UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
5 POST OFFICE SQUARE, SUITE 100
BOSTON, MA 02109-3912

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

MAR 2 2 2012

Stephen Long, Chairman
Winterport Sewer District
P.O. Box 128
Winterport, ME 04496

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. ME0100749

Dear Mr. Long:

Enclosed is the final decision of the Regional Administrator of EPA-Region I to deny the Town of Winterport'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 public comment on September 27, 2007 and ended on October 23, 2007. The comment period was later extended by EPA to November 26, 2007, for a total of 67 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 William E. Taylor Esq., of Pierce Atwood, LLP, Portland, ME, on behalf of Winterport. 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,

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

The Town of Winterport, Maine 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, Winterport sought a waiver from secondary treatment requirements under Section 301(h) of the CWA. On May 9, 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 waiver was continued with the February 2, 2004 permit reissuance. On September 27, 2007, EPA public noticed a tentative decision to deny the 301(h) waiver.

Since the last reissuance of the NPDES permit on February 2, 2004, 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 Winterport's request for reissuance of a Section 301(h) waiver, EPA's final decision to deny the waiver request will be issued concurrently with the Maine Department of Environmental Protection's (MEDEP) issuance to Winterport of a final 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 Winterport 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 Winterport'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 2008 and 2010 Integrated Water Quality Monitoring and Assessment Reports (303(d) lists). 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 (TMDL Required only if Control Plans are Insufficient)* lists Waterbody ID 722-43, Winterport.The segment of the Penobscot River receiving the Winterport POTW discharge is listed as impaired for bacteria in both the 2008 and 2010 303(d) lists. See attached Marine Fisheries Advisory and Map.
>
> *Category 5-D: Estuarine and Marine Waters Impaired by Legacy Pollutants.* The descriptions in the 2008 and 2010 303(d) lists indicate all marine and estuarine waters are listed in Category 5-D as partially supporting fishing (fish and shellfish consumption) due to elevated levels of PCBs in tissues of fish and as well as other persistent bioaccumulating substances in lobster tomalley.

Based on the analysis set forth above, as well as in the Tentative Decision, and the lack of comments necessitating changes to that decision, it is my Final Decision that the Winterport's Section 301(h) waiver application is denied. EPA has provided a "Response to Comments" document that briefly responds to all comments received on the Tentative Decision.

With this denial, NPDES permitting authority transfers to the State of Maine. A 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 any comments received on its draft permit.

