

ATTACHMENT 1

Petitioner's Notice of Appeal to the State of New
Hampshire Water Council

**THE STATE OF NEW HAMPSHIRE
WATER COUNCIL**

NOTICE OF APPEAL

Final Clean Water Act § 401 Water Quality Certification, WQC 2025-NH0100447
Manchester Wastewater Treatment Facility National Pollutant Discharge Elimination System
Permit Renewal

Conservation Law Foundation (CLF) submits this Notice of Appeal of the above-referenced Water Quality Certification, issued by the New Hampshire Department of Environmental Services (NHDES) on May 13, 2025 in connection with the National Pollutant Discharge Elimination System (NPDES) permit renewal for the Manchester Wastewater Treatment Facility (WWTF) (hereinafter “Certification”). CLF provides the following information in accordance with the requirements of Ec-Wtr 203.01(b):

I. Appellant

Conservation Law Foundation, Inc.

New Hampshire Office:
27 North Main Street
Concord, NH 03301
(603) 225-3060
tirwin@clf.org

Organizational Headquarters:
62 Summer Street
Boston, MA 02110
(617) 350-0990

II. Appellant’s Representatives

Thomas F. Irwin, Esq.
Vice President and New Hampshire Director
Conservation Law Foundation
27 North Main Street
Concord, NH 03301
(603) 573-9139
tirwin@clf.org

Jillian E. Aicher, Esq.
Equal Justice Works Legal Fellow
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
617-850-1799
jaicher@clf.org

III. Permittee / Applicant

The owner and operator of the Manchester WWTF, and the applicant for the renewed NPDES permit, is the City of Manchester.

IV. Clear and Concise Statement of Facts and Law that Explains Why the Department Decision was Unlawful or Unreasonable

CLF requests that the Water Council rule that the Certification that is the subject of this appeal is unlawful and/or unreasonable on three grounds. First, NHDES unlawfully and unreasonably issued the Certification without evaluating or determining whether, in light of discharges and emissions of per- and polyfluoroalkyl substances (PFAS) from the Manchester WWTF, the WWTF's permitted activities will comply with New Hampshire's narrative water quality standard for toxic substances and the Merrimack River's designated use for fish consumption. Second, NHDES unlawfully issued the Certification without developing an independent record to support its determination and unlawfully shifted to commenters, EPA, and the City of Manchester its burden of evaluation established under 40 C.F.R. section 121.3(a). Third, the Certification unlawfully and unreasonably proposes to weaken important benthic monitoring requirements in the associated NPDES permit.

A. Concise Statement of Facts

The Manchester WWTF is the largest WWTF in Northern New England and the only WWTF in New Hampshire that burns sewage sludge in an onsite incinerator. The WWTF discharges "treated" effluent into the Merrimack River, but the WWTF's treatment process does not address or remove PFAS. The WWTF has detected PFAS in its influent and "treated" effluent on a monthly basis since at least 2019. In addition to discharging PFAS into the Merrimack River

through wastewater discharges, the WWTF releases PFAS into the air through sludge incineration, as confirmed by data published in a peer-reviewed study in 2023 (the Seay Study).¹

PFAS are toxic substances that persist in the environment for up to several thousands of years and remain in the human body for decades. PFAS are linked with human health impacts including cancer, organ damage, high cholesterol, reproductive and fertility issues, and developmental delays. The Manchester WWTF receives wastewater from at least 88 industrial users, fourteen of which, including the City's closed landfill, are classified as Significant Industrial Users under EPA and local rules. The City has documented PFAS in the leachate that the closed landfill sends to the WWTF; eleven other Significant Industrial Users operate in PFAS-related sectors and likely discharge PFAS to the WWTF.

The Manchester WWTF requires an EPA-issued NPDES permit to operate. The City of Manchester applied for a new NPDES permit in 2019 and, in that application, did not disclose that its discharges contain PFAS.

On April 10, 2024, EPA issued a Draft Permit for the Manchester WWTF (the Original Draft Permit). The Original Draft Permit contained monitoring requirements for 40 PFAS chemicals and included a narrative requirement that the WWTF's discharges not "cause a violation of the water quality standards of the receiving water." EPA, Original Draft Permit No. NH010044, Part I.A.2, Footnote 13, Part I.A.3, Part I.E.6, (April 2024).

On June 6, 2024, NHDES issued a one-page water quality certification which included a statement that "no conditions" in the Original Draft Permit "can be made less stringent[.]" Letter from Rene Pelletier, NHDES, to Lynne Jennings, EPA Region 1, regarding Manchester WWTF Certification of NPDES Permit No. NH0100447 (June 6, 2024) (on file with NHDES).

On December 18, 2024, EPA issued a Revised Draft Permit. In anticipation of the U.S. Supreme Court's decision in *San Francisco v. EPA*, 604 U.S. ___, 145 S. Ct. 704 (2025), the Revised Draft Permit removed the Original Draft Permit's narrative permit condition that the WWTF's discharges not cause a violation of the water quality standards of the receiving water. It also included a new benthic survey requirement, mandating that "[d]uring the third calendar quarter (i.e., July through September) that begins at least 12 months after the effective date of the permit, a benthic survey shall be conducted once per permit term to assess impacts from the discharge on aquatic life in the benthic environment." EPA, Revised Draft Permit No. NH0100447, Part I.A.2, n. 23 (Dec. 2024). Like the Original Draft Permit, the Revised Draft Permit contained monitoring requirements for 40 PFAS chemicals but established no effluent limitations for PFAS.

¹ Brannon A. Seay et al., *Per- and Polyfluoroalkyl Substances Fate and Transport at a Wastewater Treatment Plant with a Collocated Sewage Sludge Incinerator*, 847 *Sci. Total Env't* (2023), available at <https://www.sciencedirect.com/science/article/pii/S0048969723009737>.

On January 9, 2025, in connection with the Revised Draft Permit, NHDES issued a draft water quality certification. The January 9 draft certification relied upon outdated regulatory language; lacked any reference to, or condition for, PFAS; and stated that the Revised Draft Permit's benthic monitoring requirement could be made less stringent by imposing a prerequisite notice requirement to the otherwise-automatic benthic survey requirement.

On February 7, 2025, CLF timely submitted comments on the January 9 draft water quality certification. CLF's comments (provided herewith) and exhibits identified the Certification's reliance on an outdated regulatory standard and highlighted: (1) the City's PFAS monthly monitoring data, which shows the WWTF discharges PFAS into the Merrimack River; (2) the Seay Study and its corresponding data, which shows the WWTF emits PFAS into the air in Manchester, and (3) a peer-reviewed study (the Pickard Study) and its corresponding data, which show that fish in the Merrimack River have contained PFAS at levels that would be harmful to humans if consumed. CLF's comments argued that, in light of these data, and absent PFAS effluent limitations, the WWTF's activities would likely not comply with New Hampshire's narrative water quality standard for toxic substances and the Merrimack River's designated use for fish consumption. CLF's comments also argued that NHDES's proposed revision and weakening of the Revised Draft Permit's benthic survey requirement conflicts with the purpose of Clean Water Act section 401 and would render the benthic survey requirement valueless.

On May 13, 2025, NHDES issued the Certification that is the subject of this appeal. The Certification replaced the January 9 draft certification's outdated regulatory language with current regulatory language yet failed to add any conditions related to PFAS. It also retained the less-stringent benthic monitoring proposal.

The Certification was accompanied by a Response to Comments in which DES described consideration of the City's PFAS monthly monitoring data submitted by CLF and an analysis of whether the WWTF had the reasonable potential to violate state water quality standards (a so-called "reasonable potential evaluation"). NHDES Response to Comments, Water Quality Certification 2025-NH0100447 at 5–7 (May 13, 2025) (hereinafter "Response to Comments"). As described in the Response to Comments, NHDES's reasonable potential evaluation was limited to whether the WWTF's discharges of four PFAS compounds may cause or contribute to a violation of recently-adopted state *numeric* PFAS surface water quality criteria. It failed to address whether the WWTF's activities – including discharging PFAS-containing effluent and emitting PFAS through its incinerator – likely cause or contribute to a violation of the state's *narrative* water quality standard for toxics and the state's designation of the Merrimack River as supporting fish consumption. The Response to Comments failed to engage in any analysis of PFAS beyond the four PFAS chemicals enumerated in the state's numeric criteria.

The Response to Comments also contained several statements indicating that NHDES expected commenters, EPA, and the City of Manchester to contribute data to the record supporting or refuting the water quality certification, rather than NHDES developing its own record or conducting an independent evaluation and determination to support its Certification decision.

