the States nor commands States how to legislate or regulate.*** The final rule merely affirms and clarifies the scope of the authority that Congress granted to certifying authorities to review and condition a federal license or permit within certain reasonable bounds, informed by the text of the Act, and provides a procedural framework for States, Tribes, and federal agencies to follow that will promote consistency in 401 certification proceedings. [emphasis added]”

NHDES’ separate authority to enforce conditions of the Certification provides additional assurance that the discharges that may result from proposed activities authorized by the General Permits will comply with applicable surface water quality standards. NHDES acknowledges that separate State laws may already provide NHDES with the authority to enforce certain requirements contained within the conditions. For example, Condition E-4 requires an activity authorized by the General Permits to obtain and comply with other applicable permits and approvals related to the activity, including permits issued by the NHDES Wetlands Bureau and NHDES Alteration of Terrain Bureau, which NHDES already has enforcement authority under NH RSAs separate from NH RSA 485:12, III. In these situations, Condition E-4 not only provides USACE with enforcement authority of those permits and approvals once the condition is incorporated into the General Permits, it also provides NHDES with another mechanism by which to conduct enforcement of those permits and approvals required for the activities. In situations where NHDES would otherwise not have statutory authority to require activities to obtain and comply with other permits and approvals required for an activity, Condition E-4 provides NHDES with that enforcement authority. Conditions E-1 through Conditions E-5 provide NHDES with a somewhat centralized State authority to provide assurance that activities authorized by the General Permits will comply with applicable surface water quality standards.

NHDES provides additional responses to this comment as it relates to Condition E-3 of the Certification under Comment A.4., below.

As described above, NHDES determined that all portions of Conditions E-1 through E-5 of the Certification are necessary to provide assurance that discharges that may result from activities authorized under the General Permits will comply with applicable surface water quality standards specified in NH RSA 485-A:8 and NH Code of Administrative Rules Env-Wq 1700. Therefore, under NH RSA 485-A:12, III, NHDES is required to include all portions of those conditions in section E. CERTIFICATION CONDITIONS rather than section D. FINDINGS of the Certification.

Comment A.4

As drafted, condition E-3 contains two findings and a Section 401 reopener clause, which is contrary to the CWA and 40 CFR Part 121, as discussed below.

The first part of the Condition reads like a finding.

New Hampshire Department of Environmental Services
Response to Comments
Water Quality Certification No. 2022-404P-001
U.S. Army Corps of Engineers General Permit No: NAE-2022-00849 for New Hampshire
August 2, 2022

“NHDES Review of Specific Projects and Addition of Conditions: *Projects described in applications for GPs shall be subject to NHDES review to determine if additional conditions on, modifications to, or monitoring of a proposed project are necessary to provide assurance that the project would comply with Surface Water Quality Standards. If NHDES determines that additional conditions on, modifications to, or monitoring of a proposed project are necessary, NHDES may include additional conditions in other NHDES permits, when authorized by law, such as permits issued by the NHDES Wetlands Bureau or the NHDES Alteration of Terrain Bureau, or request that the USACE include certain special conditions in the applicable GP(s) that would provide assurance that the project would comply with Surface Water Quality Standards...”*

The strike out portion of the above is a “reopener clause.” As such, it violates 40 CFR 121.7(a) requiring that the WQC... *be completed within the reasonable period of time...* The rationale as to why this cannot be included in any WQC condition is described in the Summary of Final Rule Rationale and Public Comment in section 2.L.1 of the 2020 Rule (p. 42278), which states, in part: *“...the final rule does not authorize or include any procedure for certifying authorities to modify certifications after issuance...[and] there are other established procedures that certifying authorities may rely on to address modifications, should the need arise...[and Section] 401 does not provide authority for a certifying authority to unilaterally modify a certification, either through certification conditions that purport to authorize the certification in the future or through any other mechanism.”* Moreover, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (USACE) issued joint guidance here: https://www.epa.gov/system/files/documents/2021-08/8-19-21-joint-epa-army-memo-on-cwa-401-implementation_508.pdf limiting the reasonable period of time.

The remainder of Condition E-3 would read as a finding, after appropriate revision, as it is rather a statement of compliance with existing laws and regulations.

*If NHDES determines that an individual Certification instead of this Certification is necessary to does not provide assurance that a proposed project would comply with Surface Water Quality Standards, NHDES will notify the USACE of that determination and request that the USACE use its discretionary authority to elevate the proposed project and require that the project proponent to apply for and obtain an individual permit for the project from the USACE in accordance with 33 CFR 325.2(e)(2). If the USACE decides to override the relevant GP(s) and require the project proponent to apply for and obtain an individual permit for the project, the USACE will notify the project proponent and NHDES of that decision, which would require the project proponent to request and obtain an individual Certification from NHDES **for that individual permit.***

Changes made: NHDES made the following change to Condition E-3 of the Certification (changes to the Certification are shown in **bold italics**): “Projects described in applications for GPs shall be **coordinated with** ~~subject to~~ NHDES. ~~review to determine if additional conditions on, modifications to, or monitoring of a proposed project are necessary to provide assurance that the project would comply with Surface Water Quality Standards.~~ If NHDES determines that additional conditions ~~on,~~ modifications ~~to,~~ or monitoring of a proposed project are necessary **to provide assurance that a**

project would comply with Surface Water Quality Standards, NHDES may include additional conditions in other NHDES permits, when ***applicable to the project and*** authorized by law, such as permits issued by the NHDES Wetlands Bureau or the NHDES Alteration of Terrain Bureau., ***or NHDES may*** request that the USACE include certain special conditions in the applicable GP ***authorizations.***~~***(s) that would provide assurance that the project would comply with Surface Water Quality Standards.***~~ If NHDES believes ***determines*** that an individual Certification ***instead of this Certification*** is necessary ~~***to provide assurance that a proposed project would comply with Surface Water Quality Standards,***~~ NHDES ***may will notify request the USACE of that determination and request*** that the USACE use its discretionary authority ***pursuant to 33 CFR §325.2(e)(2), which would to elevate the proposed project and*** require that the project proponent to ***apply for and obtain an individual permit and individual Certification for the project from the USACE in accordance with 33 CFR §325.2(e)(2).*** ~~***If the USACE decides to override the relevant GP(s) and require the project proponent to apply for and obtain an individual permit for the project, the USACE will notify the project proponent and NHDES of that decision, which would require the project proponent to request and obtain an individual Certification from NHDES. The USACE will independently evaluate any requested conditions or use of discretionary authority (if received before a decision is rendered) and determine whether these will be required to ensure the project will result in no more than minimal individual or cumulative adverse effects on the aquatic environment or be contrary to the public interest.***~~

NHDES Response: NHDES made changes to Condition E-3 based on comments it received from the commenter and further consultation with USACE about those comments. NHDES does not agree with the commenter that the addition of special conditions in a GP is a “reopener clause” and therefore violates 40 CFR §121.7(a). NHDES would only request that USACE use its permitting authority to add special conditions to a general permit when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest requirement. USACE’s permitting authority to add special conditions to the General Permits is independent and separate from the certification authorities provided to NHDES (i.e., the certifying authority) under 40 CFR Part 121.

Other Differences Between The Final and Draft Certification

In addition to the revisions noted in the above, other changes made to the final Certification since the draft Certification was issued for public notice are not considered substantive. Examples include minor format revisions, grammatical corrections, updating cross-references, removing the word “DRAFT” in the header and watermark, changing the “Decision” status on the first page from “Pending” to “Granted with Conditions”, adding a date of issuance and signature, adding a header and page numbers to Appendix A, etc.