



New Hampshire Coastal Program Routine Program Change Request



The New Hampshire Coastal Program (NHCP) is proposing minor, non-substantive changes to its list of federally licensed or permitted activities subject to federal consistency review to provide additional details regarding the nature of the activities and correct or clarify the relevant sections of the referenced federal laws authorizing the activities. The NHCP is also proposing to revise a number of its enforceable policies to incorporate “uses” of New Hampshire’s coastal and estuarine resources. Details of the proposed changes are provided below.

Proposed updates to NHCP’s list of federally licensed or permitted activities subject to federal consistency review:

The CZMA federal consistency regulations at 15 C.F.R. §930.51(a) define the term “federal license or permit” to mean “any authorization that an applicant is required by law to obtain in order to conduct activities affecting any land or water use or natural resource of the coastal zone and that any federal agency is empowered to issue to an applicant.” In accordance with the Coastal Zone Management Act federal consistency regulations at 15 C.F.R. §930.53(a), “State agencies shall develop a list of federal license or permit activities which affect any coastal use or resource, including reasonably foreseeable effects, and which the state agency wishes to review for consistency with the management program.” The NHCP’s current list of federally licensed or permitted activities subject to federal consistency review is provided in Appendix A.

The NHCP is proposing several minor, non-substantive, revisions to its list of activities subject to federal consistency review that require authorization by the Federal Energy Regulatory Commission (FERC). The proposed revisions provide additional details regarding the nature of the activities and correct or clarify the relevant sections of the referenced federal laws authorizing the activities. Due to the minor nature of the proposed revisions, the NHCP does not believe an analysis of coastal effects is warranted. It should be noted that the NHCP reviewed the NOAA-approved lists of federal license or permit activities subject to federal consistency review from a number of state coastal management programs in the region, including Maine, Massachusetts, Rhode Island, Connecticut and New York. The NHCP’s proposed revisions are consistent with the language used by these programs.

Each of the NHCP’s current NOAA-approved activities requiring authorization by FERC is listed below, followed by the NHCP’s proposed revisions in **bold** type and strikethrough, followed by NHCP’s final proposed language in *italics*.

Department of Energy/Federal Energy Regulatory Commission

- License for non-federal hydroelectric projects; Section 4(e), Federal Power Act. (16 U.S.C. § 797(e))
- Licenses **and permits, and renewals and amendments thereof**, for non-federal hydroelectric projects; **and primary transmission lines under Sections 3 (11), 4 (e & f), and 15 of the** Federal Power Act. (16 U.S.C. § 796 (11), 797 ~~(e)~~, **800 and 808**)
- *Licenses and permits, and renewals and amendments thereof, for non-federal hydroelectric projects and primary transmission lines under Sections 3 (11), 4 (e & f), and 15 of the Federal Power Act. (16 U.S.C. § 796 (11), 797, 800, and 808)*

- Abandonment of gas pipelines; Section 7, National Gas Act. (15 U.S.C. § 717(f))
- **Permission and approval for the Aabandonment of natural gas pipelines; under Section 7(b) of the** Natural Gas Act. (15 U.S.C. § 717~~(f)~~**(b)**)
- *Permission and approval for the abandonment of natural gas pipelines under Section 7(b) of the Natural Gas Act. (15 U.S.C. § 717f(b))*

- Certificates authorizing construction, or operation of, or facilities for transportation or storage of natural gas; section 7, Natural Gas Act. (15 U.S.C. § 717(f))
- Certificates authorizing construction, ~~or and~~ operation of, ~~or facilities for transportation or storage of~~ **interstate natural gas; facilities, including both pipelines and terminal facilities, under Ssections 3 and 7 of the** Natural Gas Act. (15 U.S.C. **§ 717b and § 717**~~(f)~~)
- *Certificates authorizing construction and operation of interstate natural gas facilities, including both pipelines and terminal facilities, under Sections 3 and 7 of the Natural Gas Act. (15 U.S.C. § 717b and § 717f)*

- Options and orders for permission for delivery of imported LNG. (15 U.S.C. § 717(b)). This activity was formerly under the jurisdiction of the Department of Energy/Economic Regulatory Administration.
- Options and orders for permission for ~~delivery of imported~~ **or export of natural gas LNG under Section 3 of the Natural Gas Act.** (15 U.S.C. § 717~~(b)~~) ~~This activity was formerly under the jurisdiction of the Department of Energy/Economic Regulatory Administration.~~