B. Concise Statement of Law

Section 401 of the Clean Water Act provides that federal agencies cannot issue permits to applicants to engage in activities that may cause water discharges unless the state certifies that the applicant “*will comply*” with enumerated Clean Water Act provisions and “any other appropriate requirement of State law,” including state water quality standards. 33 U.S.C. §1341(a)(1), (d) (emphasis added); *see also S.D. Warren Co. v. Maine Bd. of Env’t Prot.*, 547 U.S. 370, 374 (2006). New Hampshire state law also prohibits activities requiring 401 certification unless NHDES “certifies that any such discharge complies with the state surface water quality standards applicable to the classification for the receiving surface water body.” *See* RSA 485-A:12, III.

Federal 401 certification rules require the certifying state to first “evaluate whether the activity will comply with applicable water quality requirements.” 40 C.F.R. § 121.3(a). EPA has explained that states must support their 401 certification evaluations, and ultimate decisions, with record evidence, stating: “It is incumbent on the certifying authority to develop a record to support its determination that an activity will or will not comply with applicable water quality requirements.” 88 Fed. Reg. 66558, 66592, 66600 (Sept. 27, 2023).

After evaluation, a certifying state must determine whether the permitted activity “will comply” with Clean Water Act provisions and water quality requirements. 33 U.S.C. § 1341(a)(1); 40 C.F.R. § 121.7(c)(3), (d)(3), (e)(3). To grant certification with conditions, the conditions must ensure that the permittee “will comply” with Clean Water Act provisions and state law requirements. 33 U.S.C. § 1341(d); 40 C.F.R. § 121.7(d)(3). EPA added this “will comply” language to its current rules in 2023, replacing less-stringent regulatory language from prior rules and establishing a higher burden for certifying states to evaluate the adverse water quality impacts of permitted activities and deny or condition certification accordingly. *See* 88 Fed. Reg. 66558, 66612–13 (Sept. 27, 2023) (“While the 1971 Rule required a statement that there was ‘reasonable assurance,’ . . . the 2020 Rule and this final rule use the term ‘will comply’ which is more consistent with the 1972 statutory language used in sections 401(a)(1) and 401(d).”)

The state water quality standards with which NHDES must certify compliance include New Hampshire’s narrative standard for toxic substances, which states:

[A]ll surface waters shall be free from toxic substances or chemical constituents in concentrations or combinations that . . . [i]njure or are inimical to plants, animals, humans or aquatic life; or . . . [p]ersist in the environment or accumulate in aquatic

organisms to levels that result in harmful concentrations in . . . [e]dible portions of fish, shellfish, or other aquatic life[.]

Env-Wq 1703.21(a).

The state water quality standards with which NHDES must certify compliance also includes the state’s designated use standard, which states: “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.” *Id.*

1703.01(b). One of the important designated uses of the Merrimack River is fish consumption, meaning that the river is required to “support a population of fish free from toxicants and pathogens that could pose a human health risk to consumers[.]” *Id.* 1702.16(b); NHDES, Sections 305(B) and 303(D) Consolidated Assessment and Listing Methodology (R-WD-20-20) at 10 (2022), available at <https://www.des.nh.gov/sites/g/files/ehbemt341/files/documents/r-wd-20-20.pdf>.

The New Hampshire Supreme Court requires agencies to support their decisions with “findings of fact” and will vacate an agency decision that ignores evidence contrary to the determination. *See In re Town of Newington*, 149 N.H. 347, 354–55 (2003) (vacating a DES decision when the agency “did not address” contrary evidence and rendered a decision “devoid of findings of fact that would permit meaningful review[.]”)

A person aggrieved by an NHDES certification decision may appeal the decision to the Water Council. *See Ec-Wtr 203.01*. The appellant must “set forth fully in a notice of appeal every ground upon which it is claimed that the decision complained of is unlawful or unreasonable.” RSA 21-O:14, I-a(a). The party asserting a proposition in a Water Council appeal must prove the proposition by a preponderance of the evidence. *Ec-Wtr 203.16(f)*.

C. Concise Explanation of Why the Department’s Certification is Unlawful and Unreasonable

NHDES’s decision to certify that the WWTF will comply with water quality requirements, including state water quality standards, is unlawful and/or unreasonable for the following reasons.

- 1. The Certification is unlawful and unreasonable because, contrary to the requirements of Clean Water Act section 401(a) and 40 C.F.R. section 121.3(a), NHDES failed to evaluate and address whether the WWTF’s discharges and emissions of PFAS will comply with the state’s narrative standard for toxics (Env-Wq 1703.21(a)) and the Merrimack River’s designated use for fish consumption (Env-Wq 1703.01(b); Env Wq 1702.16(b)).**

As discussed in Part IV.A., above, the Manchester WWTF receives PFAS chemicals, does not treat for those chemicals, and as a result discharges PFAS into the Merrimack River through its wastewater effluent and into the air through its sewage sludge incinerator. While the Revised Draft Permit requires monitoring of 40 PFAS chemicals, it fails to include effluent limitations for PFAS. As a result of the recent *San Francisco v. EPA* decision, *see* 604 U.S. ___, 145 S. Ct. 704 (2025), the Revised Draft Permit also fails to include the requirement that discharges shall not cause a violation of water quality standards – a requirement that until recently has been a standard requirement in EPA Region 1 NPDES permits, the removal of which heightens the importance of DES’s section 401 Water Quality Certification review and determination.

Despite the presence of PFAS at the WWTF, NHDES rendered its Certification without having determined whether the WWTF’s discharges and emissions of PFAS will comply with the state narrative water quality standard pertaining to toxics and the Merrimack River’s designated use for fish consumption. Rather, NHDES rendered its Certification solely on the basis of a reasonable potential evaluation constrained to analyzing just four PFAS chemicals under New Hampshire’s recently-established *numeric* water quality standards for those four chemicals.

In its Response to Comments, NHDES stated that the reasonable potential analysis results “show that no revisions are needed to the final Certification, and the Manchester WWTF individual NPDES permit will ensure compliance with water quality standards.” Response to Comments at 7. That conclusion is unlawful and unreasonable, as it is contrary to Clean Water Act section 401(a) and 40 C.F.R. section 121.3(a) and unsupported by the record, as the reasonable potential evaluation for the *numeric* PFAS criteria cannot lawfully or reasonably serve as a proxy to determine compliance with the *narrative* water quality standards for toxics and the river’s designated use for fish consumption. The reasonable potential analysis and the numeric criteria cover only four PFAS compounds out of a class of more than 14,000 PFAS chemicals. They also fail to account for bioaccumulation of PFAS in aquatic life – a consideration that is essential to determining whether PFAS from the WWTF will violate narrative standards for toxics and the river’s use for fish consumption. *See* Env-Wq 1703.21(a)(2)(a) (prohibiting toxic substances from being present in surface waters in “concentrations or combinations” that “accumulate in aquatic organisms to levels that result in harmful concentrations in . . . [e]dible portions of fish, shellfish, or other aquatic life[.]”); *see also id.* 1702.16(b) (defining the designated use of “Fish consumption” as “meaning the surface water can support a population of fish free from toxicants and pathogens that could pose a human health risk to consumers[.]”).

PFAS chemicals—particularly PFOS, which is consistently present in the WWTF’s influent and effluent—are known to bioaccumulate in edible fish and pose a human health risk. Research cited in CLF’s comments shows that eating just one standard serving of fish with 8.41 parts per billion (ppb) PFOS is equivalent to drinking water at 2,400 times EPA’s health advisory level for

that chemical for an entire month.² The Pickard Study, highlighted in CLF’s comments but not acknowledged in NHDES’s Response to Comments, shows that PFOS concentrations in fish in the Merrimack River downstream of the Manchester WWTF have reached 7.914 ppb PFOS, closely approaching the 8.41 ppb level mentioned above.³ That study also calculated a daily fish consumption health-based threshold for adults as 1.06 ppb PFOS, based on NHDES’s own reference doses for that chemical, and found that most fish in the Merrimack River exceeded that health-based fish consumption threshold for PFOS.⁴

In light of the foregoing and as set forth in CLF’s comments, the WWTF’s activities likely violate the state narrative standard for toxics and the Merrimack River’s designated use for fish consumption. NHDES’s failure to address CLF’s argument that the WWTF’s activities likely violate that narrative standard and designated use – and NHDES’s failure to specifically certify that the EPA permit ensures compliance with those two standards – is unlawful and unreasonable because it demonstrates that NHDES did not determine that the WWTF “will comply” with those standards, as required by Clean Water Act section 401(a)(1). *See* 33 U.S.C. § 1341(a)(1). Moreover, NHDES’s Response to Comments demonstrates that the agency’s decision is unlawful because NHDES did not address contrary evidence of the PFAS data from fish in the Merrimack River, rendering the final decision “devoid of findings of fact that would permit meaningful review” and warranting vacatur. *See In re Town of Newington*, 149 N.H. 347, 354–55 (2003).

2. The Certification is unlawful because NHDES unlawfully shifted to commenters its burden to affirmatively evaluate and determine whether the WWTF’s activities will comply with state water quality standards.