Date: 3/22/17

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

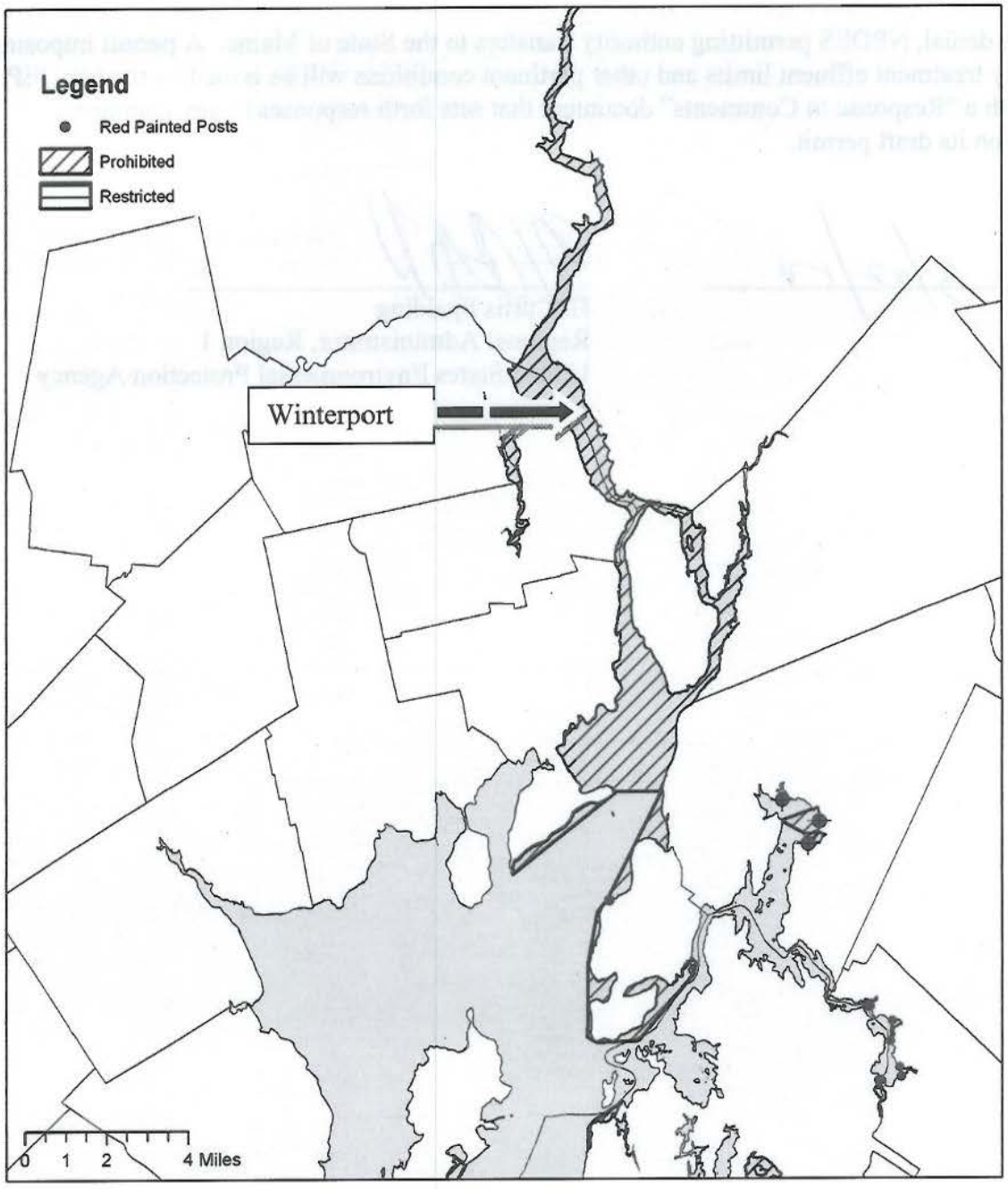

Figure 1 Area where shellfishing is prohibited by the Maine Department of Marine Fisheries (above and below Winterport).

EPA Region 1 Responses to Comments
On the Region's Tentative Denial of the Town of Winterport, 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. ME01000749; Maine License No. W001480)

Introduction:

This document presents responses by the Region 1 Office of the United States Environmental Protection Agency (EPA) to public comments received by EPA on its tentative denial of the Town of Winterport, Maine's (Winterport) 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). Winterport sought renewal of the waiver in connection with its application for renewal of its National Pollutant Discharge Elimination System (NPDES) permit (NPDES Permit No. ME0100749).

The original public comment period for the Winterport tentative waiver denial began on September 27, 2007, and ended on October 23, 2007. The comment period was later extended by EPA to November 26, 2007, for a total of 67 days, based on a request from the Town.

During the public comment period, EPA received written comments from William E. Taylor Esq., of Pierce Atwood, LLP, Portland, ME, on behalf of Winterport, and from Sean Mahoney, Vice President and Director of the Conservation Law Foundation's Maine Advocacy Center.

Following consideration of the comments received, EPA has made a final decision to deny the 301(h) waiver. As a result, the Maine Department of Environmental Protection (ME DEP) will issue Winterpoprt a new NPDES permit with secondary treatment requirements. The following text describes and responds to the comments submitted to EPA.

Town of Winterport

Comment #1: A careful reading of the amended Section 301(h) waiver language reveals that the EPA has made several unwarranted legal and factual assumptions regarding this Section's applicability to the District. First, with respect to the Winterport Water District, this public notice of a Tentative Decision and Request for Comments is premature. The language of 301(h) provides that "no permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which **at the time of application** [emphasis added] do not support a balanced indigenous population. . . ."

Winterport's NPDES permit, issued by EPA under Section 301(h), does not expire until February of 2009. The existing permit is in effect, has not been appealed, and authorizes the 301(h) waiver for the length of its term.