- . *Options and orders for permission for import or export of natural gas under Section 3 of the Natural Gas Act. (15 U.S.C. § 717b)*

The NHCP is also proposing minor, non-substantive, revisions to its list of list of activities subject to federal consistency review that require authorization by the Department of the Interior's Bureau of Ocean Energy Management (BOEM). The proposed revisions provide additional details regarding the nature of the activities and clarify the relevant sections of the federal law authorizing the activities – the Outer Continental Shelf Lands Act. Due to the minor nature of the proposed revisions, the NHCP does not believe an analysis of coastal effects is warranted. It should be noted that the NHCP reviewed the NOAA-approved lists of federal license or permit activities subject to federal consistency review from a number of state coastal management programs in the region, including Maine, Massachusetts, Rhode Island, Connecticut and New York. The NHCP's proposed revisions are consistent with the language used by these programs.

The NHCP's current NOAA-approved activities requiring authorization by BOEM are listed below, followed by the NHCP's proposed revisions in **bold** type and strikethrough, followed by NHCP's final proposed language in *italics*.

Department of the Interior/Bureau of Ocean Energy Management and Bureau of Safety and Environmental Enforcement

- . Permit for pipeline rights-of-way for oil and gas transmission on Outer Continental Shelf (OCS). (43 U.S.C. § 1334(e))
- . **Permits, licenses, easements, rights-of-way, or other grant of authority for construction and maintenance of pipelines** ~~rights-of-way~~ for oil and gas transmission on **the Outer Continental Shelf (OCS) under the Outer Continental Shelf Lands Act.** (43 U.S.C. § 1334(e) ~~et seq.~~)
- . *Permits, licenses, easements, rights-of-way, or other grant of authority, for construction and maintenance of pipelines for oil and gas transmission on the Outer Continental Shelf under the Outer Continental Shelf Lands Act. (43 U.S.C. § 1334 et seq.)*
- . Plans for the exploration, development and production of OCS resources. Oil or gas leasing activities are specifically exempted. (43 U.S.C. § 1351)
- . Plans for the exploration, development and production of ~~OCS~~ **Outer Continental Shelf** resources, **and any other permits or authorizations granted for activities described in detail in Outer Continental Shelf exploration, development and production plans, under the Outer Continental Shelf Lands Act.** ~~Oil or gas leasing activities are specifically exempted.*~~ (43 U.S.C. § 13351 et seq.)

Plans for the exploration, development and production of Outer Continental Shelf resources, and any other permits or authorizations granted for activities described in detail in Outer Continental Shelf exploration, development and production plans, under the Outer Continental Shelf Lands Act. (43 U.S.C. § 1331 et seq.)

* The Coastal Zone Act Reauthorization Amendments of 1990, Pub. L. No. 101-508, 104 Stat. 143, made clear that Outer Continental Shelf oil and gas lease sales are federal agency actions subject to federal consistency review under the provisions of 16 U.S.C. 1456(c)(1) (CZMA § 307(c)(1)), overturning the effect of *Secretary of the Interior v. California*. 464 U.S. 312 (1984).

Proposed updates to NHCP's enforceable policies:

The NHCP is based on 16 enforceable policies that reflect state priorities aimed at balancing development needs with resource protection. NHCP's current enforceable policies are grouped into six topics areas, including: 1) Protection of Coastal Resources; 2) Recreation and Public Access; 3) Managing Coastal Development; 4) Coastal Dependent Uses; 5) Historic and Cultural Resources; and 6) Marine and Estuarine Research and Education (see Appendix B). These policies are drawn from existing state laws which constitute the legal basis for state agency decisions in the coastal zone. It is these state laws, known as enforcement laws, that form the basis for NHCP's federal consistency review process. The enforcement laws for each of the NHCP's enforceable policies can be found in Chapter 3 (Coastal Policies and Authorities) of the *New Hampshire Coastal Program and Final Environmental Impact Statement, July 1988* located here - <https://www.des.nh.gov/organization/divisions/water/wmb/coastal/feis.htm>.

