



For a thriving New England

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September 16, 2020

**VIA CERTIFIED MAIL—RETURN RECEIPT REQUESTED**

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**RE: Notice of Violations and Intent to File Suit Under the Massachusetts Environmental Code and General Laws of the Commonwealth**

Dear Madam and Sirs:

Conservation Law Foundation (CLF)<sup>1</sup> and at least nine persons domiciled within the Commonwealth of Massachusetts (the “Interested Citizens” and, collectively with CLF, “Plaintiffs”), hereby gives notice of intent to file suit seeking equitable relief and relief formerly available by writ of mandamus, pursuant to Section 7A of Chapter 214 and Section 5 of Chapter 249 of the General Laws of the Commonwealth.

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<sup>1</sup> CLF is a not-for-profit 501(c)(3) organization dedicated to the conservation and protection of New England’s environment. Its mission includes safeguarding the health and quality of life of New England communities facing the adverse effects of air pollution. CLF’s membership includes individuals who live near, and use the waterbodies that have suffered environmental damage due to the unlawful acts and omissions of the officials of the Massachusetts Department of Environmental Protection (“MassDEP”), the Town of Barnstable, and the Town of Mashpee. CLF’s members are harmed by these entities’ violations of the Massachusetts Environmental Code.

Plaintiffs intend to bring a civil action enforcing the Massachusetts Environmental Code against the Massachusetts Department of Environmental Protection (“MassDEP”), the Town of Barnstable, and the Town of Mashpee (“the Towns” and, collectively with MassDEP, “Defendants”). Defendants have unlawfully abdicated their duties to protect the Commonwealth’s people and environment. Defendants have violated, are violating, and will continue to violate requirements of Title 5 of the Massachusetts Environmental Code, specifically the Defendants’ duties to order changes to on-site septic systems that they have determined are discharging nitrogen-laden effluent to the coastal surface waters of Southern Cape Cod—namely Popponeset Bay, the Three Bays Estuary, the Centerville River-East Bay System, and Lewis Bay (collectively the “Southern Cape Coastal Waters”). Defendants’ unlawful acts and omissions have resulted in severe environmental damage to the Southern Cape Coastal Waters.

This letter constitutes notice pursuant to Section 7A of Chapter 214 of the General Laws of the Commonwealth of Plaintiffs’ intention to file suit in the Barnstable County Superior Court seeking appropriate declaratory and injunctive relief, and reasonable litigation costs, including attorney, investigator, and expert-witness fees and costs, no earlier than 21 days from the postmark date of this letter.

## **FACTUAL BACKGROUND**

### ***Nitrogen-laden Effluent Discharges and the Ecological Crisis of the Southern Cape Coastal Waters***

The Southern Cape Coastal Waters are in ecological crisis. Historically, these bays and estuaries had been clean and carpeted with meadows of eelgrass—one of nature’s most valuable and productive marine habitats—teeming with diverse aquatic life. Today, the meadows have been extirpated, rotting detritus deprives the seafloor of sunlight, and algal outbreaks starve marine organisms of dissolved oxygen necessary to sustain life and offer members of the public putrid smells and unsightly scums.

Defendants long-ago officially determined the cause of the ecological crisis: nitrogen-laden effluent discharged to the Southern Cape Coastal Waters from human sources including, predominantly, nitrogen-laden effluent from septic systems regulated by Defendants under Title 5 of the Massachusetts Environmental Code. In Barnstable and Mashpee, Defendants have officially determined that the huge load of urine and fecal matter flushed into Title 5 regulated septic systems directly and indirectly discharges nitrogen effluent to the Southern Cape Coastal Waters. This nitrogen-laden effluent pours through Cape Cod’s porous soils, reaches groundwater, and is discharged directly and/or indirectly into the Southern Cape Coastal Waters, which are surface waters of the Commonwealth. According to Defendants’ official determinations, septic discharges of nitrogen-laden effluent collectively pollute the Southern Cape Coastal Waters with approximately 367,459 pounds of nitrogen per year.

### ***Defendants' Duties Under Title 5 of the Massachusetts Environmental Code***

Pursuant to statutory mandate, MassDEP has promulgated regulations “to provide for the protection of public health, safety, welfare, and the environment by requiring the proper siting, construction, upgrade, and maintenance of on-site sewage disposal systems and appropriate means for the transport and disposal of septage,” codified in Title 5 of the Massachusetts Environmental Code, 310 CMR 15.001 *et seq.* (hereinafter “Title 5”). 310 CMR 15.001(a). Under Title 5, MassDEP retains ultimate regulatory authority, but delegates responsibility for implementing and enforcing the provisions of Title 5 for septic systems to a municipality’s board of health as the Local Approving Authority. 310 CMR 15.025, 15.003(2); *id.* § 15.002.

