MAHB
Assisting Massachusetts Boards of Health through training, technical assistance and legal education
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VIA EMAIL ATTACHMENT
To: DEP.talks@mass.gov

January 30, 2023

Commonwealth of Massachusetts
Department of Environmental Protection
1 Winter Street
Boston, MA 02108

Re: Proposed Regulations governing Nitrogen Sensitive Areas (NSA), 310 CMR 15.000 and 314 CMR 21.00, Comments on behalf of Massachusetts Association of Health Boards, a Member of the Title 5/Groundwater Discharge Stakeholder Group

Dear Acting Commissioner Moran,

As you are aware, in 2017, MassDEP created and began engaging with a Title 5/Groundwater Discharge stakeholder group, representing a diverse range of interests, to review comments received on the Title 5 regulations and consider potential revisions, including discussion of a solution to address excessive nitrogen in embayments and estuaries. Although The Massachusetts Association of Health Boards (MAHB) is listed in your online FAQ sheet as a member of the Title 5/Groundwater Discharge Stakeholder Group,[1] we cannot locate any correspondence where we were informed of such inclusion and have no record of our participation to this point.

In any event, since we were vested with membership, this letter is submitted on behalf of the MAHB, as a Member of the Title 5/Groundwater Discharge Stakeholder Group.

Scope of MAHB Comments:

MAHB is the Legal Technical Assistance Provider contracted by the State Department of Public Health to assist and support boards of health in meeting their statutory and service responsibilities through programs of education, technical assistance and resource development.

[1] https://www.mass.gov/doc/310-cmr-15000-314-cmr-2100-q-a/download

We have exhaustively reviewed every one of your public fora held on this issue and wish to offer the following comments. In addition, we have conferred with several of our constituent members as noted below, and have reviewed several submissions by various boards of health, selectboards and other municipal bodies in the formation of these comments. As such, while we support the other commentors and incorporate their concerns insofar as they address issues of concern as to enforcement of sound regulations, we are confining the scope of our comments to the most pressing issues affecting our 351 local boards of health, and, in particular, those on the coastal areas of the Southcoast Region, Plymouth County and the Cape and Islands as identified in your map showing "Natural Resource Area, Nitrogen Sensitive Areas: Status as of November 2022."

At the outset, it must be acknowledged as a matter of utmost concern to MAHB that issues of environmental pollution, abatement of the existential threat of global warming and the toxic pollution of our estuaries and water supply are of utmost important to our members as a matter of threat to the public health of the Commonwealth. We share in former Commissioner Suuberg's concern that the issues addressed in the proposed regulations must be properly addressed before they "harm the Cape's (and Islands') economy through a decline in fishing, shellfishing (SIC), tourism and property values,"[2] but are extremely concerned that these effects have ramifications far more serious than those economic issues raised by the former Commissioner in that letter.

While others have called on DEP to show the economic analysis upon which the former Commissioner's statements were made, that is of no impact to the concerns of MAHB which is viewing the issues through a public health lens.

From our review of data upon which this proposed regulation is based, we cannot see any evidence of analysis addressing social determinants of public health flowing from the proposed regulations.

Our concerns center around the shifting of substantial economic burdens of implementing the proposed regulations to local boards of health without any anticipated resource allocation allowing local public health to recapture the extraordinary expenses that will be incurred in establishing the mandated programs. While DEP is mandating many steps by local health department staff to both initiate these programs, and to later enforce them, there is no mention of the potential additional hundreds of millions of dollars that will likely be obligated, nor is there any evidence of financial analysis to determine what those additional resources will likely involve.