The NHCP is proposing to revise a number of its enforceable policies to incorporate "uses" of New Hampshire's coastal and estuarine resources. The NHCP's enforceable policies currently focus primarily on the resources themselves (e.g., coastal and estuarine waters, tidal and nontidal wetlands, beaches, sand dunes, fish, shellfish, etc.) and not on the many of uses of those resources (e.g., commercial and recreational fishing, boating, site seeing, beach-going, etc.). The term "enforceable policy" is defined in the Coastal Zone Management Act (16 U.S.C. §1453(6a)) to mean "state policies...by which a state exerts control over private and public land and water uses..." Based on this definition and given that federal consistency applies whenever a federal activity initiates an event or series of events where effects on one or more coastal uses or resources are reasonably foreseeable, the NHCP finds that incorporating uses into its enforceable policies is consistent with the intent of the Coastal Zone Management Act.

Below is a list of the enforceable policies that the NHCP is requesting to revise with language proposed to be added in bold type and language to be removed in bold type and strikethrough. The relevant enforcement law(s) which form the legal basis for each policy are also provided, as are justifications for the proposed revisions and information describing how the proposed revisions are consistent with the intent of the enforcement laws.

Enforceable Policy #1:

*Protect and preserve and, where appropriate, restore the water and related land resources **and uses** of the coastal and estuarine environments. The resources of primary concern are coastal and estuarine waters, tidal and freshwater wetlands, beaches, sand dunes, and rocky shores.*

Primary Enforcement Law: RSA 482-A: Fill and Dredge in Wetlands (formerly RSA 483-A)

RSA 482-A, New Hampshire's Dredge and Fill law, protects and preserves all lands submerged or flowed by mean high tide, sand dunes, areas within 100 feet of the highest observable tide line which border on tidal waters, and wherever fresh water flows or stands (see RSA 482-A:4 in Appendix C). The law's Finding of Public Purpose (see RSA 482-A:1 in Appendix C) states that the despoliation and unregulated alteration of such areas "...will eliminate, depreciate or obstruct the commerce, recreation and aesthetic enjoyment of the public..." The NHCP finds that "commerce, recreation, and aesthetic enjoyment of the public", as described in RSA 482-A:1, constitute uses of the areas that the law is intended to protect and preserve. As such, revising enforceable policy #1 as proposed is consistent with the intent of RSA 482-A.

Enforceable Policy #2:

***Protect**, manage, conserve and, where appropriate, undertake measures to maintain, restore, and enhance the fish and wildlife resources **and related uses, including but not limited to commercial and recreational fishing**, of the state.*

Primary Enforcement Laws: RSA 206: Fish and Game Commission; RSA 211: Fish, Shellfish, Lobster and Crabs

RSA 206 establishes both the New Hampshire Fish and Game Department and the Fish and Game Commission, and tasks the Executive Director of the New Hampshire Fish and Game Department to serve as the chief administrator of the Fish and Game Commission. In this capacity, the Executive Director has the power to "protect, propagate and preserve the fish, game, and wildlife resources of the state..." (see RSA 206:10 in Appendix C). Given that RSA 206 explicitly gives the Executive Director the power to "protect...the fish, game and wildlife resources of the state...", the NHCP finds that adding "*protect*" to the language of enforceable policy #2 is consistent with the intent of RSA 206.

RSA 206 also gives the Executive Director the authority to "set and charge fees", "open and close the season for taking" and "fix the size, number and weight limits and other conditions governing taking." These authorities directly relate to the public use of fish, game and wildlife resources of the state. Therefore, the NHCP finds that adding "*and related uses*" to enforceable policy #2 is consistent with RSA 206.

Finally, RSA 211 establishes the Division of Marine Fisheries within the New Hampshire Fish and Game Department (see RSA 211:65 in Appendix C). RSA 211 also tasks the Division of Marine Fisheries with regulating and promoting both recreational and commercial marine fishing in New Hampshire's tidal waters. Given that recreational and commercial fishing constitute uses of the state's fisheries resources, the NHCP finds that adding "*including but not limited to commercial and recreational fishing*" to enforceable policy #2 is consistent with RSA 211.