Under EPA's application regulations, an application does not need to be made by the District until180 days prior to expiration. Winterport has not made application as of the date of this Tentative Decision, and therefore, EPA must wait until Winterport has made application for renewal in order to issue a public notice of even a Tentative Decision to deny the District's Section 301(h) waiver. There are compelling public policy reasons for waiting until application is made since EPA cannot know in advance what the ambient water quality will be in the receiving waters, or whether the receiving waters will support a balanced indigenous population of shellfish, fish and wildlife, as provided in Section 301(h).

In short, EPA has jumped the gun by issuing a public notice of a Tentative Decision in the case of Winterport since it cannot prospectively assume that the receiving water, at the time of application (which is likely to be mid-2008) is or is not meeting the criteria set out in 301(h).

Response #1: EPA has fully reviewed and considered the application for NPDES permit re-issuance submitted by Winterport and dated August 29, 2008. Nothing in that application warranted a change to EPA's Tentative Decision to deny Winterport's request for renewal of the Section 301(h) waiver. In addition, as discussed in Response #2, the ambient water quality impairments that contributed to EPA's Tentative Decision to deny renewal of the Section 301(h) waiver remained at the time of the permit application and at present. EPA made its Final Decision to deny Winterport's waiver request only after considering both the Town's application and up-to-date water quality information. It is also EPA's understanding that Winterport is not presently objecting to the denial of its waiver application and intends to move ahead with steps to meet the secondary treatment requirements included in the State of Maine's discharge license. Indeed, EPA understands that Winterport desires EPA to complete its Final Decision expeditiously to facilitate the Town's efforts to seek funding assistance for the addition of secondary treatment facilities. As a result of the points detailed above, EPA is confident that the Final Decision to deny the waiver is substantively correct and should be issued at this time.

Comment #2: It should be noted that this Tentative Decision is based on Maine's 2004 Integrated Water Quality Monitoring and Assessment Report which is <u>not</u> the latest report submitted to and approved by EPA. *See* page 2 of Tentative Decision dated September 27, 2007.

At the time the District makes application, the Penobscot River Estuary, which is the receiving water for the District's discharge, may not be listed as non-attainment by the state of Maine under Section 303(d).

Response #2: The State of Maine's Integrated Lists of Waters for 2006 and 2008 remain unchanged from the 2004 Maine Integrated List cited in the tentative decision to deny the waiver.

Comment #3 More importantly, there is no correlation between a state's listing under Section 303(d) and a failure to meet the criteria set out in Section 301(h). In fact, there is strong evidence to support the conclusion that despite the state's Section 303(d) listing of the Penobscot River Estuary, the receiving waters support a balanced and indigenous population of shellfish, fish and wildlife. These waters also allow recreation in and on the water. Finally, there is no *ambient* water quality measurement or test which indicates that the existing quality is below any applicable water quality standard adopted for these waters. (See attached figures from 2002 Penobscot River Study Report, MEDEP).

Therefore, even if EPA was authorized to begin a renewal of the District's 301(h) waiver at this time, there is no factual or legal basis for EPA's Tentative Decision to deny the District's 301(h) waiver.

Response # 3: EPA disagrees with this comment. There is information showing that the existing quality is below an applicable water quality standard adopted for these waters.

Maine Title 38 §465-B(1)(3)(A) (Standards for classification of estuarine and marine waters), states that "Class SC waters must be of such quality that they are suitable for recreation in and on the water, fishing, aquaculture, **propagation and restricted harvesting of shellfish** (emphasis added), industrial process and cooling water supply, hydroelectric power generation, navigation and as a habitat for fish and other estuarine and marine life."

Maine Department of Marine Resources (DMR) Regulation 95.08E, Closed Area No. 35 Penobscot River, states that "Effective immediately, because of pollution, it shall be unlawful to dig, take or posses any clams, quahogs, oysters, or mussels taken from shores, flats and waters of the Penobscot River…". This regulation has been in continuous effect since December 6, 1999.

