



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 1  
5 POST OFFICE SQUARE, SUITE 100  
BOSTON, MA 02109-3912

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

**MAR 22 2012**

Roger Raymond  
Town Manager  
P.O. Drawer X  
Bucksport, ME 04416

Re: Public Notice of a Final Decision to deny a request for a Clean Water Act Section 301(h) Waiver of Secondary Treatment for NPDES Permit No. ME0100111

Dear Mr. Raymond:

Enclosed is the final decision of the Regional Administrator of EPA-Region I to deny the Town of Bucksport's ("Town") application for a Section 301(h) waiver of secondary treatment. Pursuant to federal regulations at 40 CFR §124.6(b) the tentative decision to deny the waiver was released for a 60 day public comment period on September 27, 2007. The public comment period ended on November 26, 2007.

During the public comment period, EPA received written comments from Sean Mahoney, Vice President and Director of the Conservation Law Foundation's Maine Advocacy Center, and Katherine A. Joyce, Esq., of Bernstein, Shur, Sawyer and Nelson, P.A., Portland, ME, on behalf of the Town. Please see EPA's formal response to those comments included with this letter along with the EPA Region I Regional Administrator's final decision to deny the request for a 301(h) waiver.

As described in the tentative decision, EPA retains jurisdiction over the Section 301(h) permits in the State of Maine because that portion of the National Pollutant Discharge Elimination System (NPDES) program may not be delegated to the State. Upon the effective date of the Region's denial, EPA ceases to be the permitting authority for your discharge, and the Maine Department of Environmental Protection (MEDEP) becomes the sole NPDES permitting authority, pursuant to the Maine NPDES authorization agreement.

EPA understands that the Town is currently discussing with the MEDEP an appropriate schedule of compliance for any construction needed to achieve the new Maine Pollutant Discharge Elimination System Permit (MEPDES) permit limits.



If you have any questions, do not hesitate to contact Doug Corb of my staff at (617) 918-1565.

Sincerely,

A handwritten signature in blue ink, appearing to read "David M. White" followed by a small flourish.

Brian Pitt, Acting Branch Chief  
Municipal Permits Branch  
Office of Ecosystem Protection

Enclosures: Final decision of the Regional Administrator Pursuant to 40 CFR Part  
25, Subpart G  
EPA Region I Responses to Public Comments

cc: Gregg Wood, Maine DEP  
Alex Rosenberg, EPA Water Technical Unit  
NPDES File



In Re:

|                                 |                                 |
|---------------------------------|---------------------------------|
| TOWN OF BUCKSPORT, MAINE        | ) FINAL DECISION                |
| PUBLICLY OWNED TREATMENT WORKS, | ) OF THE REGIONAL               |
| APPLICATION FOR SECTION 301(h)  | ) ADMINISTRATOR PURSUANT        |
| VARIANCE FROM THE SECONDARY     | ) TO 40 CFR PART 125, SUBPART G |
| TREATMENT REQUIREMENTS OF THE   | )                               |
| CLEAN WATER ACT                 | )                               |
| _____                           | )                               |

The Town of Bucksport, Maine (Bucksport), owns and operates a publicly owned treatment works (POTW) that discharges treated wastewater to the Lower Penobscot River. Such wastewater discharges are prohibited unless authorized by a National Pollution Discharge Elimination System (NPDES) permit under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (CWA). While POTWs typically must satisfy permit requirements based on "secondary treatment," they may instead obtain modified permit conditions based on a waiver from secondary treatment requirements if they can satisfy the criteria specified in Section 301(h) of the CWA, as amended by the Water Quality Act (WQA) of 1987.

In applying to the United States Environmental Protection Agency (EPA) for an NPDES permit, Bucksport sought a waiver from secondary treatment requirements under Section 301(h) of the CWA. On December 31, 1985, EPA tentatively approved the Town's application for a Section 301(h) waiver. EPA issued a final NPDES permit with limits based on "primary treatment" on December 31, 1985. The permit was reissued with effluent limits based on the 301(h) waiver on October 27, 1994, and again on May 13, 2002.

Since the last reissuance of the NPDES permit on May 13, 2002, the State of Maine was authorized to run the NPDES program in Maine, with certain exceptions. One of the exceptions is for the 301(h) waiver program, which may not be delegated to states. As a result, it continues to be administered in Maine by EPA. Given that EPA's final decision, as discussed below, is to deny Bucksport's request for reissuance of a Section 301(h) waiver, EPA's final decision on the waiver request will be issued concurrently with the Maine Department of Environmental Protection's (MEDEP) issuance to Bucksport of a draft Maine Pollution Discharge Elimination System (MEPDES) permit including limits based on secondary treatment.

In 1987, Congress amended Section 301(h) of the CWA to add the following prohibition:

[n]o permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses.

The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant's current or proposed discharge.

33 U.S.C. § 1311(h) (concluding paragraph). In 1994, EPA amended its regulations implementing the Section 301(h) waiver program to incorporate the requirements of the 1987 statutory amendments. *See* 40 CFR § 125.59(b)(4).

As stated above, the Bucksport POTW discharges into the Lower Penobscot River. These waters are "saline estuarine waters," as defined by EPA regulations. *See* 40 CFR § 125.58(v). Therefore, consistent with the statutory and regulatory provisions cited above, EPA may not grant a waiver from secondary treatment standards for Bucksport's pollutant discharges into the Lower Penobscot River if the receiving waters "do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or . . . [if these waters] exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses." 33 U.S.C. § 1311(h) (concluding paragraph); 40 CFR § 125.59(b)(4). Furthermore, if these water quality problems exist, a Section 301(h) waiver is prohibited regardless of whether the problems are caused by the applicant's current or proposed discharge. *See id.*

Section 303(d) of the CWA requires States to develop lists of waters where existing, required pollution controls are not stringent enough to allow the waters to attain their designated uses and all applicable water quality standards. The lists are to identify each impaired waterbody segment and the pollutants causing or expected to cause non-attainment of applicable water quality standards.

