



# A Robinson+Cole Legal Update

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## New Massachusetts DEP Regulations Target Cape Cod Septic Systems

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The Massachusetts Department of Environmental Protection (DEP) has promulgated new regulations intended to reduce nitrogen loading from septic systems in sensitive coastal estuaries and embayments in the Commonwealth, with an initial focus on Cape Cod. These regulations took effect as of July 7, 2023, and will have a significant impact on the owners of thousands of properties with septic systems in areas where the new regulations apply. They amend DEP's Title 5 regulations, 310 CMR 15.000 *et seq.*, which regulate the construction and maintenance of on-site septic systems. They also establish a new regulatory program for municipal watershed permits at 314 CMR 21.00 *et seq.*

Prior to the recent Amendments, Title 5 regulated two types of Nitrogen Sensitive Areas (NSA) to protect drinking water: Zone II Interim Wellhead Protection Areas and areas with both on-site septic systems and non-public drinking water supply wells. In these areas, DEP restricts nitrogen loading by limiting septic system sizes to a maximum design flow of 440 gallons per day per acre. These regulations remain unchanged. The Title 5 Amendments create a new category of NSA known as the "Natural Resource Area." This category includes any watershed to an embayment or sub-embayment that as of July 7, 2023, is the subject of an EPA-approved nitrogen Total Maximum Daily Load (TMDL) and the Area Wide Water Quality Management Plan EPA approved for Cape Cod in 2015 under Section 208 of the Federal Clean Water Act. This encompasses 30 watersheds on Cape Cod. If EPA approves a TMDL after July 7, 2023, for a watershed that is subject to the Section 208 Plan, the NSA will take effect for that watershed on the date EPA approves the TMDL. The Title 5 Amendments also allow DEP to designate other Natural Resource Areas in the future, after a public review process and based on either a Massachusetts Estuary Project Report demonstrating nitrogen impacts or a scientific evaluation demonstrating nitrogen impacts. This potentially opens up areas beyond Cape Cod to Natural Resource Area designation.

The owners of septic systems in Natural Resource Areas are required to upgrade to the Best Available Nitrogen Reducing Technology, subject to certain exceptions. If the septic system is in a municipality that has obtained a Watershed Permit that covers the Natural Resource Area watershed that includes the septic system, an upgrade will not be required. Owners who upgraded their systems with DEP-approved nitrogen removing technology within the ten years prior to the applicable effective date for the Natural Resource Area are also exempt from the upgrade requirement unless their system has failed, or the use of the facility the system serves has changed.

### ***What does this mean for property owners who have septic systems?***

If the septic system is in a Natural Resource Area, the property owner is required to upgrade that system with the Best Available Nitrogen Reducing Technology within five years from the end date of the "Notice of Intent and Application Period," which is a two-year period in which a municipality can apply for a Watershed Permit. For the initial group of 30 watersheds on Cape Cod that have been designated as Natural Resource Areas as of July 7, 2023, the Notice of Intent and Application Period runs to July 7, 2025. This means that the five-year timeline to upgrade an existing septic system in any of those watersheds will commence on July 7, 2025, if the municipality in which the system is located has not received a Watershed Permit.

### ***What does this mean for new construction that requires a septic system?***

Starting six months after the designation of the Natural Resource Area, any septic system serving new construction in that Natural Resource Area is required to incorporate Best Available Nitrogen Reducing

Technology. DEP may suspend that requirement for a particular area in certain circumstances, including if a Watershed Permit application is filed within the two-year Notice of Intent and Application Period.

DEP has created a geographic information system (GIS) map intended to allow property owners to determine whether their property is in an existing Natural Resource Area and subject to the upgrade, [available here](#).

*\*Note: Kevin is a legal intern at Robinson+Cole and is not admitted to practice law.*

Please contact any of the authors listed above regarding the potential immediate or future impacts of the Title 5 Amendments and Watershed Permit Regulations on your property.

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