We are at a crossroads in public health. The DPH has raised and invested literally hundreds of millions of dollars in a changing infrastructure of local public health. They have rolled out over 50 grant programs for shared services. They have allocated over $100 Million to data collection and workforce development. Coming off of COVID-19, the ranks of our 351 boards of health have thinned considerably from what they were at the time this program was conceived by DEP. The strains on staff that did not exist and were not even imaginable in 2017 when this idea was first advanced (although our institutional memory is that the roots of this issue go back as

[2] Letter dated June 1, 2022 to "Municipal Officials"

far as the 1980's). The reality of the day is that the funding streams and ideas that formed the inception of this proposal are no longer feasibly based upon those "old assumptions." To quote an old saying, "That was then, this is now."

Equity:

The assumption that individual homeowners will be minimally impacted because they can attain interest free financing is as inhumane as it is shortsighted. Throughout the process, the role of the individual homeowner has been downplayed, and the public health impacts have been totally ignored. The discussion on the record is top heavy with concerns for fisheries, travel and tourism and void of any public health analysis.

As homeowners on fixed incomes are confronted with the potential of a $35,000 (a number that is used repeatedly as the base cost of a per-home upgrade, but for which we can find no support either way) "interest free" improvement, we cannot find a single public health impact analysis and that raise several questions.

Hypothetically, for the purposes of this discussion, we will address a family who bought their house 25 years ago and is now living on a fixed income. The family has an interest-free loan for a new boiler installed 2 years ago. This family is living "on the edge." They have paid off their house, but need a new (used) car, and they have health needs.

- How can they pay for their groceries if that base cost for an upgrade is drawn from their fixed income?
- Since this will end up as a "betterment," the repayment will be accomplished through a property tax hike. How can they afford that difference?
- Since the household income is diverted from heat, hot water, home repair and maintenance needed to maintain safe living conditions, where will that come from if they are paying higher real estate taxes?
- What considerations have been given to the mental health of people put under additional strain when they are already "on the edge?"

These are all issues of public health, that local boards of health deal with day-in and day-out and to which we can find no consideration by DEP in any of its materials.

BOH Enforcement of Reasonable Health Regulations:

In Massachusetts local boards of health have never had a single "rational health regulation" overturned by a court and sustained on appeal. This regulation, if adopted and enforced by our boards, would certainly change all of that!

Boards of health are empowered by G.L. c. 111, § 31 to make reasonable health regulations.[3] The courts have held that "The right to engage in business must yield to the paramount right of

[3] *Tri-Nel Management, Inc. v. Board of Health of Barnstable*, 433 Mass 217 (2001).

government to protect the public health by any rational means."[4] The courts recognize that board of health regulations "stand on the same footing as would a statute, ordinance or by-law."[5] That case goes on to hold, "All rational presumptions are made in favor of the validity of [the regulations]." In this state, courts will only strike a board of health regulation when the challenger proves, on the record, "the absence of any conceivable ground upon which [the regulation] may be upheld." [6] In Massachusetts, in order to overturn a health regulation, "A party challenging a board of health regulation must prove that it is illegal, arbitrary, or capricious, and must establish an absence of any conceivable grounds upon which the regulation may be upheld."[7]

While it is true that, "When applying the arbitrary and capricious standard, the reviewing court is not authorized to weigh evidence, find facts, exercise discretion, or substitute its judgment for that of the administrative body,"[8] there must be a rational underpinning to the regulation or action by the board of health.

The case, *Glass v. Town of Marblehead Bd. Of Health*,[9] is a decision by a trial judge that comes from the Marblehead Board of Health attempting to enforce a DEP regulation from which the CMR issued a regulation that was not based upon a quantifying definition of the underlying amount of noise that would constitute a violation of a regulation. The similarities are striking and chilling in the implementation of this proposed regulation.

The proposed regulation by the Department mandates that all on-sight systems installed must be a "Best Available Nitrogen Reducing Technology," with no definition or other quantification of what that is.