The State of Maine presented its Section 303(d) list in the State of Maine 2010 Integrated Water Quality Monitoring and Assessment Report. The Penobscot River Estuary is listed in several categories indicating non-attainment of applicable water quality standards. The categories are as follows:

*Category 5-B-2: Estuarine and Marine Waters Impaired by Bacteria from Combined Sewer Overflows [CSO] (TMDL Required only if Control Plans are Insufficient)* lists Waterbody ID 722-42, Bucksport. The table indicates that the long-term control plan, to be completed by 2012, involves separating sanitary and storm water sewers. This river segment has been on the 303(d) list since the time of the waiver reapplication and remains on the list due to upstream CSOs.

*Category 5-D: Estuarine and Marine Waters Impaired by Legacy Pollutants.* The description indicates that all marine and estuarine waters are listed in Category 5-D, as only partially supporting fishing (fish and shellfish consumption) due to elevated levels of PCBs in fish tissue as well as the presence of other persistent bioaccumulating substances in lobster tomalley. This list remains unchanged since the time of the reapplication for the waiver.

The Bucksport POTW discharges directly into the assessment unit designated as the Penobscot River Estuary.

The Maine Department of Marine Resources (DMR) assesses information on shellfish growing areas to ensure that harvested shellfish are safe for consumption. The DMR is authorized to close shellfish harvesting areas wherever there is a pollution source, a potential pollution threat, or poor water quality. The DMR traditionally closes shellfish harvesting areas if there are known discharges with unacceptable bacteria levels (e.g., levels above in-stream thresholds established in the National Shellfish Sanitation Program) and maintains shellfish harvesting closure areas due to lack of updated information regarding ambient water quality conditions. In addition, the DMR prohibits shellfish harvesting in the immediate vicinity of all POTW outfall pipes as a precautionary measure in the event of a failure in the POTW's disinfection system. The DMR has closed shellfish harvesting area #35, which includes the Lower Penobscot River, due to insufficient ambient water quality data to determine that the area meets the standards in the National Shellfish Sanitation Program. See attached DMR listing.

In light of the above factors, it is my Final Decision to deny Bucksport's request for renewal of its Section 301(h) waiver from the secondary treatment requirements of the CWA, as amended. This office previously issued a Tentative Decision to deny the waiver request. This tentative decision was publicly noticed for comment from September 27, 2007 through November 26, 2007. See "Tentative Decision of the Regional Administrator Pursuant to 40 CFR Part 125, Subpart G." EPA received public comments on its Tentative Decision and is issuing responses to these public comments together with this Final Decision. EPA considered the public comments and decided that they did not necessitate changes to any of the conclusions and/or findings set forth in the "Tentative Decision" to deny Bucksport's Section 301(h) waiver application.

Based on the analysis set forth above, as well as in the Tentative Decision, and the lack of comments contesting or necessitating changes to that decision, it is my Final Decision that the Bucksport's Section 301(h) waiver application is denied. A draft permit imposing secondary treatment effluent limits and other pertinent conditions will be issued by the MEDEP, along with a "Response to Comments" document that sets forth responses to the comments received on the draft permit.

Date: 3/22/12



H. Curtis Spalding  
Regional Administrator, Region 1  
United States Environmental Protection Agency

## NOTICE OF EMERGENCY RULE-MAKING

AGENCY: Department of Marine Resources

STATUTORY AUTHORITY: 12 M.R.S.A. §§6172, 6192, 6193 & 6194

Struck text is being removed, and underlined text is being added

### BASIS STATEMENT

The Commissioner of the Maine Department of Marine Resources amends the emergency DMR Regulation 95.08 E, Closed Area No. 35, Penobscot River, Penobscot, amended on December 1, 1999. This new amendment increases the size of the Prohibited area west to Squaw Head, Cape Jellison, Stockton Springs due to the area exceeding Approved criteria; and the Prohibited area will now include a part of the Prohibited area previously described in DMR Regulation Closed Area No. 36-D, Penobscot River, Lower Bagaduce River and Grindles Eddy. As authorized by 12 M.R.S.A. §§6172, 6192, 6193 & 6194 the Commissioner of Marine Resources adopts emergency amendments to Chapter 95.08(E).

**RULE TITLE AND SUBJECT:** DMR Regulation 95.08 E, Closed Area No. 35, Penobscot River, Penobscot, amended on December 1, 1999, is amended as follows:

**TITLE & TEXT OF RULE:** DMR Regulation Chapter 95.08(E), Closed Area No. 35, Penobscot River (Stockton Springs, Prospect, Bucksport, Orland, Penobscot, Castine)

Effective immediately, because of pollution, it shall be unlawful to dig, take or possess any clams, quahogs, oysters or mussels taken from the shores, flats and waters of the Penobscot River from its source to a line drawn from starting at Squaw Head, Stockton Springs; then going northeast to Fort Point; Stockton Springs, Waldo County, then due east to a -on the opposite shore in the town of Penobscot, Hancock County; red painted post located 0.2 mile west of the junctions of Routes 166 and 175 (at West Penobscot); then southwest to the western tip of Turner Point, Castine, then running south to the western tip of Perkins Point, then running south to the western tip of Blockhouse Point; then following the lowest tide mark to the southern tip of Dice Head.