Enforceable Policy #3:

*Regulate the mining of sand and gravel resources in offshore and onshore locations so as to ensure protection of submerged lands, **and** marine and estuarine life, **and existing uses**. Ensure adherence to minimum standards for restoring natural resources **and uses** impacted from onshore **and offshore** sand and gravel **mining removal** operations.*

Primary Enforcement Law: RSA 482-A: Fill and Dredge in Wetlands (formerly RSA 483-A)

As discussed above, under Enforceable Policy #1, the NHCP finds that "commerce, recreation, and aesthetic enjoyment of the public", as described in RSA 482-A:1, constitute uses of the areas that the law is intended to protect and preserve. As such, revising enforceable policy #3 to add language to protect and restore uses, as proposed, is consistent with the intent of RSA 482-A.

Finally, the NHCP proposes to add "offshore" and replace "removal" with "mining" in the second sentence of enforceable policy #3 to be consistent with the language in the first sentence of the policy.

Enforceable Policy #12:

*Ensure that the siting of any proposed energy facility in the coast will consider the national interest and will not unduly interfere with the orderly development of the region and will not have an unreasonable adverse impact on aesthetics, historic sites, coastal and estuarine waters, air and water quality, the natural environment, **and the** public health and safety, **and existing uses**.*

Primary Enforcement Law: RSA 162-H: Energy Facility Evaluation, Siting, Construction and Operation

The Declaration of Purpose (RSA 162-H:1, see Appendix C) of the state's energy facility, evaluation, siting, construction and operation law states "The legislature recognizes that the selection of sites for energy facilities may have significant impacts on and benefits to...the use of natural resources..." Given that RSA 162-H specifically references "the use of natural resources", the NHCP finds that adding "existing uses" to the language of enforceable policy #12 is consistent with the intent of the law.

If approved by NOAA's Office for Coastal Management, the above-referenced changes will be reflected in Appendix B (Coastal Program Policies) and Appendix C, Section II (Federally Licensed or Permitted Activities) of the NHCP's *Guide to Federal Consistency* (<https://www.des.nh.gov/organization/commissioner/pip/publications/wd/documents/wd-05-21.pdf>), which was approved by NOAA's Office of Ocean and Coastal Resource Management on January 16, 2009.

View the NHCP's public notice regarding this proposed Routine Program Change at the website https://www.des.nh.gov/organization/divisions/water/wmb/coastal/public_notices.htm.

Appendix A.

LISTED FEDERAL ACTIVITIES SUBJECT TO CONSISTENCY REVIEW

Federally Licensed or Permitted Activities

Department of Defense/Army Corps of Engineers

- . Section 9 permit; Rivers and Harbors Act of 1899 (33 U.S.C. § 401)
- . Section 10 permit; Rivers and Harbors Act of 1899 (33 U.S.C. § 403)
- . Section 404 permit; Clean Water Act and amendments (33 U.S.C. § 1344)
- . Section 103 permit, Marine Protection Research and Sanctuaries Act of 1972 as amended. (33 U.S.C. § 1413)

Department of Energy/Federal Energy Regulatory Commission

- . License for non-federal hydroelectric projects; Section 4(e), Federal Power Act. (16 U.S.C. § 797(e))
- . Abandonment of gas pipelines; Section 7, National Gas Act. (15 U.S.C. § 717(f))
- . Certificates authorizing construction, or operation of, or facilities for transportation or storage of natural gas; Section 7, Natural Gas Act. (15 U.S.C. § 717(f))
- . Options and orders for permission for delivery of imported LNG. (15 U.S.C. § 717(b)). This activity was formerly under the jurisdiction of the Department of Energy/Economic Regulatory Administration.