As discussed in Part IV.B, above, NHDES has an affirmative duty to determine whether the WWTF’s permitted activities will comply with water quality requirements, including state water

² Nadia Barbo et al., *Locally caught freshwater fish across the United States are likely a significant source of exposure to PFOS and other perfluorinated compounds*, 220 ENV’T RSCH. 1, at 6 (2023), available at <https://www.sciencedirect.com/science/article/pii/S0013935122024926>.

³ *See* Heidi M. Pickard et al., *PFAS and Precursor Bioaccumulation in Freshwater Recreational Fish: Implications for Fish Advisories*, 56 ENV’T SCI. & TECH 15573 (2022), available at <https://pubs.acs.org/doi/10.1021/acs.est.2c03734>. The Pickard Study’s Fish Concentrations Table shows that researchers detected 7.914 ppb PFOS in Largemouth Bass at Location 5. Heidi M. Pickard et al., *Supporting Information: Fish Concentrations Table S16*, available at <https://pubs.acs.org/doi/10.1021/acs.est.2c03734>. The Supporting Information document describes Location 5 as a sampling site on the Merrimack River at a location that is downstream from the Manchester WWTF. *See* Heidi M. Pickard et al., *Supporting Information for PFAS and Precursor Bioaccumulation in Freshwater Recreational Fish: Implications for Fish Advisories* at S-2–S-3 (2022), available at https://pubs.acs.org/doi/suppl/10.1021/acs.est.2c03734/suppl_file/es2c03734_si_001.pdf.

⁴ *See* Heidi M. Pickard et al., *Supporting Information for PFAS and Precursor Bioaccumulation in Freshwater Recreational Fish: Implications for Fish Advisories* at S-22–S23 (2022), available at https://pubs.acs.org/doi/suppl/10.1021/acs.est.2c03734/suppl_file/es2c03734_si_001.pdf.

quality standards. *See* 33 U.S.C. §1341(a)(1); 40 C.F.R. § 121.3(a). To fulfill this duty, EPA has clearly stated that under federal certification rules, “[i]t is incumbent on the certifying authority to develop a record to support its determination that an activity will or will not comply with applicable water quality requirements.” *See* 88 Fed. Reg. 66558, 66592 (Sept. 27, 2023).

Despite this clear requirement – a requirement that takes on even greater importance following the *San Francisco v. EPA* decision and EPA’s elimination of its standard narrative permit provision requiring that discharges shall not cause a violation of state water quality standards – NHDES failed to affirmatively evaluate and determine whether PFAS discharges from the Manchester WWTF will violate the state narrative water quality standard for toxics or the designated use for fish consumption.⁵ Nor did NHDES investigate the water quality impacts of the WWTF’s incineration activities (which are covered in Part F of the WWTF’s current NPDES permit and Part F of the Revised Draft Permit). Nor did it conduct monitoring, research, or any investigation to support its determination that EPA’s draft benthic monitoring requirement should be made less stringent. Rather, as demonstrated by statements in the Response to Comments⁶ and the absence of independent evaluation, NHDES unlawfully shifted to commenters, EPA, and the City of Manchester the burden of determining whether the WWTF’s activities will comply with state water quality standards.

3. The Certification’s proposed weakening of important benthic monitoring requirements in the Revised Draft Permit renders it unlawful and unreasonable.

As discussed above, Statement E.2 of the Certification contains a statement of the extent to which the benthic survey in the Revised Draft Permit can be made less stringent “without violating state water quality standards[.]” Certification at 4. That provision proposes language adding a notice prerequisite to an otherwise-automatic benthic survey. Rather than requiring one benthic survey per permit term, as set forth in the Revised Draft Permit, the Certification’s

⁵ DES explicitly relied on pages 33 to 35 of EPA’s Fact Sheet for the Revised Draft Permit as the “record” to support its determination regarding water quality standards compliance with respect to PFAS. Response to Comments at 2. DES did not independently review those EPA pages. Even if DES had engaged in that review, an analysis of the Fact Sheet pages 33 through 35 demonstrates that EPA did not analyze whether PFAS discharges from the WWTF violate state narrative water quality standards.

⁶ *See, e.g.*, Response to Comments at 4 (“The information provided by permittee, EPA, and the commenters did not indicate water quality impacts from the Fluidized Bed Incinerator (FBI) emissions.”); *id.* at 4 (“The commenters did not provide any additional information or data supporting the need for certification conditions, or separate permit coverage, related to water quality impacts from the FBI emissions.”); *id.* at 9 (“NHDES has not received any evidence to date that the cumulative effect of all effluent limitations and monitoring requirements is not sufficiently protective of the benthic environment. The commenter has not provided specific concerns regarding benthic community health in the vicinity of the WWTF outfall, or data or observational evidence to support those concerns.”).

proposal would require a benthic survey only upon a notification in writing “by NHDES or EPA that benthic deposits from the discharge are known or suspected to have a detrimental impact on downstream benthic communities.” *Id.* The Certification specifies that “[v]isual observations, benthic sample results, or long-term permit limit exceedances could indicate a potential change in either the sediments or settleable solids downstream of the outfall as compared to upstream of the outfall. Such a change could indicate that the facility’s effluent is having a detrimental impact on the downstream benthic community health.” *Id.*

As set forth in CLF’s comments, the proposed weakening of the benthic survey requirement conflicts with the purpose of Clean Water Act section 401; total suspended solids and metals effluent limitations in the permit do not suffice to protect the benthic community; and “[w]ithout an automatically-required benthic survey, the Department and EPA cannot make the requisite identification of harmful benthic deposits, rendering the proposed revision valueless for ensuring water quality standard compliance.” CLF Comments at 12. The Response to Comments countered by stating that the revised language “requiring a triggering event . . . is as protective” as current permit language that incorporates narrative standards related to the benthic community; that “monthly aesthetics monitoring” provides “further protection,” and that “NHDES has not received any evidence to date that the cumulative effect of all effluent limitations and monitoring requirements is not sufficiently protective of the benthic environment.” Response to Comments at 9. In addition to unlawfully shifting to commenters the burden of evaluating and determining that the WWTF will or will not comply with water quality standards (as discussed above), NHDES’s approach illogically assumes that aesthetically viewing “sediments or settleable solids” *after* the permit has been issued suffices to determine that the WWTF’s activities “will comply” with water quality standards protecting the benthic community. *See id.* at 9, 12.

For example, NHDES’s proposed approach does not protect the benthic community from toxic PFAS deposits. PFAS are invisible pollutants, they are found in benthic organisms,⁷ and monitoring of PFAS in the benthic environment is not explicitly included in the Revised Draft Permit’s benthic survey requirement. *See* Revised Draft Permit Part I.A.1, Footnote 23, Part I.G.5. Thus, without an automatically-required benthic survey that includes provisions for PFAS, NHDES has no lawful or reasonable basis to determine that the WWTF’s activities will comply with water quality standards protecting the benthic community with respect to PFAS. NHDES’s proposal to weaken EPA’s benthic survey – which is already insufficient because it lacks clear PFAS requirements – renders its Certification unlawful and unreasonable.

⁷ Xiaoyan Yun et al., *Bioaccumulation of per- and polyfluoroalkyl substances by freshwater benthic macroinvertebrates: Impact of species and sediment organic carbon content*, 866 *SCIENCE OF THE TOTAL ENV’T* 10 (2023), <https://www.sciencedirect.com/science/article/pii/S0048969722083127> (“Since many regulatory agencies collect benthic macroinvertebrates as a component of a water quality assessment, it is practical to modify their sampling strategies to routinely monitor PFAS and expand the knowledge base for understanding PFAS occurrence in aquatic environment.”)

V. Standing

CLF has members who are directly and adversely affected by the WWTF's activities and will be directly and adversely affected by the Certification at issue in this appeal. More specifically, CLF has members who reside in Manchester, who use and enjoy the Merrimack River in proximity to the WWTF, and who have actively participated in the Clean Water Act permitting process associated with the Manchester WWTF. The Merrimack River's water quality, and Manchester's air quality, are integral to the health, recreational, and aesthetic interests of members of CLF. The WWTF's discharges of PFAS into the Merrimack River and emissions of PFAS into Manchester's air, including but not limited to the bioaccumulation of PFAS in the aquatic environment, will directly and adversely affect members of CLF and their interests.

CLF's members include, but are not limited to:

An individual who resides in Manchester, New Hampshire approximately two miles from the WWTF who has used and enjoyed the Merrimack River for much of his life, engaging in activities that include kayaking, rowing, and fishing, including fishing in close proximity to the WWTF. The WWTF's release of PFAS into the Merrimack River detracts from his use and enjoyment of the river and causes him not to consume fish he catches. The WWTF's release of PFAS into the air causes him concern for his personal health and for the environment, including the Merrimack River.