EFFECTIVE DATE: January 13, 2009

EFFECTIVE TIME: 1:30 PM

AGENCY CONTACT PERSON: Amy M. Fitzpatrick, Department of Marine Resources,  
194 McKown Point Road, W. Boothbay Harbor, Maine 04575

[http://www.maine.gov/dmr/rm/public\\_health/closures/closedarea.htm](http://www.maine.gov/dmr/rm/public_health/closures/closedarea.htm)

EMAIL: [Amy.Fitzpatrick@maine.gov](mailto:Amy.Fitzpatrick@maine.gov)



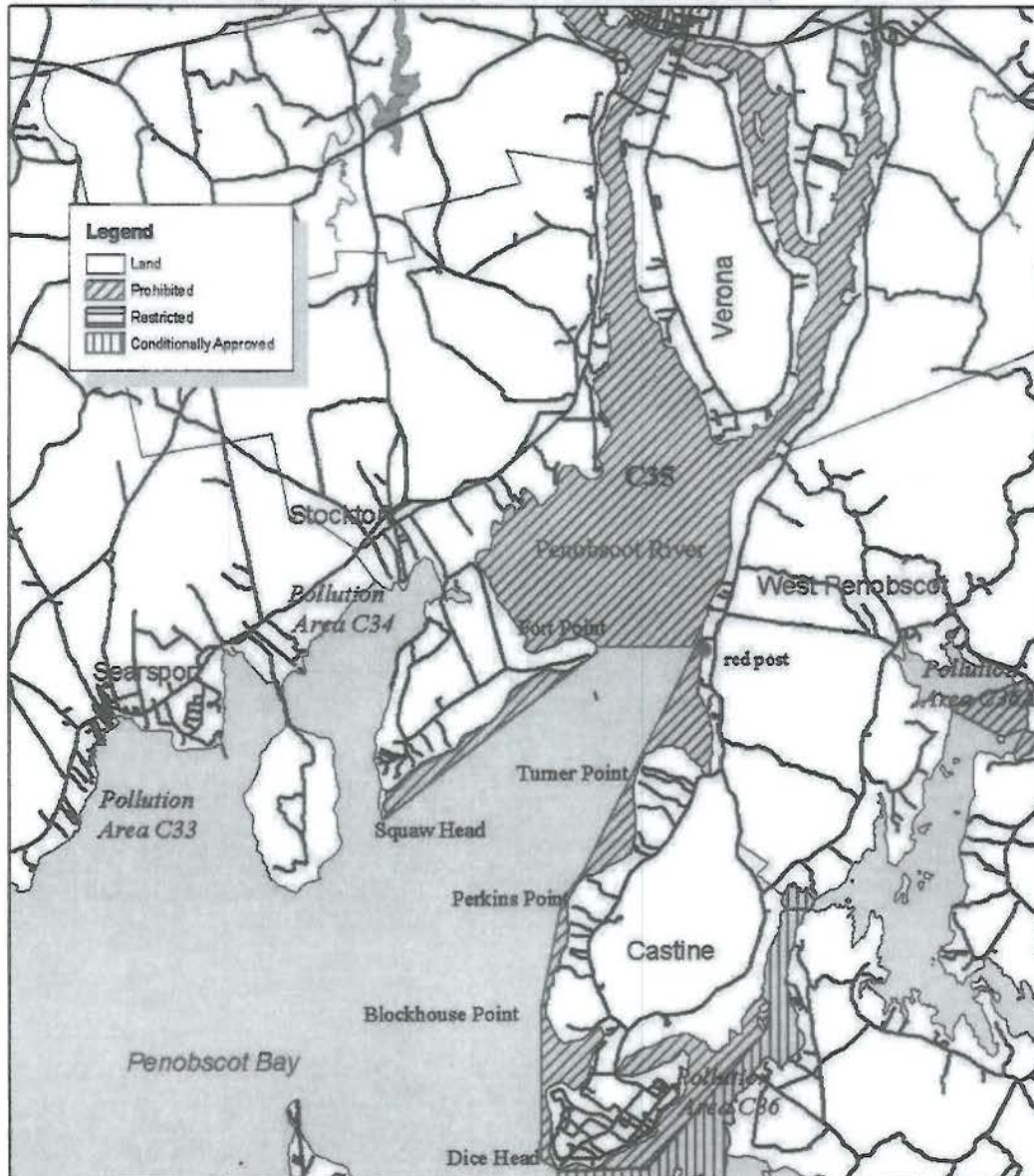
# Maine Department of Marine Resources

## Pollution Area No. 35

Penobscot River

(Stockton, Prospect, Bucksport, Orland, Penobscot, Castine)

1/13/2009



0 2 4 Miles



**EPA Region 1 Responses to Comments  
On the Region's Tentative Denial of the Town of Bucksport, Maine's  
Application under Section 301(h) of the Clean Water Act  
for a Waiver from the Act's Secondary Treatment Requirements  
(National Pollutant Discharge Elimination System Permit No. ME0100111;  
Maine License No. W002596)**

**Introduction:**

This document presents responses by the Region 1 Office of the United States Environmental Protection Agency (EPA) to the public comments received by EPA on its tentative denial of the Town of Bucksport, Maine's (Bucksport) request under Section 301(h) of the Clean Water Act (CWA) for renewal of its existing waiver from the CWA's secondary treatment requirements for pollutant discharges from the Town's publicly owned wastewater treatment works (POTW). Bucksport sought renewal of the waiver in connection with its application for renewal of its National Pollutant Discharge Elimination System (NPDES) permit (NPDES Permit No. ME0100111). The original public comment period for the Bucksport tentative waiver denial began September 27, 2007 and ended on October 26, 2007. The comment period was later extended by EPA to November 26, 2007, for a total of 60 days, based on a request from the Town.