Department of the Interior/Bureau of Ocean Energy Management and Bureau of Safety and Environmental Enforcement

- . Permit for pipeline rights-of-way for oil and gas transmission on Outer Continental Shelf (OCS). (43 U.S.C. § 1334(e))
- . Plans for the exploration, development and production of OCS resources. Oil or gas leasing activities are specifically exempted. (43 U.S.C. § 1351)

Department of Transportation and Department of Homeland Security/Coast Guard

- . License for the construction and operation of deepwater ports; Deepwater Port Act of 1974. (33 U.S.C. § 1503)
- . Permit for construction or modification of bridge structures across navigable waters of the United States. Section 9, Rivers and Harbors Act of 1899. (33 U.S.C. § 401)

Department of Transportation/Federal Aviation Administration

- . Permit and license for the construction, operation, or alteration of airports. (49 U.S.C. § 44702 and 47112)

Environmental Protection Agency

- . National Pollution Discharge Elimination System (NPDES) permit; Section 402 and 403, Federal Water Pollution Control Act. (33 U.S.C. §§ 1342 and 1343) Ocean dumping permit (exercised jointly with Army Corps of Engineers) Section 102 permit, Marine Protection Research and Sanctuaries Act of 1993 as amended. (33 U.S.C. § 1412)

National Surface Transportation Board

- . Abandonment of rail lines. (49 U.S.C. § 10903)

Any state objections or conditions under this activity must be limited to those that do not interfere with interstate rail operations or seek to impose pre-abandonment requirements. This activity was formerly under the jurisdiction of the Interstate Commerce Commission.

Nuclear Regulatory Commission

- . Permit and license required for the construction and operation of nuclear plant. (42 U.S.C. § 2133)

Appendix B:

NEW HAMPSHIRE COASTAL PROGRAM ENFORCEABLE POLICIES

Protection of Coastal Resources

1. Protect and preserve and, where appropriate, restore the water and related land resources of the coastal and estuarine environments. The resources of primary concern are coastal and estuarine waters, tidal and freshwater wetlands, beaches, sand dunes, and rocky shores.
2. Manage, conserve and, where appropriate, undertake measures to maintain, restore, and enhance the fish and wildlife resources of the state.
3. Regulate the mining of sand and gravel resources in offshore and onshore locations so as to ensure protection of submerged lands, and marine and estuarine life. Ensure adherence to minimum standards for restoring natural resources impacted from onshore sand and gravel removal operations.
4. Undertake oil spill prevention measures, safe oil handling procedures and, when necessary, expedite the cleanup of oil spillage that will contaminate public waters. Institute legal action to collect damages from liable parties in accordance with state law.
5. Encourage investigations of the distribution, habitat needs, and limiting factors of rare and endangered animal species and undertake conservation programs to ensure their continued perpetuation.
6. Identify, designate, and preserve unique and rare plant and animal species and geologic formations which constitute the natural heritage of the state. Encourage measures, including acquisition strategies, to ensure their protection.

Recreation and Public Access

7. Provide a wide range of outdoor recreational opportunities including public access in the seacoast through the maintenance and improvement of the existing public facilities and the acquisition and development of new recreational areas and public access.

Managing Coastal Development

8. Preserve the rural character and scenic beauty of the Great Bay estuary by limiting public investment in infrastructure within the coastal zone in order to limit development to a mixture of low and moderate density.

9. Reduce the risk of flood loss, to minimize the impact of floods on human safety, health and welfare, and to preserve the natural and beneficial value of floodplains, through the implementation of the National Flood Insurance Program and applicable state laws and regulations, and local building codes and zoning ordinances.
10. Maintain the air resources in the coastal area by ensuring that the ambient air pollution level, established by the New Hampshire State Implementation Plan pursuant to the Clean Air Act, as amended, is not exceeded.
11. Protect and preserve the chemical, physical, and biological integrity of coastal water resources, both surface and groundwater.
12. Ensure that the siting of any proposed energy facility in the coast will consider the national interest and will not unduly interfere with the orderly development of the region and will not have an unreasonable adverse impact on aesthetics, historic sites, coastal and estuarine waters, air and water quality, the natural environment and the public health and safety.

Coastal Dependent Uses

13. Allow only water dependent uses and structures on state properties in Portsmouth-Little Harbor, Rye Harbor, and Hampton-Seabrook Harbor, at state port and fish pier facilities and state beaches (except those uses or structures which directly support the public recreation purpose). For new development, allow only water dependent uses and structures over waters and wetlands of the state. Allow repair of existing over-water structures within guidelines. Encourage the siting of water dependent uses adjacent to public waters.
14. Preserve and protect coastal and tidal waters and fish and wildlife resources from adverse effects of dredging and dredge disposal, while ensuring the availability of navigable waters to coastal-dependent uses. Encourage beach renourishment and wildlife habitat restoration as a means of dredge disposal whenever compatible.