An individual who resides in Concord, New Hampshire who for years has made frequent recreational use of the Merrimack River. His uses over the years have included duck hunting, canoeing, hiking, and collecting trash. He considers the Merrimack River to be a valuable natural asset that contributes to his quality of life and has used and enjoyed various segments of the Merrimack River, including downriver of the WWTF. The WWTF's release of PFAS into the Merrimack River and the air detracts from his use and enjoyment of the river.

Two individuals who reside in Manchester (one of whom resides less than 400 feet from the Merrimack River) and who appreciate the Merrimack River for its recreational, ecological, and aesthetic value; who personally enjoy the river as an aesthetic asset; and who desire clean air and water, unpolluted with toxic chemicals. Their use and enjoyment of the river for aesthetic purposes is adversely affected by the WWTF's continued operations without PFAS reduction measures for its wastewater discharges and its air emissions, as are the river's recreational and ecological values which they appreciate.

VI. Copy of the Department Decision Being Appealed

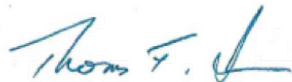
A copy of the Certification that is the subject of this appeal (WQC 2025-NH0100447) is attached. Also attached for the Council's convenience is a copy of CLF's February 7, 2025 comments on the draft certification (without exhibits).

WHEREFORE, Conservation Law Foundation respectfully requests that the Council:

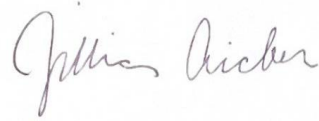
- A. Accept this appeal;
- B. Rule that the Certification that is the subject of this appeal is unlawful;
- C. Rule that the Certification that is the subject of this appeal was unreasonably granted;
- D. Vacate the Certification;
- E. Remand the Certification to the NHDES Water Division with instructions to
 - (1) Evaluate and determine, with respect to PFAS discharges and PFAS emissions from the WWTF, whether, under the Revised Draft Permit, the WWTF will comply with Env-Wq 1703.21(a) and Env 1703.01(b) and, if it will not comply, deny certification or establish PFAS-related conditions necessary to ensure that it *will* comply, and
 - (2) Remove from any certification granted in connection with the WWTF NHDES's proposed language in Certification Statement E.2 regarding benthic monitoring; and
- F. Grant such further relief as it deems just and reasonable.

Respectfully Submitted,

CONSERVATION LAW FOUNDATION
By its Attorneys



Thomas F. Irwin (NH Bar No. 11302)
Vice President and New Hampshire Director
Conservation Law Foundation
27 North Main Street
Concord, NH 03301
(603) 573-9139
tirwin@clf.org




Jillian E. Aicher (NY Bar No. 6145015)
Equal Justice Works Legal Fellow
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
617-850-1799
jaicher@clf.org

Dated: June 12, 2025

Certificate of Authorization to Represent Appellant

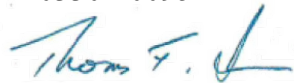
I hereby certify that on this 12th day of June, 2025, Conservation Law Foundation authorizes Jillian Aicher to act on its behalf as a representative in this matter.



Thomas F. Irwin

Certificate of Service

I hereby certify that on this 12th day of June, 2025, the notice of appeal has been served in accordance with Ec-Wtr 201.03 and Ec-Wtr 203.01(d), on the service list, with names and electronic mail addresses specified in the cover letter attached to this notice of appeal. Pursuant to Ec-Wtr 201.01, the notice of appeal has also been submitted to appeals@des.nh.gov. Pursuant to Ec-Wtr 203.01(a) and Ec-Wtr 201.01(a)(2), an original and one copy will on this day be hand delivered to “Water Council, Attention: Appeals Clerk” at the Department of Environmental Services, 29 Hazen Drive P.O. Box 95 Concord, NH 03302-0095.



Thomas F. Irwin



For a thriving New England

CLF New Hampshire 27 North Main Street
Concord, NH 03301
P: 603.225.3060
F: 603.225.3059
www.clf.org

February 7, 2025

Rene J. Pelletier
Water Division Director
New Hampshire Department of Environmental Services
29 Hazen Drive
Concord, NH 03302-0095

Via email: Rene.pelletier@des.nh.gov

CC: Tracy.l.wood@des.nh.gov; Hayley.g.franz@des.nh.gov; Stergios.spanos@des.nh.gov

Re: Draft Water Quality Certification for Manchester WWTF, WQC 2025-NH0100447

Dear Mr. Pelletier:

Conservation Law Foundation (CLF) appreciates the opportunity to comment on the New Hampshire Department of Environmental Services' Draft Water Quality Certification related to the Revised Draft NPDES Permit ("Revised Draft Permit") for the City of Manchester's Wastewater Treatment Facility (WWTF). CLF is a member-supported, nonprofit environmental advocacy organization that works in New Hampshire and throughout New England to protect the environment for the benefit of all people. CLF has a long history of advocacy to protect water resources in New Hampshire, including the Merrimack River.

As more fully discussed below, the Department's draft certification violates the Clean Water Act and its implementing regulations. The draft certification unlawfully uses a "reasonable assurance" standard that conflicts with current regulations, and it ignores the impacts on water quality of the Manchester WWTF's discharges (through its effluent) and emissions (through its incineration of sewage sludge) of toxic per- and polyfluoroalkyl substances (PFAS). The Department must evaluate the certification request under the current language in 40 C.F.R. Part 121 and section 124.53 and in accordance with EPA's 2023 preamble explaining those final rules.¹ After analyzing the impact of PFAS discharges and emissions on water quality, the Department must either deny certification unless and until EPA's final permit includes effluent

¹ See 88 Fed. Reg. 66558 (Sept. 27, 2023).

limits and industrial source control measures for PFAS, or condition certification on EPA including effluent limits and source control measures for PFAS in the final permit. *See* 40 C.F.R. § 124.55(a).

The draft certification’s conditions do not ensure compliance with state water quality standards. The Department’s draft not only fails to account for EPA’s removal of narrative permit limits in the Revised Draft Permit, but it also incorrectly asserts that the EPA’s permit provisions can be weakened without violating state water quality standards. In any future water quality certification for the Manchester WWTF’s NPDES permit, the Department must strengthen conditions to protect water quality.

I. Legal Background

Congress passed the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Section 301(a) prohibits the discharge of a pollutant from a point source into waters of the United States unless in accordance with a NPDES permit or another specified provision. *Id.* § 1311(a). Section 401 provides that Federal agencies cannot issue permits to engage in activities that may cause water discharges *unless* the state certifies that the discharge “will comply” with enumerated Clean Water Act provisions and “any other appropriate requirement of State law,” including state water quality standards. *Id.* §1341(d), *S.D. Warren Co. v. Maine Bd. of Env’t Prot.*, 547 U.S. 370, 374 (2006) (citing *PUD No. 1 of Jefferson Cnty. v. Washington Dep’t of Ecology*, 511 U.S. 700, 713, (1994)).² Congress enacted section 401 to ensure that “[n]o polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s].” *See id.* at 386 (quoting 116 Cong. Rec. 8984 (1970) (Sen. Muskie)).

New Hampshire law also prohibits activities requiring 401 certification from occurring 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.” *See* RSA 485-A:12, III.

EPA’s 401 certification rules require the certifying state to first “evaluate whether the activity will comply with applicable water quality requirements.” 40 C.F.R. § 121.3(a). In evaluating

² *See also* 88 Fed. Reg. 66558, 66558 66601 (Sept. 27, 2023).

compliance, the state must consider all water quality impacts from the potential permittee’s activity. *Id.* EPA’s rules, finalized in 2023, require states to broadly consider adverse water quality impacts of the entire permitted activity, rather than impacts of point source discharges alone.³

To deny certification, a state need only find that the activity “*may* prevent compliance with water quality requirements.”⁴ The state need not determine with certainty that the activity will cause a water quality standard violation. Denial is also appropriate when the permitted activity is one of many contributors to (not the sole cause of) adverse water quality impacts.⁵

To grant certification, a state must determine that the permitted activity “will comply” with Clean Water Act provisions and water quality requirements. 33 U.S.C. § 1341(a)(1).⁶ To grant certification with conditions, the conditions must ensure that the permittee “will comply” with Clean Water Act provisions and state law requirements. 33 U.S.C. § 1341(d). EPA’s certification rules include this “will comply” language, replacing prior regulatory language from 1971 that required certifying states to express only “reasonable assurance” that the activity will not violate water quality standards.⁷ The “will comply” language in EPA’s current rules places a higher burden on states to evaluate the adverse water quality impacts of permitted activities and deny or condition certification accordingly. The current rules’ “will comply” standard requires states to

³ 88 Fed. Reg. 66558, 66592–66601 (Sept. 27, 2023). Requiring states to consider water quality impacts of the entire permitted activity represents the “best reading” of the Clean Water Act, according to EPA, and is “supported by the legislative history of section 401, authoritative Supreme Court precedent, and the goals of section 401[.]” *Id.* at 66592.