During the public comment period, EPA received written comments from Sean Mahoney, Vice President and Director of the Conservation Law Foundation's Maine Advocacy Center, and Katherine A. Joyce, Esq., of Bernstein, Shur, Sawyer and Nelson, P.A., Portland, ME, on behalf of Bucksport.

Following consideration of the comments received, EPA has made a final decision to deny the 301(h) waiver. The following text describes and responds to the comments submitted to EPA.

**Conservation Law Foundation**

**Comment 1**

As discussed below, the Clean Water Act unambiguously supports the EPA's decision and prohibits any waiver from secondary treatment for these facilities.

In 1987, Congress adopted important amendments to the Clean Water Act by enacting the Water Quality Act of 1987 (WQA), "an Act to amend the Federal Water Pollution Control Act to provide for the renewal of the quality of the Nation's water. . . ."

In doing so, Congress demonstrated a strong intent to protect the valuable functions provided by the Nation's estuaries.<sup>1</sup> Of particular relevance, Congress amended Section 301(h) of the Clean Water Act by adding the following prohibition:

No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant's current or proposed discharge.

33 U.S.C. § 1311(h) (CWA § 301(h)). This language establishes an unambiguous, blanket prohibition against Section 301(h) waivers when receiving estuarine waters fail to satisfy any one of the above-stated mandatory criteria, namely: support for a balanced indigenous population of aquatic species and other wildlife; support for recreational uses; and ambient water quality that meets water quality standards designed to protect public water supplies, aquatic species and other wildlife, and recreational activities.<sup>2</sup> According to this language, any Section 301(h) waiver request involving a proposed discharge into saline estuarine waters *must*, as a threshold matter, establish that the estuarine waters satisfy these mandatory criteria. If the waters fail to meet any one of the mandatory criteria, a Section 301(h) waiver must, as a matter of law, be denied. 33 U.S.C. § 1311(h) (CWA § 301(h)).

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<sup>1</sup> For example, Congress established the National Estuary Program for the purpose of identifying and protecting nationally significant estuaries. It did so based on important findings that, *inter alia*:

- (A) the Nation's estuaries are of great importance for fish and wildlife resources and recreation and economic opportunity;
- (B) maintaining the health and ecological integrity of these estuaries is in the national interest; [and]
- (C) increasing coastal population, development, and other direct and indirect uses of these estuaries threaten their health and ecological integrity. . . .

WQA (Public Law 100-4) § 317(a). *See also* WQA Legislative History, 133 Congressional Record H 131, January 7, 1987 at 32 ("Section 317 contains purposes and policies of the National Estuary Program which declare that the Nation's estuaries are of great national significance for fish and wildlife resources and provide important recreation and economic opportunities. As such, it is national policy to maintain and enhance the water quality in estuaries and provide for the biological integrity of these waters."). In addition to creating the National Estuaries Program, the WQA also took steps to reserve funding to address water quality problems of marine bays and estuaries caused by discharges from combined stormwater and sanitary sewer overflows. WQA (Public Law 100-4) § 210.

<sup>2</sup> According to the preamble to the EPA's regulations promulgating the above-quoted WQA provisions, Section 301(h), as amended, created a "*flat prohibition*" against the issuance of Section 301(h) variances into waters exhibiting these signs of stress. 59 Fed. Reg. 40642, 40646 (emphasis added).

The unambiguous “blanket” nature of this prohibition is bolstered by the second sentence of the above-quoted language, which makes clear that a Section 301(h) shall not be granted *even if* the proposed discharge would not cause or contribute to the failure of the estuarine waters to satisfy the above mandatory criteria.<sup>3</sup>

Simply put, and quoting the EPA’s website relative to the Section 301(h) program, “POTWs discharging to stressed estuaries are not eligible for a 301(h) waiver.” *Amendments to Regulations Issued, the Clean Water Act Section 301(h) Program*, <http://www.epa.gov/owow/oceans/discharges/301h.html>.

The above blanket prohibition, as a matter of law, precludes the 301(h) waivers requested for the Winterport, Bucksport and Milbridge WWTFs. As set forth in the EPA’s tentative decision, the receiving waters for each of these plants are saline estuarine waters. The Winterport and Bucksport WWTFs each discharge into the Penobscot River Estuary, which is impaired by bacteria from combined sewer overflows; elevated levels of legacy pollutants; and elevated bacteria caused by WWTFs, overboard discharges, boats and non-point sources. Tentative Decision of the Regional Administrator In Re: Town of Winterport, Maine Publicly Owned Treatment Works (POTW) at 2; Tentative Decision of the Regional Administrator In Re: Town of Bucksport, Maine POTW at 2. The Milbridge WWTF discharges into the Narraguagas Estuary, which also is impaired by legacy pollutants, and by elevated bacteria levels caused by discharges from WWTFs and non-point sources. Tentative Decision of the Administrator In Re: Town of Milbridge, Maine POTW at 2. The receiving waters associated with all three plants also contain shellfish harvesting areas that are closed to harvesting. *Id.* at 3; Tentative Decisions of the Administrator In Re: Winterport and Bucksport POTWs at 3. Any one of the above factors requires denial of a Section 301(h) variance and supports the EPA’s tentative decisions.

