



MEMO

January 22, 2025

TO: Wellfleet Board of Health, Wellfleet Select Board

CC: Heith Martinez, Health Agent; Thomas Guerino, Town Administrator

FROM: Ryan Castle, CEO of the Cape Cod & Islands Association of REALTORS®

DATE: January 22, 2025

TOPIC: Wellfleet Harbor Targeted Watershed Management Plan Regulations

On behalf of the Cape Cod and Islands Association of REALTORS® (CCIAOR) members who live and work in Wellfleet, we remain concerned with the impact the draft Amended Board of Health Regulations (Amended Regulations) will have on homeowners who are required to upgrade otherwise functioning septic systems within a very short time frame and the requirement to upgrade all systems servicing a multi-unit lot whenever one must be upgraded due to a failing system. We are also worried about the cost of real estate transactions and the financial hardship the Amended Regulations will cause property owners and the effect this will have on the value of their homes.

Here are six areas of concern that we ask you to consider revising as you finalize the Amended Regulations:

I. The definition of “New Construction” in the Amended Regulations is overly broad.

Under the Amended Regulations, “New Construction” is one of the “triggering events” requiring property owners to upgrade their septic system to Best Available Nitrogen Reducing Technology.

The Massachusetts Department of Environmental Protection’s (MassDEP) definition, of “New Construction” includes the “construction of a **new building** for which an occupancy is required” as well as any increase in actual or design flow. The definition of “New Construction” in Wellfleet’s Amended Regulations, in contrast to the state Title 5 definition, includes “any construction or renovation which creates **new habitable or conditioned space**” as well as any increase in actual or design flow. This proposed language is problematic.

With this change, projects that would now require an upgrade to BANRT under Wellfleet’s BOH Amended Regulations definition of “New Construction” are:

- A home addition that makes one or more existing rooms larger but creates no new rooms.
- Internal renovations that create “new habitable or conditioned space” without creating a new room, such as raising the height of ceilings in an existing home to incorporate what was formerly unheated attic or eaves space into (an) existing room(s).
- A home addition that creates an additional “room” that does not count as a “bedroom” under either the state Title 5 or the Amended Regulations, such as, for example, a bathroom or a “mudroom” less than 70 square feet.

It is unfair to require property owners to incur the great additional expense of upgrading to BANRT to make improvements to their homes that **do not increase design flow and would not otherwise require a septic system upgrade**. One cost estimate of upgrading to BANRT ranges between \$25,000 to \$50,000 depending on whether existing septic tanks and leach fields can be maintained.

CCIAOR recommends Wellfleet's Amended definition of "New Construction" be replaced with the current state Title 5 definition as the Amended Regulations would require expensive upgrades under circumstances that do not call for the construction of a new or larger septic system.

II. Section 601.2(3). Homes served by a septic system are required to upgrade to BANRT within six months of a real estate, even if their system is new and operating properly. This upgrade requirement also extends to properties sold with a working nitrogen-reducing technology system. This is overly restrictive to homeowners.

Under Section 601.2(3) of the Amended Regulations, anytime a property served by a septic system is sold in an area of the Town that is not within an existing or proposed sewer district, the septic system must be upgraded to BANRT "prior to or within six (6) months after the date of closing."

The upgrade is required even if the septic system in question was built in compliance with the Town's Existing Regulations and the state's Title 5 regulations. For example, the Amended Regulations do not exempt from the upgrade requirement properties with systems already employing nitrogen-reducing technology that is not BANRT.

Under MassDEP Title 5 regulations requiring BANRT upgrades for systems in designated Nitrogen Sensitive Areas, systems that were upgraded within the prior 10 years with DEP-approved nitrogen removing technology are exempt from the BANRT upgrade requirement unless the system has failed, or an alteration of the property is considered "New Construction" under the state regulations. The upgrade requirements in the Amended Regulations do not include this common-sense exception.

The upgrade requirement in the Amended Regulations also could be read to require that a property which has previously upgraded to an earlier version of BANRT nonetheless would be required to upgrade to a later version of BANRT, if one exists, upon a subsequent sale or other "Triggering Event." There needs to be an exempt for a property that has already upgraded to BANRT from having to upgrade again at the time of a later sale if there is a new more effective BANRT. **Wellfleet should adopt MassDEP's Title 5 regulation language found at 310 CMR 15.215(2)(f) which states:**

Facility owners that install Best Available Nitrogen Reducing Technology pursuant to 310 CMR 15.215(2) shall not be required to upgrade to subsequent Best Available Nitrogen Reducing Technology unless the Approving Authority determines that: the system has failed and is required to be upgraded; there is an alteration to or change in use of the facility that is determined to be New Construction; or the system is failing to protect the public health, safety, and the environment.