⁴ *Id.* at 66600 (emphasis added).

⁵ *Id.* (emphasis added) (“[C]ertifying authorities may address not only adverse water quality impacts caused exclusively by the federally licensed or permitted activity, but also adverse impacts *contributed to* by a federally licensed or permitted activity. For example, a certifying authority may deny or condition an activity that will contribute to ongoing noncompliance with water quality requirements.”)

⁶ *See also* 88 Fed. Reg. 66558, 66607 (Sept. 27, 2023) (“First, a certifying authority may grant certification. A grant of certification means that the certifying authority has determined that the activity will comply with water quality requirements.”)

⁷ *See* 88 Fed. Reg. 66558, 66635 (Sept. 27, 2023) (“While the 1971 Rule required a statement that there was ‘reasonable assurance,’ . . . the 2020 Rule and this final rule use the term “will comply” which is more consistent with the 1972 statutory language used in [Clean Water Act] sections 401(a)(1) and 401(d).”)

carry out the “object” of section 401—which is “maintaining state water quality standards[.]” *S.D. Warren Co. v. Maine Bd. of Env’t Prot.*, 547 U.S. 370, 380 (2006).

EPA has clarified that states must support their certification decisions with record evidence, stating: “It is incumbent on the certifying authority to develop a record to support its determination that an activity will or will not comply with applicable water quality requirements.”⁸ The New Hampshire Supreme Court requires agencies to support their decisions with “findings of fact” and will vacate an agency decision that ignores evidence contrary to the determination. *See In re Town of Newington*, 149 N.H. 347, 354–55 (2003) (vacating a DES decision when the agency “did not address” contrary evidence and rendered a decision “devoid of findings of fact that would permit meaningful review.”)

A court may deem a state’s water quality certification decision arbitrary and capricious if the state’s analysis is brief compared to a “voluminous and complex record,” and if the agency “pre-determined” the certification result before evaluating the activity’s water quality impacts. *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 149 (2d Cir. 2008). On the other hand, courts have upheld water quality certification decisions justified by “ample scientific evidence and expert opinion[.]” *see Port of Oswego Auth. v. Grannis*, 897 N.Y.S.2d 736, 738–39 (2010), and a “careful and thorough” review of record evidence, *see Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 154 (2d Cir. 2008).

II. Factual Background

The Manchester WWTF discharges effluent into the Merrimack River, an iconic water resource of critical importance to New Hampshire and Massachusetts. In addition to its importance as a natural resource for aquatic and wildlife species, the river provides drinking water for more than 700,000 people.⁹ Along with discharging effluent into surface waters, the WWTF burns sewage sludge in an onsite incinerator that sits on the banks of the Merrimack River, releasing emissions

⁸ 88 Fed. Reg. 66558, 66592, 66600 (Sept. 27, 2023). As detailed in a letter submitted to the Department simultaneously with this comment letter, pursuant to RSA 91-A, CLF has requested all records related to water quality certifications for the Original Draft NPDES Permit and Revised Draft NPDES Permit for the Manchester WWTF.

⁹ About the Merrimack, EPA (July 31, 2024), <https://www.epa.gov/merrimackriver/about-merrimack>.

into the ambient air. The Manchester WWTF is the only WWTF in New Hampshire that incinerates sewage sludge.¹⁰

EPA issued a Draft Permit for the Manchester WWTF on April 10, 2024.¹¹ The Department issued a corresponding one-page water quality certification on June 6, 2024, stating that “[t]he permit, as currently written, *will ensure*” compliance with water quality standards and that “no conditions” in the Original Draft Permit “can be made less stringent[.]”¹² EPA issued Revised Draft NPDES Permit on December 18, 2025.¹³ The Department then released a draft water quality certification on January 9, 2025, which included conditions and statements.¹⁴

Several state water quality standards apply to the Merrimack River, which is directly affected by the Manchester WWTF. For example, New Hampshire’s narrative standard for toxic substances provides that “all surface waters shall be free from toxic substances or chemical constituents in concentrations or combinations that . . . [i]njure or are inimical to plants, animals, humans or aquatic life; or . . . [p]ersist in the environment or accumulate in aquatic organisms to levels that result in harmful concentrations in” edible fish or other wildlife. N.H. Code Admin. Env-Wq 1703.21(a)(1). In addition, “[a]ll surface waters shall be restored to meet the water quality criteria for their designated classification including existing and designated uses.” *Id.* Env-Wq 1703.01(b).

¹⁰ National Biosolids Data Project, State Biosolids Survey: 2018 Data (2021), https://static1.squarespace.com/static/601837d1c67bcc4e1b11862f/t/6203f0b582fcb750de408e1/1644425397690/N%20H_BiosolidsDataSummary_NBDP%26NEIWPC20220209.pdf.

¹¹ EPA, Original Draft Permit No. NH0100447 (April 2024), <https://www.epa.gov/system/files/documents/2024-04/draftnh0100447permit-2024.pdf>.

¹² Letter from Rene Pelletier, Dep’t Env’t Servs., to Lynn Jennings, EPA Region 1, regarding Manchester Wastewater Treatment Facility Certification of NPDES Permit No. NH0100447 (June 6, 2024) (on file with Dep’t Env’t Servs.) (emphasis added).

¹³ EPA, Revised Draft Permit No. NH0100447 (December 2024), <https://www.epa.gov/system/files/documents/2024-12/draftnh0100447permitrevision-2024.pdf>.

¹⁴ Dep’t Env’t Servs., Draft Water Quality Certification, 2025-NH0100447 at 2 (January 2025), https://www.des.nh.gov/sites/g/files/ehbemt341/files/media/media_document/manchesterdraftcert.pdf (emphasis added).

To protect human health, the Merrimack River is designated for a “fish consumption” use, meaning the water is required to “support a population of fish free from toxicants and pathogens that could pose a human health risk to consumers[.]”¹⁵ To protect aquatic life, the Merrimack River “shall provide, wherever attainable, for the protection and propagation of fish, shellfish and wildlife, and for recreation in and on the surface waters.” *See* N.H. Code Admin. Env-Wq 1703.01(c). And as a Class B water, “disposal of sewage or waste [shall not] be inimical to aquatic life or to the maintenance of aquatic life” in the Merrimack River. RSA 485-A:8, II.¹⁶ Importantly, the portion of the Merrimack River that receives effluent from the Manchester WWTF is already impaired for fish consumption, aquatic life, and primary contact recreation uses.¹⁷

The Manchester WWTF’s discharges into the Merrimack River and emissions into ambient air contain toxic PFAS chemicals. Two sources of information appended as Exhibits A and B—Manchester WWTF’s own PFAS monitoring data and a peer-reviewed article—document PFAS in the WWTF’s inputs and outputs.¹⁸ As detailed in CLF’s June 10, 2024, Comments on EPA’s Original Draft NPDES Permit for the WWTF and corresponding exhibits, appended here as Exhibit C, the WWTF receives wastewater from 14 significant industrial users, at least 12 of which operate in PFAS-related sectors.¹⁹

Despite the WWTF’s contributions of health-harming, bioaccumulative, and persistent PFAS chemicals directly into the Merrimack River and to the ambient air near the river, EPA’s Original Draft Permit and Revised Draft Permit did not include effluent limits or industrial source control measures for PFAS. Nothing in the Department’s draft certification indicates that it considered

¹⁵ N.H. Dep’t Env’t Servs., Section 305(B) and 303(D) Consolidated Assessment and Listing Methodology (R-WD-20-20) (R-WD-20-20) at 10 (2022), <https://www.des.nh.gov/sites/g/files/ehbemt341/files/documents/r-wd20-20.pdf>.

¹⁶ *See also* EPA, Original Draft Permit, Fact Sheet at 16 (April 2024), <https://www.epa.gov/system/files/documents/2024-04/draftnh0100447permit-2024.pdf>.

¹⁷ *Id.* at 17.

¹⁸ City of Manchester WWTF PFAS Monitoring Reports (2019–23) (Exhibit A); Brannon A. Seay et al., *Per- and Polyfluoroalkyl Substances Fate and Transport at a Wastewater Treatment Plant with a Collocated Sewage Sludge Incinerator*, 847 SCI. TOTAL ENV’T 1 (2023) (Exhibit B).

¹⁹ Conservation Law Foundation, Comments on Draft NPDES Permit No. NH0100447 at 7 (June 10, 2024), accessible at <https://www.clf.org/wp-content/uploads/2024/07/2024-6-10-CLF-Comments-on-Manchester-NH-Draft-NPDES-Permit.pdf> (Exhibit C includes both the June 10 Comments and the exhibits to those comments).

whether the WWTF’s discharges and/or emissions of PFAS chemicals may contribute to state water quality standards violations.