#### **Response: 1**

EPA agrees with the commenter’s conclusion that EPA may not issue Bucksport a waiver under Section 301(h) of the CWA from the statute’s secondary treatment requirements, which typically apply to POTWs. EPA may not provide such a waiver because Bucksport discharges to saline estuarine waters which are not attaining applicable water quality standards.

#### **Town of Bucksport**

#### **Comment 2**

On September 27, 2007, the U.S. Environmental Protection Agency (the “EPA”) issued a Tentative Decision (the “Tentative Decision”) denying the Town of Bucksport’s (the “Town”) request, pursuant to 33 U.S.C.A. §1311(h) of the Clean Water Act (also referred to herein as “Section 301(h)”), for a secondary treatment waiver.

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<sup>3</sup> As the EPA has acknowledged: “No permits may be issued for discharges into estuarine waters which exhibit certain specified stressed conditions, *without regard to whether the applicant’s discharge is causing or will cause those conditions.*” 56 Fed. Reg. 2814 (emphasis added). See also *id.* at 2821 (“WQA section 303(e) makes clear that discharges into stressed estuary waters *are prohibited in all cases, without regard to whether the stressed conditions are caused by the applicant’s discharge.*”) (emphasis added).

The Tentative Decision represents a potential reversal of EPA precedent, according to which these waivers have been granted to the Town for almost 20 years.

## **Response 2**

The 1987 amendments to the CWA included significant changes to Section 301(h), which are, in turn, reflected in EPA regulations promulgated in August of 1994 at 40 CFR Part 125, Subpart G.

The Clean Water Act Amendments and the revised regulations substantially changed the criteria that must be satisfied to obtain or retain a 301(h) waiver for discharges to saline estuarine waters. Specifically, the concluding paragraph of Section 301(h), prohibits issuance of a Section 301(h) waiver for a discharge to saline estuarine waters that:

... exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish, and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the Applicant's current or proposed discharge ....

*See also* 40 CFR § 125.59(b)(4) (reiterating criteria from the statute).

EPA issued NPDES permits to Bucksport in 1994 and 2002 with effluent limits based on waivers from secondary treatment requirements under Section 301(h) of the CWA. At the time of these permit decisions, the Penobscot River was listed by the State of Maine as not attaining water quality standards, but EPA did not properly consider the new Section 301(h) requirements regarding saline estuarine waters in making those decisions. The Penobscot River is also currently listed by the State of Maine as not attaining applicable water quality standards, but EPA is now properly taking into account the prohibition on Section 301(h) waivers for discharges into saline estuarine waters that are not satisfying applicable water quality standards.

## **Comment 3**

Request for Extension of the Comment Period-Based upon the Town's review of the Tentative Decision and the record information upon which it relies. It is currently an open question whether the Penobscot River Estuary was included in the Report based on recently collected data, or based on categorical assumptions. For this reason, the Town is in the process of engaging the DEP and the Department of Marine Resources in discourse regarding the existence of data to support the inclusion of the Penobscot River Estuary in Category 5. Due to the nature of the conversations, the complications surrounding the accumulation and storage of data in a reviewable form, and the need for such data, if found to exist, to be analyzed to determine its bearing on whether the Penobscot River Estuary was, at the time of the application for the 301(h) waiver, not attaining its designated uses, the Town hereby requests a 90 day extension of the comment period to allow the Town to obtain, digest and set forth to the EPA the results of its search.

Should this request be denied, the Town requests that the EPA reverse its tentative decision, and issue a 301(h) waiver to the Town for its next license term.

The Town ... requests that the EPA extend the comment period associated with the Tentative Decision for a period of 90 days to allow the Town a sufficient opportunity to determine what data exist to support this decision.

### **Response 3**

After discussions with counsel for the permittee, EPA extended the public notice comment period 30 days. The Town did not submit additional comments during the extended comment period.

EPA based its tentative denial decision on the Integrated List of Waters submitted by the State of Maine and approved by EPA. EPA is satisfied that a comprehensive search of available scientifically supported data was conducted in the preparation of the list. See Response #5.

Since the public notice of the Tentative Denial, EPA has approved total maximum daily loads (“TMDLs”) for both fecal coliform and *Escherichia coli* bacteria (approved September 28, 2009<sup>4</sup>) that address impairment to the Bucksport segment of the Penobscot River. A TMDL establishes the maximum discharge loads for a pollutant that will ensure attainment of water quality standards. Pursuant to 40 CFR 130.7, water quality-limited segments requiring TMDLs must be identified, and TMDLs must then be established for all pollutants preventing or expected to prevent attainment of water quality standards. The completion and approval of the TMDL provides confirmation that the receiving water is impaired for bacteria.<sup>5</sup>

As of December 31, 2011, there are 7 combined sewer overflows (CSO) in Bangor, 5 CSOs in Brewer, 1 CSO in Winterport, and 1 CSO in Bucksport.<sup>6</sup> The 14 CSOs at and above Bucksport on the Penobscot River continue to discharge bacteria to the river during storm events. CSOs are identified as the source of bacterial contamination on the Penobscot River in the Statewide Bacteria TMDL.

The decision to list CSOs as the cause of non-attainment of Maine Bacterial Water Quality Criteria for downstream Penobscot River segments is explained in the paragraph below.

...The proximate causes of the non-attainment were identified as discharges of untreated wastewater from combined sewer overflow (CSOs) upstream of Bucksport in Lincoln, the Brewer/Bangor area, and Dover Foxcroft.

