

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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| UNITED STATES OF AMERICA |) | |
| |) | |
| and |) | |
| |) | |
| STATE OF MAINE, |) | |
| |) | |
| Plaintiffs |) | Civil Action No. |
| |) | |
| v. |) | |
| |) | |
| CITY OF BANGOR, MAINE, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

COMPLAINT

Plaintiffs, the United States of America, through its undersigned attorneys, by the authority of the Attorney General, and at the request of the Administrator of the United States Environmental Protection Agency (“EPA”), and the State of Maine, through its undersigned attorney, at the request of the Administrator of the Maine Department of Environmental Protection (“MEDEP”), file this Complaint and allege as follows:

NATURE OF THE ACTION

1. This is a civil action brought against the City of Bangor, Maine (“Bangor” or the “City”) pursuant to Section 309(b) and (d) of the Federal Water Pollution Control Act of 1972, as amended (commonly referred to as the “Clean Water Act” and hereinafter referred to as the “CWA”), 33 U.S.C. § 1319(b) and (d), seeking injunctive relief and civil penalties for Bangor’s failure to comply fully with the CWA in its discharge of pollutants from its wastewater collection system and small municipal separate storm sewer system (“MS4”) without

authorization or in noncompliance with its Maine Pollutant Discharge Elimination System (“MEPDES”) permit and Maine General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer Systems, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and 38 M.R.S.A. § 414(5).

JURISDICTION, VENUE AND NOTICE

2. This Court has jurisdiction over the subject matter of this action pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1331, 1345 and 1355.

3. Venue is proper in this district pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b) and (c), and 28 U.S.C. § 1395.

4. Notice of the commencement of this action has been given to the State of Maine, co-Plaintiff in this action, pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

DEFENDANT

5. Bangor is a municipality organized and existing under the laws of the State of Maine, with the power to sue and be sued.

6. Bangor is a “municipality” within the meaning of Section 502(4) of the CWA, 33 U.S.C. § 1362(4), and a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

7. Bangor owns, and is responsible for the operation and maintenance of a “publicly owned treatment works” (“POTW”) that includes a wastewater collection system (“Collection System”) and wastewater treatment facility (“WWTF”) that discharges to the Penobscot River and Kenduskeag Stream. Bangor also owns and operates an MS4, which is comprised of a system of conveyances designed to collect, convey and discharge storm water to receiving waters. Bangor’s POTW also serves small portions of two adjacent municipalities.

STATUTORY AND REGULATORY BACKGROUND

8. The CWA is a comprehensive statute designed “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve that goal, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters of the United States except in compliance with, *inter alia*, the terms and conditions of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

9. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the term “discharge of pollutants” to include “any addition of any pollutant to navigable waters from any point source.”

10. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines the term “pollutant” to include, *inter alia*, “sewage, garbage, sewage sludge . . . , biological materials . . . , and . . . industrial, municipal, and agricultural waste discharged into water.”

11. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines the term “navigable waters” as “the waters of the United States, including the territorial seas.”

12. Part 122 of Title 40 of the Code of Federal Regulations (“C.F.R.”), promulgated under the CWA to regulate the NPDES permit program, defines “waters of the United States” to include, in relevant part, “[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide,” and tributaries to such waters. 40 C.F.R. § 122.2.

13. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines the term “point source” to include “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . from which pollutants are or may be discharged.”

14. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), establishes the NPDES permit system, and authorizes the EPA to issue permits for the discharge of pollutants into navigable waters of the United States, but only in compliance with Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and such other conditions as the EPA determines are necessary to carry out the provisions of the CWA.

15. Section 402(b) of the CWA, 33 U.S.C. § 1342(b), provides that the EPA Administrator may authorize a state to issue NPDES permits in accordance with the requirements of the CWA. On January 12, 2001, the EPA Administrator granted the State of Maine the authority to issue permits for all areas of the State outside of Indian country, known as MEPDES permits, pursuant to Section 402(b) of the CWA, 33 U.S.C. § 1342(b), and the MEDEP is the delegated Maine authority that issues such MEPDES permits. EPA subsequently granted Maine the NPDES permitting authority under the MEPDES program for all areas of the State, including those areas in Indian country. “After the issuance of a license by the MEDEP, it is unlawful to violate the terms or conditions of the license, whether or not such violation actually lowers the quality of the receiving waters below the minimum requirements of their classification.” 38 M.R.S.A § 414(5).

16. Under Section 402(p) of the CWA, 33 U.S.C. § 1342(p), permits for discharges from municipal storm sewers (i) may be issued on a system- or jurisdiction-wide basis; (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and (iii) shall require controls to reduce the discharge of pollutants to the maximum extent

practicable, including management practices, control techniques and systems, design and engineering methods, and such other provisions as the Administrator [of EPA] or the State determines appropriate for the control of such pollutants.