III. The Department Must Consider and Address Record Evidence of PFAS Discharges and Emissions, Revise its Certification Evaluation, and Deny Certification Based on PFAS Contributions.

The draft 401 certification fails to evaluate the water quality impacts of, or even mention, PFAS contributions from the Manchester WWTF and its incinerator. Thus, the Department ostensibly failed to “develop a record to support its determination that an activity will or will not comply with applicable water quality requirements” with respect to PFAS.²⁰

To the contrary, the Department granted certification on June 6, 2024 in a brief, one-page document stating that “[t]he permit, as currently written, *will ensure*” compliance with water quality standards and that “no conditions” in the Original Draft Permit “can be made less stringent[.]”²¹ Then, when EPA issued a Revised Draft Permit with less stringent provisions that omit narrative limitations, the Department issued a brief, five-page draft certification only 22 days later.²² The brevity of both certification documents, the Department’s failure to address water quality impacts of PFAS, and the Department’s proposal to grant certification of a less protective Revised Draft Permit despite the Department’s initial statement that the permit cannot “be made less stringent” indicate that the Department “pre-determined” the certification result before evaluating the water quality impacts of the Manchester WWTF and its incinerator. *See Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 149 (2d Cir. 2008). These factors, individually and collectively, would render finalization of the draft certification unlawful and unreasonable.

²⁰ 88 Fed. Reg. 66558, 66592, 66600 (Sept. 27, 2023). As detailed in a letter submitted to the Department simultaneously with this comment letter, pursuant to RSA 91-A, CLF has requested all records related to water quality certifications for the Original Draft NPDES Permit and Revised Draft NPDES Permit for the Manchester WWTF.

²¹ Letter from Rene Pelletier, Dep’t Env’t Servs., to Lynn Jennings, EPA Region 1, regarding Manchester Wastewater Treatment Facility Certification of NPDES Permit No. NH0100447 (June 6, 2024) (on file with Dep’t Env’t Servs.) (emphasis added).

²² Dep’t Env’t Servs., Draft Water Quality Certification, 2025-NH0100447 at 2 (January 2025), https://www.des.nh.gov/sites/g/files/ehbemt341/files/media/media_document/manchesterdraftcert.pdf (emphasis added).

The Department’s draft certification is also premised on standards that are outdated and contrary to the language of EPA’s current regulations. The Department must conduct an evaluation consistent with existing regulatory requirements and, after doing so, must deny certification due to the PFAS-related impacts of the WWTF on the Merrimack River.

First, the draft certification is incorrectly premised on “reasonable assurance” language, stating that “the permit will provide *reasonable assurance* that the discharges will comply with New Hampshire’s surface water quality standards[.]”²³ However, as detailed above, EPA explicitly removed the “reasonable assurance” phrase from 401 certification regulations. The statute requires the certifying state to determine that the permittee “will comply” with water quality requirements, 33 U.S.C. § 1341(a)(1), (d), and the current rules intentionally include the “will comply” language as well. 40 C.F.R. § 121.7(c)–(e). That language places a higher burden on the state to scrutinize water quality impacts of the activity at issue and to protect the state’s surface water resources. The Department must therefore analyze whether the WWTF’s operations under the Revised Draft NPDES permit—including its releases of PFAS with no effluent limits or source control requirements—“will comply” with state surface water quality standards prohibiting harmful levels of toxic pollutants and protecting fish consumption and aquatic life.

In addition, the draft certification indicates that the Department considered only the impact of the WWTF’s discharge—rather than all WWTF activities, including sewage sludge incineration—in its evaluation. The draft certification states that “the permit will provide reasonable assurance that the *discharges* will comply with New Hampshire’s surface water quality standards[.]”²⁴ The current rules, however, require states to consider not only the water quality impacts of discharges, but also all water quality impacts of the permitted activity. The Department must therefore consider the impacts of the WWTF’s discharges of PFAS, *and* the incinerator’s emissions of PFAS, on the Merrimack River.

²³ Dep’t Env’t Servs., Draft Water Quality Certification, 2025-NH0100447 at 2 (January 2025), https://www.des.nh.gov/sites/g/files/ehbemt341/files/media/media_document/manchesterdraftcert.pdf (emphasis added).

²⁴ Dep’t Env’t Servs., Draft Water Quality Certification, 2025-NH0100447 at 2 (January 2025), https://www.des.nh.gov/sites/g/files/ehbemt341/files/media/media_document/manchesterdraftcert.pdf (emphasis added).

After evaluating the impacts of the WWTF's PFAS discharges and emissions based on data in the attached exhibits and otherwise collected by the Department as part of its analysis, the Department must deny certification, or at least condition certification on PFAS effluent limitations and source control, because it cannot determine that the Manchester WWTF will comply with state water quality standards. Both the narrative toxics standard and the designated use provisions require water quality that is safe for human health (including fish consumption) and aquatic life.²⁵ The PFAS compounds detected in the Manchester WWTF's effluent likely contribute to violations of those standards.²⁶

For example, PFOS has been detected in edible fish in the Merrimack River at levels reaching 7.914 parts per billion (ppb).²⁷ That level is harmful if consumed, as it closely approaches the 8.41 ppb level at which eating one standard serving of fish is equivalent to drinking water at 2,400 times EPA's PFOS health advisory level for an entire month.²⁸ Given that the WWTF has discharged PFOS into the Merrimack River since the City began monitoring in 2019 (and likely since a much earlier time), the WWTF is likely contributing to those harmful concentrations in violation of New Hampshire's narrative toxics standard and fish consumption designated use. The EPA's Draft Permit for the WWTF contains no effluent limits or source control measures to reduce the PFAS entering or exiting the WWTF; thus, the permit will not remedy the harmful water quality impacts of the WWTF's PFAS contributions.

²⁵ See N.H. Code Admin. Env-Wq 1703.21(a) (establishing narrative toxics standard); *id.* Env-Wq 1703.01(b) (protecting designated uses); N.H. Dep't Env't Servs., Section 305(B) and 303(D) Consolidated Assessment and Listing Methodology (R-WD-20-20) at 10 (2022), <https://www.des.nh.gov/sites/g/files/ehbemt341/files/documents/r-wd20-20.pdf> (designating “[a]ll surface waters” for fish consumption and potential drinking water supply.)

²⁶ Conservation Law Foundation, Comments on Draft NPDES Permit No. NH0100447 at 19–23 (June 10, 2024), accessible at <https://www.clf.org/wp-content/uploads/2024/07/2024-6-10-CLF-Comments-on-Manchester-NH-Draft-NPDES-Permit.pdf>.

²⁷ See Heidi M. Pickard et al., *PFAS and Precursor Bioaccumulation in Freshwater Recreational Fish: Implications for Fish Advisories*, 56 ENV'T SCI. & TECH. 15573 (2022), <https://pubs.acs.org/doi/10.1021/acs.est.2c03734>; see also Heidi M. Pickard Et al., Supporting Information for PFAS and Precursor Bioaccumulation in Freshwater Recreational Fish: Implications for Fish Advisories S-2–S-3 (2022), https://pubs.acs.org/doi/suppl/10.1021/acs.est.2c03734/suppl_file/es2c03734_si_001.pdf (Fish Concentrations Table S16, Location 5, Largemouth Bass, Σ PFOS) (Exhibit E).

²⁸ Nadia Barbo et al., *Locally caught freshwater fish across the United States are likely a significant source of exposure to PFOS and other perfluorinated compounds*, 220 ENV'T RSCH. 1, at 6 (2023), <https://www.sciencedirect.com/science/article/pii/S0013935122024926> (Exhibit F).

Because the Department cannot certify that the permitted WWTF and incineration activities *will comply* with water quality requirements considering PFAS discharges and air emissions from the Manchester WWTF, the Department must deny 401 certification or condition certification upon EPA including appropriately protective effluent limitations or source control measures for PFAS. *See* 33 U.S.C. § 1341(a)(1), (d).²⁹

IV. The Department Must Strengthen Conditions in Any Future 401 Certification for the Manchester WWTF NPDES Permit.

The Department’s draft certification conditions do not ensure that the WWTF’s activities will comply with New Hampshire’s water quality standards. Any future certification for the Manchester WWTF’s NPDES Permit must update its conditions to ensure compliance, as set forth below.