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<sup>4</sup> Maine Statewide Bacteria TMDL, Appendix V Public Comments & DEP Response, August 2009, Maine Department of Environmental Protection

<sup>5</sup> On January 13, 2009, The Maine Department of Marine Resources also published a Notice of Emergency Rule-Making amending the existing Closed [shellfish] Area No. 35 to include Bucksport (and other towns) “because of pollution”

<sup>6</sup> Status of Licensed Discharges and Combined Sewer Overflow Abatement Program, Page 12, Maine Department of Environmental Protection, April 2011

The decision to list stretches of the river near Bucksport and these other communities as being in non-attainment was based on water quality sampling, knowledge of the CSOs, and best professional judgment (P. Mitnick, pers. com.). Brewer and Bangor are among over 30 communities statewide which will require significant engineering solutions for control or abatement of CSOs. ME DEP estimated the statewide effort will take 15 years and cost \$250-300 million....<sup>7</sup>

#### **Comment 4**

In the event that EPA denies the Town's request for an enlargement of the comment period, the Town respectfully seeks a reversal of the Tentative Decision, as EPA's proposed denial of the Section 301(h) waiver is inconsistent with the permitting history of the Town's Wastewater Treatment Facility and appears to be unsupported by hard data.

#### **Response 4**

With regard to the permitting history, as stated in Response #2, EPA's should have addressed the non-attainment of State water quality standards during the permit and Section 301(h) waiver renewal reviews in 1994 and 2002. EPA re-evaluates all aspects of NPDES permits at each five year permit reissuance, consistent with the terms of the statute and regulations and the CWA's goal of restoring and maintaining the chemical, physical and biological integrity of the Nation's waters. There can, and often must, be changes in requirements when new permits are issued.

#### **Comment 5**

The Tentative Decision is Not Supported by Record Evidence - EPA's Tentative Decision to deny Bucksport a 301(h) waiver relies upon a 1987 amendment to Section 301(h) intended to prohibit the issuance of a 301(h) waiver for discharges into saline estuarine waters which, at the time of application, do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards.

The EPA's determination that the Town's Wastewater Treatment Facility's Penobscot River receiving waters are in non-attainment is based solely upon the MEDEP's 2004 Integrated Water Quality Monitoring and Assessment Report (the "Report") which lists the Penobscot River Estuary as an estuarine and marine water not fully attaining all designated uses. The consequences of this determination are that the Town can no longer discharge to those waters without secondary treatment.

EPA appears to rely upon the MEDEP Report without any further analysis of the reasons for the findings of non-attainment, whether those reasons are adequately supported by data or otherwise scientifically-based and whether the imposition of a secondary treatment requirement would, in any manner, affect the non-attainment status of the waters. The three categories in which the Report finds the Penobscot in non-attainment are:

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<sup>7</sup> Stakeholder Involvement In Watershed-Based Permitting: The Penobscot River Example, Page 6, David F. Mitchell, Ph.D., Ken Gallant, ENSR, May 20, 1997

- 1) Category 5-B-1: Estuarine and Marine Waters Impaired only by Bacteria. This area is closed to harvesting of shellfish due to elevated bacteria levels caused by the discharge of wastewater treatment facilities, overboard discharges, boats and non-point sources.
- 2) Category 5-B-2: Estuarine and Marine Waters Impaired by Bacteria from Combined Sewer Overflows.
- 3) Category 5-D: Estuarine and Marine Waters Impaired by Legacy Pollutants. The Penobscot is included in this category because ALL estuarine and marine waters are listed in Category 5-D due to elevated levels of PCBs in tissues of some fish as well as other persistent bio-accumulating substances in lobster tomalley.

In the Report, the MEDEP designated the Penobscot River Estuary as a Category 5 water body (meaning that it is impaired or threatened for one or more designated uses by a pollutant). Because the MEDEP may include a water body that is currently in attainment in the Report, the EPA's exclusive reliance on the Report to conclude that the Penobscot River Estuary was not attaining its designated uses at the time of Bucksport's application for the 301(h) waiver is a legally insufficient basis for the denial of a 301(h) waiver.

The Report specifically states that a water body can be listed as Category 5 where: Current data

1. (Collected within 5 years) for a standard either indicates impaired use, or a trend toward expected impairment within the listing period, and where quantitative or qualitative data/information from professional sources indicates that the cause of impaired use is from a pollutant(s).
2. Water quality models predict impaired use under current loading for a standard and where quantitative or qualitative data/information from professional sources indicates that the cause of impaired use is from a pollutant(s).
3. Those waters have been previously listed on the State's 303(d) list of impaired waters, based on current or old data that indicated the involvement of a pollutant(s), and where there has been no change in management or conditions that would indicate attainment of use.

According to the very report upon which EPA relied, a water body can be listed in Category 5 even where there is no empirical evidence that it is not currently attaining its designated uses. While this may make sense for various prospective decisions the State must make regarding discharges to its waters, it is not sufficient to support a denial of a 301 (h) waiver.

If there is no empirical evidence that the Penobscot River Estuary was not in attainment at the time of Bucksport's application for a 301(h) waiver, then its inclusion in the Integrated Water Quality Monitoring and Assessment Report should have no bearing on Bucksport's eligibility under 301 (h) for a secondary treatment waiver, which specifically states that the non-attainment must be "at the time of application."

This result is wholly inequitable and has a punitive effect on a Town that has only been cooperative. Even more compelling than fundamental fairness, however, is the fact that EPA's decision is based principally upon speculative designations of the status of the Facility's receiving water which appear not to be supported by real data.

