

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

Certification Number	WQC 2022-404P-001
Activity Name	U.S. Army Corps of Engineers General Permit No: NAE-2022-00849 for New Hampshire
Activity Location	State of New Hampshire
Potentially Affected Surface Waters	Waters of the United States in the State of New Hampshire
Owner/Applicant	U.S. Army Corps of Engineers, New England District
Agent Filing Application on Behalf of Owner/Applicant	Frank J. DelGiudice Chief, Chief, Permits & Enforcement Branch C, Regulatory Division U.S. Army Corps of Engineers, New England District 696 Virginia Road Concord, MA 01742-2751
Applicable Federal Law and Regulation Requiring Water Quality Certification	See Facts C-1, C-3, and C-7 regarding federal law and regulation that require the U.S. Army Corps of Engineers to obtain a water quality certification under section 401 of the Clean Water Act.
Decision (subject to Conditions below)	August 2, 2022
Date of Issuance	August 2, 2022

A. INTRODUCTION

The U.S. Army Corps of Engineers, New England District (the USACE), seeks a Water Quality Certification (WQC or Certification) under section 401 of the Clean Water Act (CWA) from the New Hampshire Department of Environmental Services (NHDES) for 23 general permits (GPs) that would be issued as General Permit No: NAE-2022-00849 under section 404 of the CWA or section 10 of the Rivers and Harbors Act. The GPs authorize activities in New Hampshire that are subject to the USACE's jurisdiction and have no more than minimum individual and cumulative adverse impacts in waters of the United States and ocean waters adjacent to the seaward limit of the outer continental shelf (Activities). The intent of the GPs is to expedite the review of the Activities and simplify the permit application review processes for the USACE and NHDES Wetlands Bureau, as the permit review processes are very similar relative to federal and state statutory authority. The GPs would replace the existing general permits under General Permit No. NAE-2016-02415 that the USACE issued in 2017 that is due to expire on August 18, 2022. The GPs authorized under General Permit No: NAE-2022-00849 would be effective for approximately five years.

This Certification documents laws, regulations, determinations and conditions related to the GPs for the attainment and maintenance of New Hampshire surface water quality standards that are provided in NH RSA 485-A:8 and NH Code of Administrative Rules Env-Wq 1700 (Surface Water Quality Standards) to protect and restore the designated uses identified in the Surface Water Quality Standards.

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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 discharges that would or may result from the Activities covered by the GPs will comply with Surface Water Quality Standards. Accordingly, NHDES hereby grants this Certification subject to the conditions in section E of this Certification, in accordance with section 401 of the CWA (33 U.S.C. 1341) and NH RSA 485-A:12, III.

C. FACTS AND LAWS

Federal Certification Law and Regulation

- C-1. Section 401(a)(1) of the CWA states in part: “Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate [...] that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title. [...] No license or permit shall be granted until the certification required by this section has been obtained or has been waived [...] No license or permit shall be granted if certification has been denied by the State [...].”
- C-2. Section 401(d) of the CWA states in part: “Any certification provided under this section [401] shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with [enumerated provisions of the CWA] and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.”
- 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 these regulations in the Federal Register (Vol. 85, No. 134, pages 42210 to 42287), which became effective on September 11, 2020.
- C-4. The term “discharge,” as applied under section 401 of the CWA means the potential for a discharge. It does not need to be a certainty, only that it may occur should the federal license or permit be granted.

Further, the discharge does not need to involve the addition of pollutants (such as water released from the tailrace of a dam). As the U.S. Supreme Court has stated: “When it applies to water, ‘discharge’ commonly means a ‘flowing or issuing out’” and an addition of a pollutant is not “fundamental to any discharge.”¹

- C-5. The section 502(7) of the CWA (33 U.S.C. §1362(7)) defines “navigable waters,” as “waters of the United States”. Waters of the United States are defined in 40 CFR § 122.2.
- C-6. The GPs would be issued in accordance with 33 CFR §325.5(c)(1) for general permits, which states: **“Regional permits.** Regional permits are a type of general permit. They may be issued by a division or district engineer after compliance with the other procedures of this regulation. If the public interest so requires, the issuing authority may condition the regional permit to require a case-by-case reporting and acknowledgment system. However, no separate applications or other authorization documents will be required.”
- C-7. 33 CFR §325.2(b)(1) states: **“Section 401 Water Quality Certification.** If the district engineer determines that water quality certification for the proposed activity is necessary under the provisions of section 401 of the Clean Water Act, he shall so notify the applicant and obtain from him or the certifying agency a copy of such certification.”
- C-8. 33 CFR §325.2(e)(2) states: **“Regional permits.** Regional permits are a type of general permit as defined in [33 CFR 322.2\(f\)](#) and [33 CFR 323.2\(n\)](#). They may be issued by a division or district engineer after compliance with the other procedures of this regulation. After a regional permit has been issued, individual activities falling within those categories that are authorized by such regional permits do not have to be further authorized by the procedures of this regulation. The issuing authority will determine and add appropriate conditions to protect the public interest. When the issuing authority determines on a case-by-case basis that the concerns for the aquatic environment so indicate, he may exercise discretionary authority to override the regional permit and require an individual application and review. A regional permit may be revoked by the issuing authority if it is determined that it is contrary to the public interest provided the procedures of [§ 325.7 of this part](#) are followed. Following revocation, applications for future activities in areas covered by the regional permit shall be processed as applications for individual permits. No regional permit shall be issued for a period of more than five years.”