The Town of Barnstable’s Board of Health is the Local Approving Authority for the Town of Barnstable and the Town of Mashpee’s Board of Health is the Local Approving Authority for the Town of Mashpee. Title 5 places affirmative legal duties on these Boards of Health to enforce its requirements within the respective towns, “with oversight and assistance by the Department as necessary or as set forth in 310 CMR 15.000.” 310 C.M.R. 15.025.

Title 5 defines circumstances in which operation of a septic system qualifies as a per se violation of the Code. 310 CMR 15.024. One such circumstance is where the operation of the system results in “discharge of effluent directly or indirectly to . . . a surface water of the Commonwealth.” 310 CMR 15.024(8). With some limited exceptions, a septic system must be inspected “at or within two years prior to the time of transfer of title to the facility served by the system.” 310 CMR 15.301. Inspections must be performed by a System Inspector approved by MassDEP. 310 CMR 15.340. During a system inspection, the inspector analyzes whether the septic system displays any of the “failure criteria” identified in Title 5. 310 CMR 15.302(2)(c); *id.* 15.303. One of the listed failure criteria is that “there is a discharge of effluent directly or indirectly . . . to a surface water of the Commonwealth.” 310 CMR 15.303(1)(a)(2). If the Town or MassDEP determines that a septic system is failing to protect public health and safety and the environment, the system “shall be upgraded,” 310 CMR 15.303(1), and MassDEP and/or the Town must order the upgrade of a system if one or both determine that a “specific circumstance exists by which any system threatens public health, safety, welfare or the environment, causes or threatens to cause damage to property or creates a nuisance.” 310 CMR 15.303(2).

### ***Defendants' Determinations and Unlawful Conduct***

MassDEP, the Town of Barnstable, and the Town of Mashpee have determined that the operation of each traditional septic system (that is, septic system other than innovative/alternative systems) within the watersheds of the Southern Cape Coastal Waters is a specific circumstance by which the system violates Title 5 and contributes to the harm of the Commonwealth’s environment.

Specifically, beginning in 2006, as mandated by the Federal Clean Water Act (33 U.S.C. § 1313(d)), MassDEP submitted final Total Maximum Daily Loads (“TMDL”) to the federal

Environmental Protection Agency (EPA) for approval, for each of the Southern Cape Coastal Waters including such determinations:

- In April 2006, MassDEP submitted a TMDL for Popponesset Bay determining that nitrogen pollution had caused “degraded water quality, adverse impacts to ecosystems, and limits on the use of water resources” in the waterbody, and concluding that each traditional septic system within the Popponesset Bay drainage is polluting the Southern Cape Coastal Waters with nitrogen-laden effluent. EPA approved the TMDL in January 2008.
- In April 2007, MassDEP submitted a TMDL for the Three Bays Estuary determining that nitrogen pollution had caused “degraded water quality, adverse impacts to ecosystems, and limits on the use of water resources” in the waterbody, and concluding that each traditional septic system within the Three Bays Estuary drainage is polluting the Southern Cape Coastal Waters with nitrogen-laden effluent. EPA approved the TMDL in February 2008.
- In December 2007, MassDEP submitted a TMDL for the Centerville River–East Bay System determining that nitrogen pollution had caused “degraded water quality, adverse impacts to ecosystems, and limits on the use of water resources” in the waterbody, and concluding that each traditional septic system within the Centerville River–East Bay System drainage is polluting the Southern Cape Coastal Waters with nitrogen-laden effluent. EPA approved the TMDL in January 2008.
- In March 2015, MassDEP submitted a TMDL for Lewis Bay determining that nitrogen pollution had caused “degraded water quality, adverse impacts to ecosystems, and limits on the use of water resources” in the waterbody, and concluding that each traditional septic system within the Lewis Bay drainage is polluting the Southern Cape Coastal Waters with nitrogen-laden effluent. EPA approved the TMDL in April 2015.

Based on MassDEP’s TMDLs for Popponesset Bay, Lewis Bay, the Three Bays Estuary, and the Centerville River–East Bay System, the Town of Barnstable adopted Interim Regulations for the Protection of Saltwater Estuaries into its regulations governing onsite sewage disposal systems. Town of Barnstable Code § 360-45. In issuing the Interim Regulations, the Town of Barnstable incorporated the determinations from MassDEP’s Popponesset Bay, Three Bays Estuary, Centerville River-East Bay System, and Lewis Bay TMDLs as the Town’s own determinations.