17. Section 309(b) of the CWA, 33 U.S.C. § 1319(b), authorizes the commencement of a civil action for appropriate relief, including a permanent or temporary injunction, against any person who violates Section 301(a) of the CWA, 33 U.S.C. § 1311(a), or a permit condition or limitation in a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

18. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates Section 301(a) of the CWA, 33 U.S.C. § 1311(a), or a permit condition or limitation in a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, shall be subject to a civil penalty for each day of each violation.

GENERAL ALLEGATIONS

19. Pursuant to the Maine Water Quality Standards, approved by EPA under Section 303 of the CWA, 33 U.S.C. § 1313, the Penobscot River and Kenduskeag Stream are classified as Class B and C, respectively, though the Kenduskeag Stream is Class B upstream of the Bullseye Bridge. Tributaries of the Penobscot River and Kenduskeag Stream are Class B waters. 38 M.R.S.A §§ 464-470. Class B and C waters include designated uses of recreation in and on the water, fishing, agriculture, navigation, and habitat for fish and other aquatic life. 38 M.R.S.A §§ 465(3)(A), 465(4)(A).

20. At all relevant times, Bangor has owned and operated a Collection System and WWTF that discharges to the Penobscot River and the Kenduskeag Stream. The WWTF receives sanitary and process wastewaters from residential, commercial and industrial facilities within the City and from neighboring towns. The Collection System includes five pump stations,

and approximately 2,667 manholes that give access to 165 miles of pipe. As part of Bangor's MS4, the City maintains approximately 110 miles of separate stormwater pipes with approximately 4,000 associated catch basins and 300 outfalls.

Combined Sewer Overflows

21. Approximately one quarter of Bangor's Collection System is combined, conveying both domestic and industrial wastewater and part of the City's storm water runoff to the WWTF. During rain events, rainwater often overwhelms the capacity of the combined system, resulting in combined sewer overflows ("CSOs") through the City's nine CSO outfalls.

22. Bangor's CSO outfalls and the Collection System components through which CSOs have occurred are each a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

23. Bangor's CSO discharges include, among other things, "sewage," a "pollutant" under Section 502(6) of the CWA, 33 U.S.C. § 1362(6). Bangor's CSO discharges also include other pollutants, such as industrial wastes, oil and pesticides, and floating debris washed into the sewer system, all of which are also "pollutants" under the CWA.

24. Bangor's CSO discharges enter the Penobscot River or Kenduskeag Stream, both of which are "navigable waters" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

25. Certain discharges from Bangor's WWTF and nine CSO outfalls are authorized under a federal NPDES permit issued by the MEDEP (MEPDES Permit No. ME0100781). MEPDES Permit No. ME0100781 was issued to Bangor on February 12, 2002 and expired on February 12, 2007. However, because Bangor timely applied to renew the permit, the permit's conditions remained in effect until the permit was re-issued by the MEDEP on May 26, 2011

(“2011 MEPDES Permit”). It became effective on May 26, 2011 and expires on May 26, 2016. Like the earlier permit, the 2011 MEPDES Permit authorizes, subject to specific limitations and conditions, the discharge of secondary-treated municipal wastewaters from the WWTF, primary-treated wastewater from a generic bypass structure at the WWTF when wet weather flows exceed the WWTF secondary treatment capacity, and untreated sanitary/stormwater from nine CSO outfalls when flows exceed the total primary and secondary capacity at the WWTF.

26. CSO discharges are not authorized under the 2011 MEPDES Permit if they “contain materials in concentrations or combinations which are hazardous or toxic to aquatic life,” or “would impair the usages designated by the classification of the receiving waters,” which, under the applicable state water quality standard classifications, Maine Water Quality Standards Class B and C, includes recreation in and on the water, fishing, agriculture, navigation, and habitat for fish and other aquatic life. 38 M.R.S.A §§ 465(3)(A), 465(4)(A).

Unauthorized Overflows

27. In addition to the CSO discharges, Bangor also discharges sewage and other pollutants from various components in the Collection System, such as manholes and pump stations, which are not identified by the 2011 MEPDES Permit or any other permit as authorized outfalls (hereinafter referred to as “Unauthorized Overflows”).

28. Bangor’s Unauthorized Overflows include, among other things, “sewage,” a “pollutant” under Section 502(6) of the CWA, 33 U.S.C. § 1362(6). Bangor’s Unauthorized Overflows also include other pollutants, such as untreated industrial wastes, toxic materials, including oil and pesticides, and floating debris washed into the sewer system, all of which are also “pollutants” under the CWA.

29. Bangor's Unauthorized Overflows and the Collection System components through which Unauthorized Overflows have occurred, such as manholes and pump stations, are each a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

30. Bangor's Unauthorized Overflows enter, directly or through catch basins and manholes, the Penobscot River or Kenduskeag Stream or their tributaries.