State Certification Law

- C-9. 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.”

¹ 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).

State Surface Water Quality Standards²

- C-10. The Surface Water Quality Standards under NH RSA 485-A:8 and Env-Wq 1700 together fulfill the requirement of section 303 of the CWA that the State of New Hampshire adopt water quality standards consistent with the provisions of the CWA. Further, RSA 485-A:8, I and II, establish two classes of surface waters in New Hampshire for the purposes of adopting Surface Water Quality Standards for each classification: Class A and Class B.
- C-11. Env-Wq 1700 includes designated uses (see C-14), narrative and numeric water quality criteria to protect the designated uses, and antidegradation provisions to minimize lowering of water quality in surface waters. Among other purposes, Env-Wq 1700 is used by NHDES for evaluating applications for Certification.
- C-12. Env-Wq 1701.02, titled “Applicability”, states: “These rules shall apply to:
- (a) All surface waters; and
 - (b) Any person who:
 - (1) Causes any point or nonpoint source discharge of any pollutant to surface waters;
 - (2) Undertakes hydrologic modifications, such as dam construction or water withdrawals; or
 - (3) Undertakes any other activity that affects the beneficial uses or the water quality of surface waters.”
- C-13. Env-Wq 1703.01, titled “Water Use Classifications; Designated Uses”, states:
- “(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-14. 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

² 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.

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-15. 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-16. Env-Wq 1702.38 defines “pollutant” as “‘pollutant’ as defined in 40 CFR 122.2.” 40 CFR 122.2 defines “pollutant” as “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. It does not mean:

(a) Sewage from vessels; or

(b) Water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well [that is] used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that the injection or disposal will not result in the degradation of ground or surface water resources.

NOTE: Radioactive materials covered by the Atomic Energy Act are those encompassed in its definition of source, byproduct, or special nuclear materials. Examples of materials not covered include radium and accelerator-produced isotopes. See *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976).”

C-17. Env-Wq 1702.44 defines “surface waters” as “‘surface waters of the state’ as defined in NH RSA 485-A:2, XIV and waters of the United States as defined in 40 CFR 122.2.”

NH RSA 485-A:2, XIV defines “surface waters of the state” as “perennial and seasonal streams, lakes, ponds and tidal waters within the jurisdiction of the state, including all streams, lakes, or ponds bordering on the state, marshes, water courses and other bodies of water, natural or artificial.” 40 CFR 122.2 defines “waters of the United States.”

C-18. Env-Wq 1702.51 defines “wetland” as “‘wetland’ as defined in RSA 482-A:2, X, as reprinted in Appendix C. Wetlands include, but are not limited to, swamps, marshes, bogs and similar areas as delineated in accordance with Env-Wt 100 *et seq.*” 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.”

Enforcement of Surface Water Classification

- C-19. NH 485-A:12, I states: "After adoption of a given classification for a stream, lake, pond, tidal water, or section of such water, the department shall enforce such classification by appropriate action in the courts of the state, and it shall be unlawful for any person or persons to dispose of any sewage, industrial, or other wastes, either alone or in conjunction with any other person or persons, in such a manner as will lower the quality of the waters of the stream, lake, pond, tidal water, or section of such water below the minimum requirements of the adopted classification. If the department shall set a time limit for abatement of pollution under paragraph II, and it becomes apparent at any time during the compliance period that full compliance with the adopted classification will not be attained by the end of such period due to the failure of any person to take action reasonably calculated to secure abatement of the pollution within the time specified, the department shall notify such person or persons in writing. If such person or persons shall fail or neglect to take appropriate steps to comply with the classification requirements within a period of 30 days after such notice, the department shall seek appropriate action in the courts of the state."
- C-20. RSA 485-A:12, II states: "If, after adoption of a classification of any stream, lake, pond, or tidal water, or section of such water, including those classified by RSA 485-A:11, it is found that there is a source or sources of pollution which lower the quality of the waters in question below the minimum requirements of the classification so established, the person or persons responsible for the discharging of such pollution shall be required to abate such pollution within a time to be fixed by the department. If such pollution is of municipal or industrial origin, the time limit set by the department for such abatement shall be not less than 2 years nor more than 5 years. For good cause shown, the department may from time to time extend any time limit established under this paragraph. Any determination by the department under this paragraph shall be subject to appeal as provided for in RSA 485-A:19."