First, the Department’s certification conditions should account for the fact that EPA’s Revised Draft Permit removed narrative provisions, constraining EPA’s ability to ensure compliance with New Hampshire’s water quality standards and criteria through the permit. For example, as described in CLF’s January 30, 2025 comments on the Revised Draft Permit, appended as Exhibit D, the Revised Draft Permit removed a narrative provision from the Original Draft NPDES Permit that stated: “The discharge shall not cause a violation of the water quality standards of the receiving water.”³⁰ The Revised Draft Permit also removed a provision that incorporated the language of New Hampshire’s narrative criteria for toxic pollutants.³¹

In place of the narrative provisions, the Revised Draft Permit includes enhanced Whole Effluent Toxicity requirements and a Pollutant Scan for specified pollutants. However, EPA implicitly recognized that the new monitoring provisions do not cover all pollutants encapsulated by the state narrative water quality standards. The agency’s Revised Draft Permit acknowledges that

²⁹ *See also* 88 Fed. Reg. 66558, 66607 (Sept. 27, 2023) (“A denial of certification means that the certifying authority is not able to certify that the activity will comply with water quality requirements.”); *see id.* (“A grant of certification with conditions means that the certifying authority has determined that the activity will comply with water quality requirements, but only if certain conditions are met.”)

³⁰ EPA, Revised Draft Permit No. NH0100447, Part I.A.3 (deleted) (December 2024), <https://www.epa.gov/system/files/documents/2024-12/draftnh0100447permitrevision-2024.pdf>.

³¹ *Id.* at Part I.A.6 (deleted).

Whole Effluent Toxicity requirements may not capture “other sources of toxic effects (including to human health)” and that the Pollutant Scan includes “many” but not all “common toxic pollutants.”³² The narrative provisions in the Original Draft Permit, on the other hand, covered pollutants that the permittee did not list on its application but that nonetheless may violate water quality standards. *See Ohio Valley Env’t Coal., Inc. v. Marfork Coal Co.*, 966 F. Supp. 2d 667, 685 (S.D.W. Va. 2013) (permit provisions incorporating state water quality standards function “[a]s a backstop” that “protects water quality standards that [the permitting authority] did not anticipate would be threatened based on the discharge levels reported in a permit application.”).

The Department’s draft certification fails to respond to, or address in any way, the Revised Draft Permit’s elimination of narrative provisions directly pertaining to the state’s surface water quality standards. Rather, the conditions cite only two statutory provisions and two regulatory provisions, without explaining how the certification conditions will ensure compliance with the remaining state water quality standards and criteria.³³ The Department’s failure to address the removal of narrative provisions pertaining to the state’s surface water quality standards directly conflicts with the statement in the June 10, 2024 certification for the Original Draft Permit that “no conditions” in the Original Draft Permit “can be made less stringent[.]”³⁴ To ensure that the permitted activity will comply with New Hampshire’s water quality standards, in a future certification, the Department must include a condition stating that “The discharge shall not cause or contribute to a violation of the water quality standards of the receiving water.”

Second, the Department’s revision to EPA’s proposed benthic study permit requirement conflicts with the purpose of 401 certification to ensure compliance with water quality standards. The Department’s proposed revision also incorrectly interprets the state water quality regulations it references. The proposed revision would remove an automatic permit requirement that Manchester WWTF conduct a benthic survey and would add a prerequisite to trigger the study

³² *Id.* at *Statement of Basis for 2024 Revised Draft Permit*, 7–8.

³³ Dep’t Env’t Servs., Draft Water Quality Certification, 2025-NH0100447 at 2–4 (January 2025), https://www.des.nh.gov/sites/g/files/ehbemt341/files/media/media_document/manchesterdraftcert.pdf (emphasis added).

³⁴ Letter from Rene Pelletier, Dep’t Env’t Servs., to Lynn Jennings, EPA Region 1, regarding Manchester Wastewater Treatment Facility Certification of NPDES Permit No. NH0100447 (June 6, 2024) (on file with Dep’t Env’t Servs.).

requirement.³⁵ The proposed prerequisite is a notification from the Department or EPA that benthic deposits are “known or suspected to have a detrimental impact on downstream benthic communities.”³⁶

The Department states that the permit’s effluent limitations on total suspended solids and metals already protect the benthic community near the WWTF’s outfall and “meet surface water quality standards, specifically those in Env-Wq 1703.03(c)(1)(a) and 1703.08.”³⁷ However, neither Env-Wq 1703.03(c)(1)(a) nor 1703.08 narrowly apply to total suspended solids, metals, or other pollutants with specific numeric limitations in the permit. Rather, Env-Wq 1703.03(c)(1)(a) states that surface water shall be “free from substances in kind or quantity” that form harmful benthic deposits, and 1703.08(b) requires that “Class B waters shall contain no benthic deposits that have a detrimental impact on the benthic community, unless naturally occurring.” Without an automatically-required benthic survey, the Department and EPA cannot make the requisite identification of harmful benthic deposits, rendering the proposed revision valueless for ensuring water quality standard compliance.

Third, DES should include a condition requiring PFAS monitoring of fish in the receiving water of the Manchester WWTF using method 1633. As discussed above, data shows that the Manchester WWTF discharges and emits PFAS, which can bioaccumulate in aquatic life to levels that harm humans and water quality. In addition, EPA has recommended that states monitor several PFAS compounds in fish and shellfish that “have been found to occur in the edible tissue of fish and shellfish at concentrations that may be of concern for human health.”³⁸

V. Conclusion

For the reasons discussed above, the Department’s draft certification violates the Clean Water Act and EPA regulations. The Department must perform a 401 evaluation under current regulatory standards, considering and addressing record evidence of PFAS discharges and

³⁵ Dep’t Env’t Servs., Draft Water Quality Certification, 2025-NH0100447 at 4 (January 2025), https://www.des.nh.gov/sites/g/files/ehbemt341/files/media/media_document/manchesterdraftcert.pdf.

³⁶ *Id.*

³⁷ *Id.*

³⁸ EPA, Off. of Water, Contaminants to Monitor in Fish and Shellfish Advisory Programs: Compilation of Peer Review-Related Information EPA 823-R-24-001 at 15 (July 2024), <https://www.epa.gov/system/files/documents/2024-06/contaminants-monitor-fish-peer-review-package.pdf>.



emissions from the WWTF. Based on that evaluation, the Department must deny certification because, if finalized, EPA's Revised Draft NPDES permit will not ensure compliance with state water quality standards that apply to the Merrimack River. In any future certification for the Manchester WWTF, the Department must strengthen conditions by including a narrative provision incorporating state water quality standards and by removing the proposed revision to EPA's benthic survey requirement. Finally, the Department should add a condition requiring PFAS monitoring in fish.

Respectfully submitted,

/s/ Jillian Aicher

Jillian Aicher
Equal Justice Works Legal Fellow
Conservation Law Foundation
jaicher@clf.org

/s/ Tom Irwin

Tom Irwin
Vice President, New Hampshire
Conservation Law Foundation
tirwin@clf.org

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

| | |
|--|--|
| Certification Number | WQC 2025-NH0100447 |
| Federal Permit Requiring Section 401 Water Quality Certification | Manchester Wastewater Treatment Facility Individual National Pollutant Discharge Elimination System Permit (NH0100447) |
| Activity Description | Discharges of wastewater and stormwater from the Manchester Wastewater Treatment Facility and 15 combined sewer overflow outfalls |
| Activity Location | Manchester |
| Potentially Affected Surface Waters Near the Activity (other affected surface waters may exist) | Merrimack River (NHRIV700060803-14-02, NHRIV700060803-14-01, NHIMP700060802-04) Piscataquog River (NHRIV700060607-22) Rays Brook (NHRIV700060802-15) Baker Brook (NHRIV700060803-08) Unnamed Brook (NHRIV700060803-17) |
| Receipt Date of Request for Certification | December 18, 2024 |
| Reasonable Period of Time | 6 months |
| Decision | Granted with Conditions |
| Date of Issuance | Signature Date |

A. INTRODUCTION

On December 18, 2024, the New Hampshire Department of Environmental Services (NHDES) received a request from the U.S. Environmental Protection Agency Region 1 (EPA), the permitting authority for National Pollutant Discharge Elimination System (NPDES) permits in New Hampshire, to certify the draft Manchester Wastewater Treatment Facility (WWTF) Individual NPDES Permit (NH0100447) in accordance with Clean Water Act Section 401(a)(1) and pursuant to 40 CFR Section 124.55.

The purpose of the certification is to ensure that the Manchester WWTF Individual NPDES Permit is drafted in a manner that complies with New Hampshire’s surface water quality standards specified under [Title L RSA 485-A](#) and [New Hampshire Code of Administrative Rules Env-Wq 1700](#).

B. PERMIT DESCRIPTION

EPA is issuing the Manchester WWTF Individual NPDES Permit to authorize the discharge of wastewater and stormwater from the Manchester WWTF and 15 combined sewer overflow (CSO) outfalls to the Merrimack River, Piscataquog River, Rays Brook, Baker Brook, and an Unnamed Brook. The permit establishes effluent limitations, monitoring requirements, reporting requirements, and other conditions for these discharges to meet water quality standards in the receiving waters.