#### **Response 5:**

Pursuant to Section 303(d) of the Clean Water Act, each State is required, among other things, to identify those waters within its boundaries for which technology-based limits are not stringent enough to attain water quality standards. Pursuant to 305(b) of the CWA, each State also is required to periodically prepare a description of the water quality of all navigable waters in the State, including recommendations for additional actions necessary to achieve water quality objectives. States typically combine these reports into a single "Integrated List of Waters" that satisfies the requirements of both 303(d) and 305(b). Pursuant to 40 CFR 130.7(a), which addresses the process for involving the public and other stakeholders in the development of the section 303(d) list, EPA encourages States to provide opportunities for public participation in the development of the Integrated Report and to demonstrate how they considered public comments in their final decisions.

The State of Maine's 2010 Integrated List was recently approved by EPA, as were previous lists submitted for 2004, 2006, and 2008. EPA's September 20, 2011, approval letter and the accompanying approval documentation show that the State conducts a process that invites public participation, and that the best available data was used in the determinations of whether or not water quality standards were being attained. During the public participation period, members of the public can submit both comments on the state's proposed Integrated List and any water quality data that they believe the state should consider.

As described in EPA's September 20, 2011 approval letter:

The Maine Department of Environmental Protection (ME DEP) also successfully completed a public participation process in 2010 during which the public was given the opportunity to review and comment on the State's proposed §303(d) list. As a result of this effort, Maine has considered public comments in the development of the final list. A summary of the public comments and ME DEP's response to comments were included in the final submittal.

In addition, the documentation accompanying the approval letter included the following additional information:

In developing Section 303(d) lists, States are required to assemble and evaluate all existing and readily available water quality-related data and information, including, at a minimum, consideration of existing and readily available data and information about the following categories of waters: (1) waters identified as partially meeting or not meeting designated uses, or as threatened, in the State's most recent Section 305(b) report; ...

EPA has reviewed Maine's submission, and has concluded that the State developed its §303(d) list in compliance with §303(d) of the Act and 40 CFR §130.7. EPA's review is based on its analysis of whether the State reasonably considered existing and readily available water quality-related data and information and reasonably identified waters required to be listed.

ME DEP conducted a public participation process, providing the public with an opportunity to review and comment on Maine's draft 2010 §303(d) list. A public comment period was opened upon the release of Maine's draft list on July 29, 2010, and was closed on August 27, 2010. On July 29, 2010, ME DEP posted Maine's draft list on ME DEP's website, and issued a press release designed to inform the public of the availability of Maine's draft 2010 IR<sup>8</sup> to roughly 15-18 radio, television and print outlets around the state and to the Associated Press. During the week of July 29, 2010, ME DEP mailed notices directly to approximately 150 persons and entities on the Agency Rulemaking Subscription Service List, and ran a legal notice in four daily newspapers located in the state (Bangor Daily News, Kennebec Journal, Lewiston Sun Journal, and The Portland Press Herald). EPA concludes that Maine's public participation process was consistent with its Continuing Planning Process (CPP), and that Maine provided sufficient public notice and opportunities for public involvement and response.

Similarly, the TMDLs for fecal coliform and e-coli underwent a public review process. EPA regulations [40 C.F.R. § 130.7(c)(1)(ii)] require that calculations to establish TMDLs be subject to public review. As part of this public review, after the public comment period for a TMDL has ended, responses to public comments are issued. Paper and electronic forms of the report are made available for public review and the notice is placed in the legal advertising section of local papers. The final TMDL and responses to comments are sent to EPA for final approval.

In summary, the CWA and accompanying federal regulations establish procedures for identifying impaired waters, and for preparing TMDLs to address those impairments, State procedures are subject to EPA review and approval, and include public participation components, so that the best data and science are used in establishing the lists of impaired waters. The MEDEP and EPA did rely on these processes in concluding that the receiving water is impaired. There was ample opportunity for the Town to challenge the non attainment status of the Penobscot River, and the subsequent TMDL through the public participation processes associated with those actions.

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<sup>8</sup> IR means "Integrated Report"

The Maine DEP 2006 Integrated Water Quality Report Appendices, Page 99, Table Labeled: Category 4-B-1: Estuarine and Marine Waters Impaired by Pollutants-Pollution Control Requirements Reasonably Expected to Result in Attainment, states that the Penobscot River Estuary is impaired for the use of fish consumption caused by Dioxin, PCBs, and bacteria caused by industrial sources and CSOs.

The Penobscot River Estuary at the point of discharge from Bucksport is listed in non-attainment in both the 2006 and current 2010 IR as follows:

- 1) Category 5-B-1: Estuarine and Marine Waters Impaired only by Bacteria. This area is closed to harvesting of shellfish due to elevated bacteria levels caused by the discharge of wastewater treatment facilities, overboard discharges, boats and non-point sources. See Page 105 of the Maine DEP 2006 Integrated Water Quality Report Appendices.

This area (DMR No. 35, Waterbody ID No. 722-25) remains closed to all shell fishing by the Department of Marine Resources, Regulation 95.08 E, updated area closure effective January 13, 2009.

- 2) Category 5-B-2: Estuarine and Marine Waters Impaired by Bacteria from Combined Sewer Overflows. (Waterbody ID 722-42), See Page 110, of the Maine DEP 2006 Integrated Water Quality Report Appendices.

The Penobscot River Estuary is listed again in the Maine DEP 2010 Integrated water Quality Report Appendices, Page 114, Table Category 5A and 5B-1 "TMDL now completed for listed causes" which is elevated fecal coliform bacteria. A TMDL was completed in 2009 which places CSO communities on schedules to abate CSOs.