The sole court decision that has overturned a board of health regulation in Massachusetts jurisprudence comes from a local board of health attempting to enforce an ill-conceived regulation emanating from the Department of Environmental Protection! Dr. Einstein postulated on the wisdom of trying a failed endeavor a second time, and MAHB implores the DEP to not proceed with the proposed regulation without thoroughly defining all standards that are to be enforced by local boards! DEP has itself, stated in public presentations that while it has proposed or provided no standard today (as of 11/25/22), and "the Department is not leaning towards a standard,"[10]

Funding and Miscellaneous Issues

The regulation as proposed is a textbook example of an unfunded mandate. DEP is proposing a program that will require hundreds of thousands if not millions of dollars to establish on a local

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[4] Druzik et al v. Board of Health of Haverhill, 324 Mass. 129 (1949).
[5] *Druzik v. Board of Health of Haverhill*, 324 Mass. 129, 138 (1949).
[6] *Arthur D. Little, Inc. v. Com'r of Health for Cambridge*, 395 Mass. 535 (1985).
[7] *Padden v. West Boylston*, 445 Mass. 1104 (2005).
[8] *United Comb v. Leominster Board of Health*, 17 Mass. L.R. 233
[9] 25 Mass L.R. 288
[10] See, https://www.youtube.com/watch?v=_W7xFF6qgNM. Illustrating that uncertainty, it was stated, that "communities that want to utilize these technologies will be looking for a certain level of removal. So it may not be 10 that is enough. They may need 8, they may need seven..." 1:05:57 on video

level, and is placing enforcement within local boards of health, as they are statutorily obligated to. The agency is foisting a program upon local boards without any consideration for the actual, real-life, foreseeable hardships that this proposed regulation will bring to local boards.

No consideration has been given to funding the staff for education, community outreach, or other staff-driven functions. There is nothing in the DEP regulation to establish any revenue sources to carry out what is arguably the largest undertaking aimed at local public health ever, even considering the demands COVID placed upon our boards. On the Cape and Islands, as well as other coastal communities, this undertaking will be unprecedented. This is on top of the extraordinary demands placed on local public health by COVID, modernization of public health delivery, and new programs currently being rolled out by DPH.

The legal enforcement responsibility needs more clear enunciation. How much legal staff will DEP supply, vs. town counsel for the enforcement. Clearly not everyone will comply. There are going to be as many good reasons not to comply as there are homeowners in the affected areas. One commentator has raised the possibility of a 70% compliance rate and has made a case for how the remaining 30% can overwhelm municipal finances, not to mention an already badly backlogged court docket. We fail to see any indemnity provision where DEP is obligating itself to enforce judicial actions. This is unsatisfactory.

Not everyone living in the affected area owns their property as a second, or beach house. The overwhelming majority of properties are nowhere near the beach, and belong to those living "on the edge," discussed above. The reality is that adding this obligation to their cycle of monthly bills will destroy their household in many ways. MAHB is especially concerned with potential instances of depression, emotional health, financial health, and the general health of the population who will have to make a hard choice – keeping their home or a septic system.

The proposed regulation fails to consider the exceptions to public health regulatory authority surrounding agriculture. The board of health has no authority over agricultural properties in most instances. Nothing in the proposed regulation appears to acknowledge that.

Under G.L. c. 111, § 31A local boards of health are limited to on-site disposal systems. This proposed regulation does not deal with that reality.

Similarly, the proposed regulation seems to be blind to G.L. c. 40B affordable housing exemptions. Again, those residents are at risk from a public health/environmental justice standpoint.

Finally, attention is drawn to the lack of discussion of G.L. c. 111, §127P's grandfathering provisions that essentially block board of health actions in some cases.

In conclusion, the MAHB cannot endorse this proposed regulation as it stands. It has been driven by a need for the DEP to meet a settlement of ancillary litigation and because of impending deadlines in that litigation. MAHB respectfully submits that DEP has put its needs ahead of the science, an economic analysis and the good of the public health.

Respectfully Submitted,
Mass. Assoc. of Health Boards,

By: Cheryl Sbarra/MH
Cheryl Sbarra, J.D., Executive Director and
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and,

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Michael Hugo, J.D., Director of Policy
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