Preservation of Historic and Cultural Resources

15. Support the preservation, management, and interpretation of historic and culturally significant structures, sites and districts along the Atlantic coast and in the Great Bay area.

Marine and Estuarine Research and Education

16. Promote and support marine and estuarine research and education that will directly benefit coastal resource management.

Appendix C:

APPLICABLE STATE ENFORCEMENT LAWS

Chapter 482-A: Fill and Dredge in Wetlands -

482-A:1 Finding of Public Purpose.

It is found to be for the public good and welfare of this state to protect and preserve its submerged lands under tidal and fresh waters and its wetlands, (both salt water and fresh-water), as herein defined, from despoliation and unregulated alteration, because such despoliation or unregulated alteration will adversely affect the value of such areas as sources of nutrients for finfish, crustacea, shellfish and wildlife of significant value, will damage or destroy habitats and reproduction areas for plants, fish and wildlife of importance, **will eliminate, depreciate or obstruct the commerce, recreation and aesthetic enjoyment of the public**, will be detrimental to adequate groundwater levels, will adversely affect stream channels and their ability to handle the runoff of waters, will disturb and reduce the natural ability of wetlands to absorb flood waters and silt, thus increasing general flood damage and the silting of open water channels, and will otherwise adversely affect the interests of the general public.

482-A:4 Definition.

Without limiting RSA 482-A:3, the waters and adjacent areas within this state to which this chapter applies are defined as follows:

I. Wherever the tide ebbs and flows, this chapter shall apply to all lands submerged or flowed by mean high tide as locally determined, any sand dune or vegetation thereon in the state of New Hampshire, and, in addition, to those areas within 100 feet of the highest observable tide line which border on tidal waters, such as, but not limited to, banks, upland areas, bogs, salt marsh, swamps, meadows, flats or other lowlands subject to tidal action.

II. Wherever fresh water flows or stands and in all areas above tidal waters not included in paragraph I of this section, it shall apply (in addition to great ponds or lakes of 10 acres or more in natural area as provided for in RSA 482-A:16-20 and RSA 482-A:21-25) to those portions of great ponds or lakes created by the raising of the water level of the same, whether by public or private structure, and to all surface waters of the state as defined in RSA 485-A:2 which contain fresh water, including the portion of any bank or shore which borders such surface waters, and to any swamp or bog subject to periodical flooding by fresh water including the surrounding shore.

Chapter 206: Fish and Game Commission -

206:1 Commission Created; Name of Department.

There shall be an agency of the state to be known hereafter as the fish and game department under a commission to be known as the fish and game commission.

206:10 Powers and Duties.

I. It shall be the duty of the executive director to function as the chief administrator of the commission and to **protect**, propagate and preserve the fish, game, and wildlife resources of the state and to protect and conserve nongame birds of the state. The executive director shall, subject to the limitations hereinafter set forth, have the power and authority to adopt and enforce rules, pursuant to RSA 541-A, for the adequate and effective control, management, restoration, conservation, and regulation of the fish, game, bird, and wildlife resources of the state, including rules designed to prohibit or otherwise regulate nonagricultural activities which may cause the introduction or spread of infectious disease in the state's wildlife resources. Such power and authority shall include: (a) the right, after consultation with the commission, **to set and charge fees** adopted pursuant to RSA 541-A, (b) the right **to open and close the season for taking fish, game, birds, and wildlife**, and (c) the right **to fix the size, number and weight limits, and other conditions governing the method and manner of taking the same**. Such power and authority may be exercised with reference to the state as a whole, or for any specified county or part thereof, or for any lake, pond, stream, or part thereof.

Chapter 211: Fish, Shellfish, Lobsters and Crabs -

211:65 Division Established.

A division of marine fisheries is established in the department of fish and game. The division is responsible for the **regulation and promotion of both recreational and commercial marine fishing in the salt waters of the state**.

Chapter 162-H: Energy Facility Evaluation, Siting, Construction and Operation

162-H:1 Declaration of Purpose. – The legislature recognizes that the selection of sites for energy facilities may have significant impacts on and benefits to the following: the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air and water quality, **the use of natural resources**, and public health and safety.