- 3) Category 5-D: Estuarine and Marine Waters Impaired by Legacy Pollutants. The Penobscot is included in this category because ALL estuarine and marine waters are listed in Category 5-D due to elevated levels of PCBs in tissues of some fish as well as other persistent bio-accumulating substances in lobster tomalley. See Page 111 of the Maine DEP 2006 Integrated Water Quality Report Appendices.

Category 5-D: Estuarine and Marine Waters Impaired by Legacy Pollutants  
All estuarine and marine waters capable of supporting American lobster are listed in Category 5-D, partially supporting fishing ("shellfish" consumption) due to elevated levels of PCBs and other persistent, bioaccumulating substances in lobster tomalley. See Page 121 of the Maine DEP 2010 Integrated Water Quality Report Appendices.

#### **Comment 6**

The Tentative Decision Unfairly Punishes the Town - EPA's Tentative Decision is inequitable given that the original decision to construct and operate a primary treatment facility, rather than a secondary treatment plant, was, in essence, made by the Maine DEP and EPA. In 1985, when the Town first designed its Wastewater Treatment Facility, it sought state and federal funding to construct a secondary treatment facility.

At the time, the DEP informed the Town that its eligibility for the 301(h) secondary treatment waiver rendered it ineligible for funding to construct a secondary treatment facility. Following this guidance, the Town applied for a 301(h) waiver and constructed a primary treatment facility. Today [this letter was written in October of 2007], after only 19 years of operation, the Town is being told that the \$1.5 million dollar investment that its taxpayers made in the Facility was money poorly spent.

Moreover, though the water quality in the Penobscot River has actually improved since the agencies originally directed the Town to construct a primary treatment facility, the Town is now being required to upgrade to a secondary treatment.

**Response: 6**

EPA does not agree, and is not suggesting in any way, that the \$1.5 million spent on primary treatment in 1985 was "money poorly spent." The decision to seek a Section 301(h) waiver and to construct primary treatment made sense in 1985 in light of the legal requirements and environmental data that existed at that time. As a result, Bucksport was at least able to provide primary treatment of its sewage before discharging it into the Lower Penobscot River. Moreover, public expenditures to install and operate secondary treatment have been avoided for approximately 26 years.

That said, the fact is that after 1985, Congress tightened the criteria that must be satisfied to qualify for a Section 301(h) waiver for sewage discharges to estuarine waters. In other words, the Congress narrowed the exception that Section 301(h) provides to the general requirement that POTWs provide secondary treatment for their sewage. As discussed above, Congress amended the Clean Water Act to prohibit waivers that would allow the discharge of primary treated wastewater to estuarine waters that were failing to satisfy water quality standards. Congress took this step in recognition of the public importance of estuaries and the environmental improvements that are provided by secondary treatment. For the present decision, EPA and ME DEP must apply the terms of the statute and regulations that are currently in effect.

EPA also notes that the WWTP has been operating for 23 years, which is approximately the design life for major treatment plant components, meaning that many of the primary treatment processes are probably near or at the end of their useful life. Moreover, to the extent that existing treatment plant components do not need to be replaced, they may be able to be used in conjunction with a new secondary treatment plant, as secondary treatment plants typically have a primary treatment stage as well.

Finally, EPA and MEDEP recognize that installing secondary treatment will be costly, but the regulatory agencies are ready to work with the Town to try to agree on a reasonable schedule for financing and installing the new equipment that appropriately takes cost into account.

**Comment 7**

The Tentative Decision not only ignores this history of inconsistent agency guidance to the Town, it gives no credit to the current treatment capability of the Town's Facility. The Town utilizes a polymer system of wastewater treatment which results in the removal of far more solids than is required of a primary treatment facility: specifically, its system currently removes in excess of 70% of solids on a regular basis (these removal rates have been as high as 87%, as recently as August, 2007), compared to the 50% required of a primary treatment facility.

**Response 7**

The secondary treatment requirements do not stipulate treatment methods, but simply establish effluent quality that must be attained (e.g. 85 percent removal of BOD and TSS). The permittee may be able to meet this effluent quality without constructing a completely new treatment facility, but according to the comment, the existing system only removes about 70% of solids on a regular basis.

**Comment 8**

The proposed denial also fails to account for the Town's investment, at the urging of MEDEP, of significant resources in addressing water pollution originating from its CSOs. Based on DEP's representations that the CSO discharges were of substantially greater concern to the DEP than the wastewater treatment facility discharges, the Town is in the process of investing \$2.9 million dollars in developing a CSO upgrade by which stormwater would be diverted from the sewer system, pumped through a swirl concentrator and then received by primary treatment. The Facility's user fees had to be increased by 35% in order to cover the cost of these upgrades, and additional 15% increase will be needed upon operation of these improvements. After the expenditure of millions of dollars to ensure a compliant and efficient treatment system, Bucksport is now being denied a 301(h) waiver, and instructed that it must expend approximately \$4 million dollars more to construct a secondary treatment facility.

**Response: 8**

Pollutant discharges from municipal sewage treatment plants and municipal CSOs both must comply with the Clean Water Act's pollution control requirements. Reducing CSO discharges does not excuse a municipality from compliance with requirements applicable to its sewage treatment plant, just as compliance by a municipality's sewage treatment plant does not excuse its CSOs from needing to comply with applicable requirements.

EPA anticipates that following the denial of the 301(h) waiver, the State of Maine will issue a final permit requiring secondary treatment, and then will work with the Town to develop a schedule of compliance for achieving secondary limits. Typically, such a schedule would provide a reasonable period of time to obtain funding and construct the needed upgrades, taking affordability issues and other environmental priorities into account.