MS4 Discharges

31. Bangor is also the owner and operator of an MS4, which is comprised of a system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, and storm drains) designed to collect, convey, and directly discharge storm water to receiving waters.

32. Outfalls in Bangor's MS4, from which pollutants are discharged, are "point sources," within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

33. Bangor's MS4 outfall discharges include, *inter alia*, sediments, oils, grease, nutrients and metals, all "pollutants" under the CWA.

34. Bangor's MS4 outfall discharges enter the Penobscot River or Kenduskeag Stream or their tributaries.

35. On June 3, 2003, the MEDEP issued a "General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer Systems" ("2003 MS4 Permit") authorizing the direct discharge of stormwater from regulated MS4s. This permit was reissued on July 1, 2008 and again on July 1, 2013 ("2008 MS4 Permit" and "2013 MS4 Permit" respectively). The 2013 MS4 Permit's term is five years and expires on July 1, 2018.

36. Bangor submitted a Notice of Intent ("NOI") to be covered by the 2003 MS4 Permit on June 3, 2003. The City reapplied for coverage under the 2008 MS4 Permit by

submitting an NOI on June 23, 2008 and reapplied for coverage under the 2013 MS4 Permit by signing an NOI on July 12, 2013 and submitting it on July 16, 2013. Pursuant to Section I.C. of the 2003 and 2008 MS4 Permits (Continuation of General Permit Coverage), the City remained covered by the permit for the entire period between the City's original NOI submittal on June 3, 2003 and the City's subsequent submission of NOIs in 2008 and 2013.

37. Part I.D.2. of the 2008 and 2013 MS4 Permits do not authorize discharges that are mixed with sources of non-stormwater other than those discharges in compliance with Part IV.H.(3)(c) of the 2008 and 2013 MS4 Permits.

38. Part IV.H.(3)(c) of the 2008 and 2013 MS4 Permits do not include untreated wastewater or sewage or "illicit discharges" as allowable non-storm water discharges.

39. Part IV(H)(3) of the 2008 MS4 Permit required implementation of six Minimum Control Measures or "MCMs." One of the MCMs required that the City "develop and implement a prioritized dry-weather outfall inspection plan" (as part of the "Illicit Discharge Detection and Elimination" or "IDDE" plan) (Part IV(3)(a)(iii)). In addition, the 2008 MS4 Permit required that the City have a "defined procedure/policy or protocol in place that details the steps that must be taken when an illicit discharge is identified during inspections to locate the source of the illicit discharge and eliminate it." (Part IV(H)(3)(iii), 2nd paragraph).

40. In 2008, Bangor submitted to EPA and MEDEP an MS4 Stormwater Management Plan ("2008 MS4 Plan") in which it provided a general IDDE plan and an IDDE inspection protocol that includes steps to conduct follow-up investigations if and when dry-weather flows are observed.

41. Similar to the 2008 MS4 Permit, Part IV(H)(3) of the 2013 MS4 Permit requires the development, implementation and enforcement of a program to detect and eliminate illicit discharges and non-stormwater discharges.

42. Bangor submitted a revised IDDE plan to EPA and MEDEP on June 26, 2014, that was subsequently approved by EPA in consultation with MEDEP.

FIRST CLAIM FOR RELIEF

Unpermitted Discharges from Combined Sewer System

43. The paragraphs above are realleged and incorporated herein by reference.

44. Between 2010 and the present, the City has reported hundreds of CSO discharges, with a total discharge volume of at least 725 million gallons of untreated sanitary and storm water to the Penobscot River or the Kenduskeag Stream.

45. Special Condition N of the 2011 MEPDES Permit authorizes untreated sanitary and storm water discharges from Bangor's nine CSO outfalls to the Penobscot River or Kenduskeag Stream only if such discharges do not, *inter alia*, "contain materials in concentrations or combinations which are hazardous or toxic to aquatic life," or "would impair the usage designated by the classification of the receiving waters," which, under the applicable state water quality standard classifications includes recreation in and on the water, fishing, agriculture, navigation, and habitat for fish and other aquatic life. 38 M.R.S.A. §§ 465(3)(A), 465(4)(A).

46. Bangor's CSO discharges caused and continue to cause water quality violations in the Penobscot River and Kenduskeag Stream because such discharges contain human waste by-products such as fecal coliform, and biochemical oxygen demand, and other pollutants that violate the Maine Water Quality Standards Class B and C for designated uses of recreation in

and on the water, fishing, agriculture, navigation, and habitat for fish and other aquatic life. 38 M.R.S.A. §§ 465(3)(A), 465(4)(A).

