

November 20, 2014

**Via Email**

Paul Niedzwiecki  
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Cape Cod Commission  
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**Re: DRAFT Cape Cod Area Wide Water Quality Management Plan Update**

Dear Mr. Niedzwiecki:

The Conservation Law Foundation (“CLF”) appreciates the opportunity to comment on the Draft Cape Cod Area Wide Water Quality Management Plan Update (“Draft Update”).

Founded in 1966, CLF is a member-supported environmental advocacy organization that works to solve the problems threatening our natural resources and communities in Massachusetts and throughout New England. For years, CLF has been deeply engaged with the problems posed by the nutrient pollution crisis on Cape Cod, and CLF continues to work toward a solution for this crisis.

A robust and legally sufficient update (“Final Update”) to the 36-year-old Clean Water Act Section 208 Water Quality Management Plan for Cape Cod is an essential step in the process of cleaning up Cape Cod’s embayments. CLF acknowledges and appreciates the intensive effort of the Cape Cod Commission (“CCC”) and the towns and citizens of Cape Cod over the past year and a half in putting together the Draft Update, and the work that remains to finish and implement the Draft Update. CLF also appreciates the commitments to a successful Draft Update process made under oath by the Executive Director of the Cape Cod Commission, the Commissioner of the Massachusetts Department of Environmental Protection (“DEP”), and the Director of the Office of Ecosystem Protection for the US Environmental Protection Agency, Region 1 (“EPA”).<sup>1</sup>

For the Final Update to be an effective roadmap for future action to remedy the Cape’s nitrogen crisis, it must both satisfy the law under Section 208 of the Clean Water Act and anticipate and address potentially crippling implementation problems. To those ends, CLF would like to highlight several points of concern in the Draft Update.

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<sup>1</sup> Additionally, CLF and EPA have proposed a settlement to CLF’s Cape Cod nutrient pollution-related litigation against EPA that depends on EPA’s approval of a successful Final Update by September 30, 2015.

1. *Designation of Waste Management Agencies*

The Draft Update appears to appreciate the critical importance of the designation of one or more Waste Management Agencies to implement the plan. This is both a statutory requirement under the Clean Water Act, see CWA § 208(c)(1), 33 U.S.C. § 1288(c)(1), and a practical imperative if the Cape is to make progress toward achievement of the necessary reductions in pollutant loading. The Waste Management Agencies must, at the time of submission of the plan to EPA, have the authority to design and construct new treatment works, accept grants or other funding, raise revenues, and incur indebtedness, among other requirements. § 1288(c)(2)(A)-(I). The Administrator may not accept the designation of any agency that lacks any of these essential characteristics. § 1288(c)(2).

The Draft Update appears to favor inter-municipal agreements as Waste Management Agencies. As both a practical and legal matter, the designation of a Waste Management Agency cannot be accepted by EPA if it lacks authority to undertake any of these actions. Neither can a Waste Management Agency be accepted if its ability to undertake any of these actions is at risk of rejection by a popular vote. The Cape's embayments are critically impaired today because the towns of the Cape have generally failed to overcome the two-thirds vote required at each Town Meeting or Town Council to take actions with financial ramifications. CLF is not convinced that an inter-municipal agreement will be able to satisfy the statutory requirements for Waste Management Agencies at the time of submission of the Draft Update to EPA.

2. *Fallback Agency Designation*

The Draft Update's recommendation that DEP mandate the formation of a water pollution abatement district for any watershed without a designated Waste Management Agency by June 30, 2015 will be crucial to satisfying the Final Update's legal requirements under the Clean Water Act. Draft Update at 5-25, 8-2 (R5.7). From CLF's perspective, this requirement will not be satisfied by a proposed inter-municipal agreement.

To the extent that the CCC continues to consider inter-municipal agreements as a potential substitute for designation of Waste Management Agencies, it must specify how such an agreement will be deemed sufficient as a designated Waste Management Agency by June 30, 2015. Further, it should extend the fallback water pollution abatement district designation provision to apply at any point where the political process in a town deprives an inter-municipal agreement of any of its statutorily-mandated fiscal abilities. The Final Update should also contain the option for DEP to replace an underperforming Waste Management Agency with a water pollution abatement district after a short, specified period of time.

3. *Assessing progress*

The Draft Update proposes a reasonable time horizon for the watersheds' adaptive management plans, but should be clearer about the results of poor performance assessed at 5 year intervals. Draft Update at 4-14, Fig. 4-3 (R4.1). While the document states that poorly performing technologies will be identified and application of the technology will be discontinued at the end of the three year testing periods, it does not specify whether or how replacement technologies are to be implemented. The Final Update's discussion of adaptive management plans should require intermediate consideration of a technology's performance during the three year testing period and preparation for immediate implementation of replacement technologies at the end of three years (or sooner) for a poorly performing technology option.

4. *Future Updates to the Plan*

Areawide Plans under Section 208 must be updated "as needed to reflect changing water quality conditions, results of implementation actions, new requirements or to remove conditions in prior conditional or partial plan approvals." 40 C.F.R. § 130.6(e). The Final Update should explicitly state this requirement and identify specific date triggers for future updates.

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Thank you for the opportunity to comment. CLF looks forward to continued dialogue with the CCC, EPA, and MassDEP with the goal of restoring and maintaining the health of Cape Cod's waterways.

Sincerely,



Caitlin Peale Sloan

Staff Attorney  
Conservation Law Foundation