The attached DMR shellfish area closure map shows that the Penobscot River above, at, and below the Winterport discharge is included in DMR's prohibited area. (See Figure 1) The prohibition of harvesting of shellfish demonstrates that the estuarine waters of the Penobscot River are in non-attainment for the Class SC water quality standard, specifically for the **propagation and restricted harvesting of shellfish.**

Comment #4: If EPA proceeds with its denial process, it should be aware of several factors relating to the District's treatment plant and its ability to implement secondary treatment. The existing wastewater treatment plant has been online since 1984 and is designed to process an average daily flow of about 0.11 MGD from about 300 connected sewer users.

The existing plant provides for primary sedimentation followed by chlorine disinfection without biological secondary treatment. The plant's effluent is currently required to meet the following:

- Monthly average flows less than 0.11 MGD
- Monthly average BOD removal greater than 30 percent
- Monthly average TSS removal greater than 50 percent
- Seasonal monthly average fecal coliform counts less than 15 col/100 ml
- Seasonal weekly fecal coliform counts less than 50 col/100 ml and
- Chlorine residual to river less than 0.85 mg/l

The District is currently subject to an EPA mandated sewer system master plan for CSO abatement which requires the rehabilitation of 26,000 LF of poorly defined sewer projects over the next eight years. Administrative Order Docket No. 04-05 ("A.O."). The estimated cost of the plan was $3.2 million dollars in 2004 dollars, and has likely escalated to about $5.0 million in 2007 dollars due to energy costs driving construction costs upwards.

The current master plan lacks an itemized assessment of which projects should be prioritized, how much excess flow each project will remove and how these expenditures will impact the present CSO frequency which is averaging only one event per year. While the District may need to rehabilitate portions of its sewer system due to their poor structural condition, no assessment has been completed to compare the costs of treating these occasional peak flows in the event that the plant must be upgraded.

If the 301(h) waiver is revoked, it will force the District to upgrade the present plant to secondary biological treatment or to build a new plant. A Facilities Plan will be required to consider various secondary treatment options and costs. In order to upgrade the present treatment plant, the following processes will be needed:

- Upgrade plant influent lift station
- Upgrade plant influent grinder
- Upgrade plant grit removal system
- Install selector basin
- Install aeration basins
- Install final clarifiers
- Install disinfection system
- Convert existing clarifier to aerobic sludge digestion/storage
- Install return/waste sludge pumps
- Install sludge press with support systems
- Add aeration blower room
- Upgrade existing plant operations building
- Modify existing plant site systems and
- Construct retaining wall at Fire Station rear boundary to utilize expansion area.

The plant's pump and piping hydraulics, grit removal system, final clarifiers and disinfection systems are the most impacted processes from peak flows in the sewer system. Biological processes, such as aeration basins are sized on organic loading and can tolerate periods of peak flow provided that the clarifiers are sized on a mass flux basis to capture the biological solids. The cost of providing a secondary treatment plant upgrade to accommodate the present sewer system loadings is estimated at $7.5 million in 2007 dollars. This would eliminate the need to replace some of the present $5.0 million dollars of sewers on a peak flow basis, although the poor structural condition of some sewer sections may warrant the need for their replacement beyond CSO considerations.

If an aggressive sewer system rehabilitation program were conducted to reduce excess flows and abate CSO discharges, the cost of the treatment plant upgrade could be reduced, but these reductions would have to be compared against the cost of the sewer projects. Because such an analysis cannot be made based upon the limited data available in the present CSO master plan, the present EPA A.O. regarding the sewer system should be vacated. The tentative 301(h) waiver decision changes the District's focus moving forward. It is essential that sewer system improvements be considered in the context of how reduced flows impact the treatment plant's sizing and upgrade costs.

The District will likely conduct an updated CSO master plan that identifies specific rehabilitation projects, their costs, their CSO reduction impact, and their treatment plant cost impact. The final project scope should be the mixture of sewer projects and treatment plant capacity that addresses both issues at the lowest cost.

This can be accomplished through a combined sewer system master plan study that meets typical standard of care in conjunction with a Facilities Plan for the treatment plant that meets established EPA guidelines.

The Facilities Plan must also address financial capacity issues. The District's 300 sewer users do not have the financial capacity to undertake the magnitude of sewer system/treatment plant improvements that may be mandated.