EPA gave public notice of the availability of the draft Manchester WWTF Individual NPDES Permit on December 18, 2024. The public notice provided a public comment period until February 3, 2025 and stated that the draft permit and fact sheet could be obtained on EPA's website:

[NH0100447 Draft Manchester WWTF Individual NPDES Permit](#)

C. DECISION

Based on a review of the draft permit, and subject to conditions included herein, NHDES has determined that the permit, as currently written, will ensure that the discharges will comply with New Hampshire's surface water quality standards specified under [Title L RSA 485-A](#) and [New Hampshire Code of Administrative Rules Env-Wq 1700](#). NHDES hereby grants this certification in accordance with 40 CFR 121.7(d) and 40 CFR 124.53(e), subject to the conditions in Section D. CERTIFICATION CONDITIONS.

D. CERTIFICATION CONDITIONS

The following conditions shall be included in the permit to ensure that the discharges will comply with New Hampshire's surface water quality standards:

1. The Permittee shall not at any time, either alone or in conjunction with any person or persons, cause directly or indirectly the discharge of waste into the said receiving water unless it has been treated in such a manner as will not lower the legislated water quality classification of, or interfere with the uses assigned to, said water by the New Hampshire Legislature.

This condition assures compliance with RSA 485-A:12.

2. Any person responsible for a bypass or upset at a wastewater facility shall give immediate notice of the bypass or upset to all public or privately owned water systems drawing water within 20 miles downstream of the point of discharge, regardless of whether or not the water systems are on the same receiving water or on another surface water to which the receiving water is tributary. The Permittee shall maintain a list of all persons, including their telephone numbers, who are to be notified immediately by telephone. In addition, written notification, which shall be postmarked within three days of the bypass or upset, shall be sent to such persons.

Note that per RSA 485-A:2XIX, "wastewater facility" is defined as the structures, equipment, and processes required to collect, convey, and treat domestic and industrial wastes, and dispose of the effluent and sludge.

This condition assures compliance with RSA 485-A:13(l)(c).

3. Any person proposing to construct or modify any of the following shall submit an application for a sewer connection permit to NHDES:
 - a. Any extension of a collector or interceptor, whether public or private, regardless of flow
 - b. Any wastewater connection or other discharge in excess of 5,000 gallons per day
 - c. Any wastewater connection or other discharge to a WWTF operating in excess of 80 percent design flow capacity or design loading capacity, based on actual average flow or loadings for three consecutive months
 - d. Any industrial wastewater connection or change in existing discharge of industrial wastewater, regardless of quality or quantity
 - e. Any sewage pumping station greater than 50 gallons per minute or serving more than one building
 - f. Any proposed sewer that serves more than one building or that requires a manhole at the connection

This condition assures compliance with Env-Wq 703.07(a).

4. At a frequency no less than once every five years, the Permittee shall submit to NHDES:
 - a. A copy of its current sewer use ordinance, if it has been revised without department approval subsequent to any previous submittal to the department, or a certification that no changes have been made.
 - b. A current list of all significant indirect dischargers to the POTW. At a minimum, the list shall include for each significant indirect discharger: its name and address, the name and daytime telephone number of a contact person, products manufactured, industrial processes used, existing pretreatment processes, and discharge permit status.
 - c. A list of all permitted indirect dischargers.
 - d. A certification that the municipality is strictly enforcing its sewer use ordinance and all discharge permits it has issued.

This condition assures compliance with Env-Wq 305.21.

5. When the effluent discharged for a period of three consecutive months exceeds 80 percent of the design flow or design loading capacity of the facility, the Permittee shall submit to NHDES a projection of flows and loadings up to the time when the design capacity of the facility will be reached, and a program for maintaining satisfactory treatment levels consistent with approved water quality management plans. Before the design flow will be reached, or whenever treatment necessary to achieve permit limits cannot be assured, the Permittee may be required to submit plans for facility improvements.

This condition assures that adequate planning will be conducted so that flows or loads to a facility do not exceed the facility's design capacity. If flows or loads exceed the facility's design capacity, the effluent may not receive complete treatment and could result in water quality impacts if discharged.

E. 40 CFR 124.53(e) STATEMENTS

In accordance with 40 CFR 124.53(e), which states, "State certification on a draft permit may include a statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards," the following changes can be made to the permit without violating state water quality standards:

1. An allowance for a revision to the pH limits:

The pH range of 6.5 to 8.0 Standard Units (S.U.) must be achieved in the final effluent unless the Permittee can demonstrate to NHDES: 1) that the range should be widened due to naturally occurring conditions in the receiving water; or 2) that the naturally occurring receiving water pH is not significantly altered by the Permittee's discharge. The scope of any demonstration project must receive prior approval from NHDES. In no case, shall the above procedure result in pH limits outside the range of 6.0 to 9.0 S.U., which is the federal effluent limitation guideline regulation for pH for secondary treatment and is found in 40 CFR § 133.102(c).

2. A revision to Part I.G.5 Benthic Survey, as indicated in bold below:

~~"During the third calendar quarter (i.e., July through September) that begins at least 12 months after the effective date of the permit~~ **If notified in writing by NHDES or EPA that benthic deposits from the discharge are known or suspected to have a detrimental impact on downstream benthic communities, the Permittee shall conduct a benthic survey ~~once per permit term~~ within one year of the notification to assess those impacts from the discharge on aquatic life in the benthic environment. *Visual observations, benthic sample results, or long-term permit limit exceedances could indicate a potential change in either the sediments or settleable solids downstream of the outfall as compared to upstream of the outfall. Such a change could indicate that the facility's effluent is having a detrimental impact on the downstream benthic community health.***

Because the permit includes effluent limitations on parameters such as total suspended solids and metals, it is already expected to be protective of the benthic community in the vicinity of the facility's outfall and meet surface water quality standards, specifically those in Env-Wq 1703.03(c)(1)(a) and 1703.08. NHDES' position is that a benthic survey should only be required if benthic deposits from a discharge are known or suspected to have a detrimental impact on a downstream benthic community and more specific benthic data is necessary to determine if additional protections are needed.

F. ENFORCEMENT

Certification conditions are subject to enforcement mechanisms available to the federal licensing or permitting agency and to the state of New Hampshire, including those provided under RSA 485-A:12, I and RSA 485-A:12, III.

G. PUBLIC NOTICE

NHDES gave public notice of the availability of the draft certification on January 9, 2025. The public notice provided a 30-day public comment period and stated that the draft certification could be obtained on [NHDES' website](#).

H. APPEAL PROCESS

Any person aggrieved by this decision may appeal to the New Hampshire Water Council. Information regarding appealing a decision made by NHDES can be found on the [NHDES website](#). A link to the New Hampshire Water Council's rules is available on the [New Hampshire Environmental Council website](#) (or more directly at the [Water Council page](#)). Copies of the rules can also be obtained by contacting the NHDES Public Information Center at [\(603\) 271-2975](#).

I. SIGNATURE AND DATE



Digitally signed by
Rene J. Pelletier
Date: 2025.05.13
09:08:25 -04'00'

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

Date

cc: Ted Diers, Assistant Director, NHDES WD
Tracy Wood, P.E., Administrator, NHDES WD-WWEB
David Neils, Administrator, NHDES WD-WMB



For a thriving New England

CLF New Hampshire 27 North Main Street
Concord, NH 03301
P: 603.225.3060
www.clf.org

Via Email

June 12, 2025

Water Council, Attention: Appeals Clerk
Department of Environmental Services
29 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095

RE: Conservation Law Foundation's Notice of Appeal of Clean Water Act § 401 Water Quality Certification for the Manchester Wastewater Treatment Facility National Pollutant Discharge Elimination System Permit Renewal – WQC 2025-NH0100447

Dear Appeals Clerk:

Enclosed please find Conservation Law Foundation's Notice of Appeal in the above referenced matter.

An original and one copy will on this day be hand delivered to "Water Council, Attention: Appeals Clerk" at the Department of Environmental Services, 29 Hazen Drive P.O. Box 95 Concord, NH 03302-0095. We have served all parties on the service list in Ec-Wtr 203.01(d) via email, pursuant to Ec-Wtr 201.03(c).

Sincerely,

Johanne S. Van Rossum
Johanne S. Van Rossum

Service list (via email):

Rene Pelletier, Director, NHDES Water Division (rene.j.pelletier@des.nh.gov)
Robert Robinson, Manchester Wastewater Treatment Facility (rrobinson@manchester.gov)
Adam Dumville, McLane Middleton (Adam.Dumville@MCLANE.com)
Meridith Finegan, EPA (finegan.meridith@epa.gov)
Ted Diers, NHDES (theodore.e.diers@des.nh.gov)
Tracy Wood, NHDES (tracy.l.wood@des.nh.gov)
David Neils, NHDES (david.e.neils@des.nh.gov)
Emily Gray Rice, Manchester City Solicitor (erice@manchesternh.gov)

CC (via email):

Tom Irwin, Conservation Law Foundation (tirwin@clf.org)
Jillian Aicher, Conservation Law Foundation (jaicher@clf.org)