State Wetlands Permitting Program

- C-21. NH RSA 482-A:3, I(a) prohibits any person from excavating, removing, filling, dredging, or constructing any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from NHDES. NH RSA-A:4 specifies that Chapter 482-A to all surface waters of the state as defined in RSA 485-A:2 (see Fact C-17). The Commissioner of NHDES has adopted Env-Wt 100 through Env-Wt 900 to implement the NHDES permitting program authorized by NH RSA 482-A, including Chapter Env-Wt 300, titled "Permits and other Authorizations; Conditions Applicable to All Work in Jurisdictional Areas."
- C-22. Env-Wt 103.25 defines "jurisdictional area" as "an area that is subject to regulation under RSA 482-A, including but not limited to surface waters, streams, lakes, rivers, ponds, wetlands, banks, flats, shores, sand dunes, upland tidal buffer zones, and duly-established 100-foot buffers."
- C-23. Env-Wt 305.02, titled "Applicability", states in relevant part:
" (a) Subject to (b)-(f), below, this chapter shall apply as of December 15, 2019 to any person who undertakes or proposes to undertake any dredge, fill, or construction activities, or any combination thereof, in a jurisdictional area."
- C-24. Env-Wt 307.03, titled "Protection of Water Quality required", states in relevant part:

“(a) No activity shall be conducted in such a way as to cause or contribute to a violation of:

(1) the surface water quality standards specified in NH RSA 485-A:8 or Env-Wq 1700.”

State Alteration of Terrain Permitting Program

- C-25. NH RSA 485-A:17, I requires, among other things, any person proposing to dredge, excavate, place fill, mine, transport forest products or undertake construction in or on the border of the surface waters of the state, and any person proposing to significantly alter the characteristics of the terrain, in such a manner as to impede the natural runoff or create an unnatural runoff, to be directly responsible to submit to NHDES detailed plans concerning such proposal and any additional relevant information requested by NHDES, at least 30 days prior to undertaking any such activity. The applicant must receive a permit from NHDES prior to undertaking those operations. The Commissioner of NHDES has adopted Alteration of Terrain (AOT) rules under Chapter Env-Wq 1500, titled “Alteration of Terrain”, to protect drinking water supplies, surface waters, and groundwater by specifying the procedures and criteria for obtaining permits required by NH RSA 485-A:17.
- C-26. Env-Wq 1503.19, titled “Criteria for Issuance of AOT Permits”, states in relevant part: “The department shall not issue an AOT permit unless the applicant demonstrates that all of the following criteria are met:
- (a) Temporary water quality protection measures in accordance with Env-Wq 1505.05 that are adequate to prevent violations of the surface water quality (SWQ) standards will be used during the construction phase of the proposed activity and maintained until all areas are stabilized;
 - (b) The permanent methods for protecting water quality proposed in the application meet the requirements of Env-Wq 1507.02 and are adequate to prevent violations of the SWQ standards.”
- C-27. Env-Wq 1502.67 defines “surface water quality standards (SWQ standards)” as “the combination of designated uses of surface waters and the water quality criteria for such surface waters based upon such uses as described in RSA 485-A:8-12 and Env-Wq 1700.”

State Certification Application and Other Documents and Records

- C-28. The GPs are federal permits under section 404 of the CWA or section 10 of the Rivers and Harbors Act.
- C-29. The USACE provided public notice for the GPs on June 7, 2022. The public notice included drafts of the GPs and a request for public comments.
- C-30. On May 27, 2022, NHDES received an application from the USACE for a Certification of the GPs that included a copy of the draft GPs.
- C-31. NHDES posted on its website a draft Certification for public comment from June 23, 2022 to 4:00 PM on July 28, 2022.

D. FINDINGS

- D-1. The GPs that NHDES reviewed for this Certification are the GPs the USACE submitted to NHDES on May 27, 2022 (see Introduction A and Fact C-30).