The present operating budget of the primary treatment plant is $190,000 per year. The average sewer user is now paying $630 per year. EPA and DEP have traditionally considered 2% MHI as the threshold beyond which sewer user fees impose a financial hardship on the community. The published MHI for Winterport is $40,000, although the sewered area is likely lower. At $40,000 MHI, a 2% user fee would be $800 per year. If operating costs did not increase, the District's capacity to borrow would be about $170 per user or $51,000 per year for 300 users. This would amortize $1.0 million dollars at 30 years and 3% interest. However, operating costs will increase with the secondary treatment. Electrical costs for aeration, sludge removal costs to process secondary biological sludges, and labor costs for additional process control testing will likely consume all or more than the incremental $51,000 of annual maximum budget that is available. Exact operating cost increases will be determined in the Facilities Plan. It will be financially impossible for the 300 sewer users in Winterport to finance the extensive capital improvement projects that a 301(h) denial will require. Significant outside grant funding will be needed from all available sources in order for the District to comply.

Assuming that funding was available today, the District would need sufficient time to comply with secondary treatment limitations. As a minimum, six months would be needed to conduct updated CSO Master Plans (subject to sufficient wet weather conditions for sewer flow gauging) and to develop a Facilities Plan. Once the Facilities Plan was approved by DEP for implementation, one year should be allotted for design and DEP design review and two years for construction. Therefore, compliance would require at least 3.5 years from the date that funding is available. Since funding is currently not available, the time needed to assemble an adequate funding package must be added to the 3.5 years.

It will likely take several years and monies from multiple funding sources to obtain enough funding to allow this project to proceed. During that time, the cost of the project can be expected to escalate, especially if energy costs continue to rise.

While EPA may ultimately decide to deny the District's 301(h) waiver without regard to the District's impact on water quality, it is important that at least a mention be made of the environmental benefits of the proposed action.

The most recent DEP Penobscot River study conducted in 2002 shows that the existing primary treatment discharge from Winterport has an insignificant impact on the river's water quality. (See attached figures from 2002 Penobscot River Study Report, MEDEP.) CSO discharges are currently occurring at a rate of one per year and the amount of lost flow has averaged only 260,000 GPD in a river basin that has a low flow of approximately 2,400,000,000 GPD.

In short, imposition of secondary treatment at Winterport will not affect instream water quality or the attainment status of the receiving waters. If the 301(h) waiver is denied, Winterport must have sufficient time to address the condition of its aged sewer system and treatment plant. It must be understood that 300 sewer users need significant grant funding to allow this to happen without bankrupting the community. Ultimately, as noted above, these costly mandates will have an immeasurable impact on the Penobscot River's water quality.

Response #4: When the waiver denial becomes final, the State of Maine will issue a final MPDES permit with secondary treatment requirements. The draft permit was public noticed on October 21, 2011. If the Winterport discharge, as expected, cannot achieve the secondary limitations, the State will likely enter into a consent agreement with the Town. It is our understanding that the State and permittee have been negotiating such an agreement in anticipation of the waiver denial becoming final. Any such agreement will likely include a schedule that allows time to plan the appropriate facilities and to acquire funding to construct the collection system remediation measures and plant upgrades. EPA plans to discuss this issue with MEDEP, and then make its decision regarding whether to vacate the EPA order.

Comment #5: The Winterport Water District requests that EPA Region 1 defer action on its Tentative Decision until the District makes application for renewal of its NPDES permit in mid 2008. At that time EPA may properly assess the attainment status of the District's receiving waters and may be able to use updated information contained in the State's 2008 Integrated Water Quality Monitoring and Assessment Report.

Response #5: As discussed in Response #1 and Response #2, EPA's made its Final Decision after the 2008 application was submitted, and neither the permit application nor the water quality information available at the time of the permit application, or since, provides information that would warrant changing the decision.

Conservation Law Foundation

Comment #6: 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.[1] Of particular relevance, Congress amended Section 301(h) of the Clean Water Act by adding the following prohibition:

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[1] 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.

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.[2] 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)). 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.[3] 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.

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[2] 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).

[3] 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 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 #6: EPA agrees with the commenter's conclusion that EPA may not issue Winterport a waiver under Section 301(h) of the CWA from the statute's secondary treatment requirements. EPA may not provide such a waiver because Winterport discharges to saline estuarine waters which are not attaining applicable water quality standards.