The Town of Mashpee issued a Needs Assessment Report as part of its development of a Watershed Nitrogen Management Plan to address the Town’s need for reducing nitrogen impacts to its coastal embayments, including the waters of the Popponesset Bay watershed. The Needs

Assessment Report incorporates by reference the determination by the Massachusetts Estuary Project—also the basis of MassDEP’s Popponesset Bay TMDL—that every traditional septic system operating in the Popponesset Bay drainage contributes nitrogen-laden effluent to the surface waters of the watershed. In October 2007, the Town submitted the Needs Assessment Report to the Commonwealth as an official submittal of the Town of Mashpee.

Upon determining that traditional septic systems were polluting the Commonwealth’s surface waters, Defendants became bound by Massachusetts law to order upgrades of these systems. Defendants have failed, and continue to fail, in this duty. Defendants have not ordered the update of traditional septic system within the Towns of Barnstable or Mashpee despite their determinations that these systems contribute to the Southern Cape Coastal Waters’ nitrogen crisis. On the contrary, even in the last two years, the Towns of Barnstable and Mashpee have authorized the continued use of numerous traditional septic systems—both accepting false inspection forms that state these systems comply with Title 5, and by affirmatively issuing permits for the installation and continued use of such systems—with the knowledge that these systems will continue to discharge nitrogen-laden effluent into the Southern Cape Coastal Waters and accelerate the Waters’ ecological decline.

### **RELIEF TO BE REQUESTED**

MassDEP, the Town of Barnstable, and the Town of Mashpee are liable for the above-described violations of the Massachusetts Environmental Code, as well as for violations occurring prior to the date of this letter and for violations that continue afterwards.

Plaintiffs will seek declaratory relief to the effect that:

- Defendants have determined under 310 CMR 15.303(1) that traditional septic systems in the drainage of the Southern Cape Coastal Waters in the Towns of Barnstable and Mashpee are discharging nitrogen-laden effluent directly or indirectly to these surface waters of the Commonwealth;
- By failing to order the upgrade of these traditional septic systems, Defendants are in breach of their mandatory duties under Title 5;
- These traditional septic systems must be ordered “upgraded in accordance with the timeframes of 310 CMR 15.305(1) and the standards of 310 CMR 15.404 and 15.405”;
- MassDEP has failed adequately to train and approve competent system inspectors, compromising the integrity of the Title 5 inspection regime in the Commonwealth.

CLF and the Interested Citizens will also seek injunctive relief, including an order that:

- Enjoins Defendants jointly to submit for the Court's approval a proposed Plan, not more than five years in duration, by which Defendants will order all owners and operators of traditional septic systems in the drainage of the Southern Cape Coastal Waters in the Towns of Barnstable and Mashpee to "upgrade[]" in accordance with the timeframes of 310 CMR 15.305(1)" so as to stop the discharges of nitrogen-laden effluent directly or indirectly to surface waters of the Commonwealth;
- Enjoins Defendants, during the pendency of the development and implementation of Defendants' court-supervised Plan, from authorizing the installation or modification of, or accepting a passing inspection report for, any traditional septic system within the drainages of the Southern Cape Coastal Waters;
- Enjoins MassDEP to update its guidance to approved System Inspectors to (i) inform System Inspectors of MassDEP's determination that traditional septic systems within the Southern Cape Coastal watersheds are discharging nitrogen-laden effluent directly or indirectly to surface waters of the Commonwealth and (ii) expressly require System Inspectors to determine whether a particular system is discharging or will discharge nitrogen-laden effluent to surface waters of the Commonwealth when deciding whether a system passes inspection;
- Enjoins MassDEP to suspend approvals and renewal approvals of system inspectors until such time as MassDEP has developed training materials and programs sufficient to fully disclose and apprise system inspectors of MassDEP's determinations that Title 5 systems are discharging nitrogen-laden effluent directly and/or indirectly into the Southern Cape Coastal Waters consistent with the TMDLs;
- Enjoins the Town of Barnstable and the Town of Mashpee to propose, for the Court's approval, a supplement to the MassDEP-approved Inspection Form requiring that System Inspectors certify whether the inspected system is located within the surface or subsurface drainage area of the Southern Cape Coastal Waters as defined in the TMDLs and Town determinations that such discharges are discharging nitrogen-laden effluent directly or indirectly to the surface waters of the Commonwealth.

CLF and the Interested Citizens will also seek recovery of costs associated with this matter, as well as any further relief that the Court deems appropriate.

## **CONCLUSION**

This letter provides notice that in no sooner than 21 days, CLF and the Interested Citizens will ask the Court to remedy the ongoing harm and to order Defendants to comply with Massachusetts law by fulfilling their duties to order the upgrade of septic systems that pollute the Southern Cape Coastal Waters and exacerbate its ecological crisis.

During the 21-day notice period, CLF and the Interested Citizens are willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of litigation. If Defendants wish to pursue such discussions, please have Defendants' attorneys contact me in the next seven days.

Sincerely,

CONSERVATION LAW FOUNDATION

By its attorney,

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