- D-2. The USACE is responsible for the development and implementation of the GPs, including any amendments.
- D-3. The GPs are federal permits (see Fact C-28).
- D-4. Surface waters include navigable waters for the purposes of a Certification under section 401 of the CWA (see Facts C-1, C-5, C-17 and C-18).
- D-5. Jurisdictional areas include surface waters for the purposes of the NHDES permitting program authorized by NH RSA 482-A (see Facts C-21 through C-24).
- D-6. The named and unnamed rivers, streams, lakes, ponds, tidal waters, wetlands, and other bodies of water in New Hampshire that would be potentially affected by Activities authorized under the GPs are surface waters as defined in Env-Wq 1702.44 (see Fact C-17).
- D-7. Activities authorized under the GPs may result in discharges to surface waters and may cause permanent, temporary, or secondary impacts to surface waters in New Hampshire (see Facts C-3 and C-15).
- D-8. Because Activities authorized under the GPs may result in discharges (see Finding D-7) to surface waters that are navigable waters (see D-4) and the GPs are federal permits (see Finding D-3), a Certification is required in accordance with section 401 of the CWA (see Fact C-1) and NH RSA 485-A:12, III (see Fact C-9). NHDES has received an application for a Certification from the USACE (see Fact C-30).
- D-9. Activities authorized under the GPs will involve impacts in jurisdictional areas, including dredge, fill, or work in surface waters. The NHDES permitting program authorized by NH RSA 482-A and implemented by the NHDES Wetlands Bureau addresses those impacts, including compensatory mitigation where required. This Certification decision relies, in part, on an approved permit from the NHDES Wetlands Bureau for impacts to jurisdictional areas that may result in a discharge to surface waters (see Facts C-21 through C-24).
- D-10. Activities authorized under the GPs may involve impacts in or on the border of surface waters, or impacts that significantly alter the characteristics of terrain in such a manner as to impede the natural runoff or create an unnatural runoff to surface waters. The NHDES permitting program authorized by NH RSA 485-A:17 and implemented by the NHDES Alteration of Terrain Bureau addresses those impacts, including potential construction and operation-related impacts to surface waters from certain land alteration projects. This Certification decision relies, in part, on an approved permit from the NHDES Alteration of Terrain Bureau for impacts to terrain that may result in a discharge to surface waters (See Facts C-25 through C-27).
- D-11. NHDES reviewed permit applications for proposed Activities covered under the former GPs and intends to do the same for proposed Activities covered under the new GPs to determine whether additional conditions on, modifications to, or monitoring of a proposed project are necessary to provide assurance that the proposed project would comply with Surface Water Quality Standards.
- D-12. Most projects authorized under the GPs, if conducted in accordance with the conditions of the GPs and permits issued by the NHDES Wetlands Bureau and the NHDES Alteration of Terrain Bureau, are expected to comply with Surface Water Quality Standards.

E. CERTIFICATION CONDITIONS

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

- E-1. **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.

For an explanation and authority for this condition, see B. DECISION and Fact C-9.

- E-2. **Compliance with Surface Water Quality Standards:** Construction and operation of all projects associated with Activities authorized by the GPs shall comply with New Hampshire Surface Water Quality Standards.

For an explanation and authority for this condition, see Facts C-1, C-2, C-9 through C-20.

- E-3. **NHDES Review of Specific Projects and Addition of Conditions:** Projects described in applications for GPs shall be coordinated with NHDES. If NHDES determines that additional conditions, modifications, 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. NHDES may request that the USACE include certain special conditions in the applicable GP authorizations. If NHDES believes that an individual Certification is necessary, NHDES may request that the USACE use its discretionary authority pursuant to 33 CFR §325.2(e)(2), which would require that the project proponent to obtain an individual permit and individual Certification. 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.

For an explanation and authority for this condition, see Facts C-1, C-8, C-9 and Finding D-11.

- E-4. **Obtain and Comply with all other Applicable Permits:** Construction of any specific activity authorized by the GPs shall not commence until all other applicable permits and approvals have been granted, including, but not limited to, those permits issued by the NHDES Wetlands Bureau, which includes compensatory mitigation where required, and the NHDES Alteration of Terrain Bureau. Activities authorized by the GPs shall comply with the GPs and all other applicable permits.

For an explanation and authority for this condition, see Fact C-9 Findings D-9 and D-10.

- E-5. **Compliance Inspections:** In accordance with applicable laws, including NH RSA 485-A:12, III, NHDES reserves the right to inspect any of the Activities authorized by the GPs and the effects of the Activities on surface waters to monitor compliance with the conditions of this Certification.

For an explanation and authority for this condition, see Fact C-9.

F. ENFORCEMENT


Certification conditions are subject to enforcement mechanisms available to the state of New Hampshire, including those provided under NH RSA 485-A:22 (see Fact C-9).

G. APPEAL

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 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.

If you have questions regarding this Certification, please contact James Tilley, NHDES Water Quality Certification Supervisor at (603) 271-0699 or james.w.tilley@des.nh.gov.

H. SIGNATURE & DATE


Rene J. Pelletier, P.G. *Ted Diers for*
Director, NHDES Water Division

09/02/22
Date

cc via email:

- Ted Diers, Assistant Director, NHDES Water Division
- Philip Trowbridge, P.E., Manager, NHDES Land Resources Management Program
- Darlene Forst, Administrator, NHDES Wetlands Bureau
- Ridge Mauck, P.E., Administrator, NHDES Alteration of Terrain Bureau
- John Magee, NH Fish and Game Department
- Jacqueline LeClair, U.S. Environmental Protection Agency