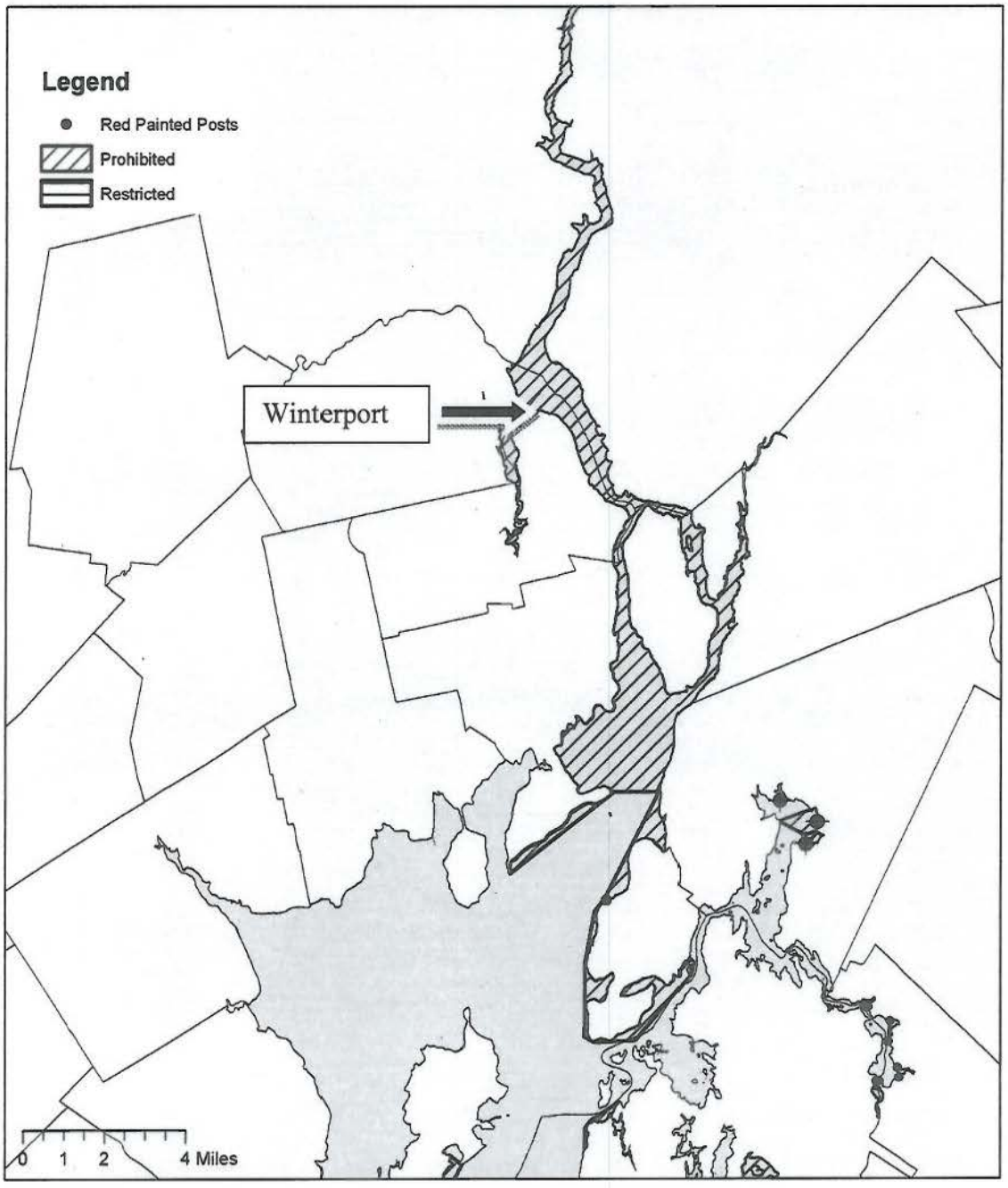

Figure 1 Area where shellfishing is prohibited by the Maine Department of Marine Fisheries (above and below Winterport).