47. Bangor's CSO discharges containing pollutants that cause water quality violations in the Penobscot River and Kenduskeag Stream are violations of the 2011 MEPDES Permit, 38 M.R.S.A. § 414(5), and Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

48. Bangor is liable for civil penalties of up to \$37,500 per day for each violation occurring after January 12, 2009, pursuant to Sections 309(b) and (d) of the CWA, 33 U.S.C. §§1319(b) and (d); and the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701.

49. Unless enjoined by an order of the Court, Bangor will continue to discharge pollutants from its CSO outfalls that cause violations of Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311(a) and 1342, violations of Maine law, 38 M.R.S.A. §414(5), and water quality violations in the Penobscot River and Kenduskeag Stream.

SECOND CLAIM FOR RELIEF

Unauthorized Overflows

50. The paragraphs above are realleged and incorporated herein by reference.

51. On at least 21 different occasions between June 2010 and the present, Bangor has had Unauthorized Overflows of sanitary sewage and other pollutants from various components of the Collection System to the Penobscot River or Kenduskeag Stream or their tributaries.

52. The 2011 MEPDES Permit authorizes the discharge of wastewaters only at the WWTF and the nine permitted CSO outfalls; other discharges from the Collection System are not authorized by the 2011 MEPDES Permit nor any other permit.

53. Bangor's Unauthorized Overflows from various components of the Collection System to the Penobscot River or Kenduskeag Stream or their tributaries are violations of the

2011 MEPDES Permit, 38 M.R.S.A. § 414(5), and Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

54. Bangor is liable for civil penalties of up to \$37,500 per day for each violation occurring after January 12, 2009, pursuant to Sections 309(b) and (d) of the CWA, 33 U.S.C. §§1319(b) and (d); and the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701.

55. Unless enjoined by an order of the Court, Bangor will continue to violate Section 301(a) of the CWA, 33 U.S.C. § 1311(a), to violate Maine law, 38 M.R.S.A. §414(5), and have Unauthorized Overflows from various components of the Collection System to the Penobscot River or Kenduskeag Stream or their tributaries.

THIRD CLAIM FOR RELIEF

MS4 Discharges

56. The paragraphs above are realleged and incorporated herein by reference.

57. Between June 2010 and the present, Bangor observed dry weather flows at 25 outfalls during IDDE inspections. However, Bangor did not conduct follow-up inspections at at least 5 such locations between 2012 and 2014.

58. Bangor's failure to conduct follow-up inspections as part of its IDDE program when dry weather flows were observed, as required by the 2008 and 2013 MS4 Permits, and associated MS4 Plans and IDDE plans and inspection protocols, are violations of its 2008 and 2013 MS4 Permits, 38 M.R.S.A. § 414(5), and Section 301(a) of the Act, 33 U.S.C. § 1311(a).

59. Bangor is liable for civil penalties of up to \$37,500 per day for each violation occurring after January 12, 2009, pursuant to Sections 309(b) and (d) of the CWA, 33 U.S.C. §§1319(b) and (d); and the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701.

60. Unless enjoined by an order of the Court, Bangor will continue to violate Section 301(a) of the CWA, to violate Maine law, 38 M.R.S.A. §414(5), and will not fully comply with the 2013 MS4 Permit to conduct adequate IDDE inspection follow-up on outfalls identified as having dry weather discharges, and generally implement and enforce an effective program to detect and eliminate illicit discharge and non-stormwater discharges.

PRAYER FOR RELIEF

WHEREFORE, the United States of America and the State of Maine respectfully request that the Court grant the following relief:

1. Permanently enjoin the City, pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), from any and all future violations of the CWA and 38 M.R.S.A. § 414(5), and from discharges of pollutants except as authorized by the MEPDES and MS4 Permits issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342;
2. Order the City to pay a civil penalty not to exceed \$37,500 per day for each violation occurring after January 12, 2009; and
3. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

John C. Cruden
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

/s/ Laura J. Rowley
Laura J. Rowley, Senior Counsel
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, DC 20044-7611
(202) 616-8763
laura.rowley@usdoj.gov

THOMAS E. DELAHANTY II
United States Attorney
District of Maine

John G. Osborn
Chief, Civil Division
U.S. Attorney's Office, District of Maine
100 Middle Street Plaza
East Tower, Sixth Floor
Portland, Maine 04101
(207) 780-3257
John.Osborn2@usdoj.gov

/s/ Scott W. Boak
Scott W. Boak, Assistant Attorney General
Office of the Maine Attorney General
6 State House Station
Augusta, Maine 04333-0006
(207) 626-8566
Scott.Boak@maine.gov

OF COUNSEL:

Tonia Bandrowicz
Senior Enforcement Counsel
Office of Environmental Stewardship
U.S. Environmental Protection Agency, Region 1
5 Post Office Square, Suite 100
Boston, MA 02109