Additionally, Wellfleet should not require the owner of a property with a functioning septic system to upgrade to BANRT at a cost of up to \$50,000 within six months of a sale of the property rather than allowing them more time to upgrade. **The Town should allow a two-year compliance window that matches the time period Wellfleet will allow properties with cesspools to install a BANRT system [Section 601.2(5)].** This would be a fairer approach as would allow homeowners more time to handle the cost of upgrading to a BANRT system.

III. Section 601.2(3) requires an upgrade to BANRT upon a “Real Estate Sale Transfer of Title” but does not define that term. The definition needs clarification.

“Real Estate Sale Transfer of Title to the property” is a triggering event requiring a septic system upgrade to BANRT within six months after the date of closing.

The Amended Regulations do not define the capitalized term “Real Estate Sale Transfer of Title.” It is not clear precisely what would be considered a Real Estate Sale Transfer of Title for purposes of Section 601.2(3). Presumably, this term is intended to include arms-length transactions that transfer the fee title to a property by deed for financial consideration. However, could it also include sales that take other forms such as intrafamily purchases for nominal consideration? Would it include the sale of a trust interest or controlling shares in a corporation that own a property?

CCIAOR recommends that the definition is revised to make it clear that “Real Estate Sale Transfer of Title” only refers to arms-length purchases that transfer the entire fee title to the property for a fair market price.

IV. Section 601.4(B)(3) requires property owners who live in a sewer district to upgrade to a “new BANRT system” within twelve months of being told that sewer will not be made available to their property, but do not impose the same requirement on properties that do not have sewer available because they are outside a sewer district.

CCIAOR believes this section unfairly treats property owners who live in a sewer district but through no fault of their own are unable to connect to sewer because it is not “available” to their property. Unlike property owners who do not have sewer “available” to them because they **are not** in a sewer district, property owners who **are** in a sewer district but who cannot obtain sewer service, are required to upgrade even without a “Triggering Event.”

There should be an exception to the upgrade requirement of Section 601.4(B)(3) for property owners who have **properly operating septic systems** built in compliance with the Town’s Existing Regulations and the state’s Title 5 regulations. There should be an exemption for properties with septic systems that were previously upgraded with nitrogen-reducing technology that is not BANRT. Section 601.4(B)(3) is more restrictive than Wellfleet’s Watershed Management Plan, which states:

The proposed implementation of enhanced I&A systems is **linked to property-owner initiatives including new construction, expansions of buildings, repairs to failing systems, and real estate transactions.** A proposed Health Regulation (and possibly a Wetlands Regulation) could provide these triggers that would

direct conversion to the more effective septic system technologies over the twenty-year planning timeframe.⁴³

Under these rules, an upgrade is required only when there is a “triggering event.” Basing an upgrade on a “triggering” event is consistent with Wellfleet’s Watershed Management Plan’s proposal to implement enhanced nitrogen-reducing technology in connection with property owner-initiated events like new construction and building expansions, repairs to failing systems and real estate transactions.

Property owners in sewer districts that **do not have the sewer available to them** should have the same rules as property owners who do not have sewer available to them because they are **not in a sewer district**. In addition, the Town should allow a two-year compliance window that matches the time period Wellfleet will allow properties with cesspools to install a BANRT system [Section 601.2 (5)].

V. Section 602 would unfairly force owners to upgrade all systems on the lot to current regulatory standards if only one of them fails.

Section 602 of the Amended Regulations states:

In the event of the failure of one (1) septic system on a lot that has more than one (1) non-conforming septic system, the failing system shall be immediately upgraded, and the remaining non-conforming septic systems shall also be upgraded to meet the current requirements of Title 5 and these regulations within two (2) years’ time.⁴⁴

Where there are multiple separate septic systems on the same lot, as might occur for a condominium or cottage colony, this provision would require the owners to upgrade **all** the systems on the lot to current standards if one of them fails. In other circumstances, a property owner who has a non-conforming septic system that has not failed has no obligation under the Amended Regulations to upgrade their system to current standards merely because a neighbor’s system has failed. **It is unreasonable to impose an upgrade requirement based solely on the form of ownership.**

Section 602 of the Amended Regulations unreasonably holds owners of property with multiple non-conforming septic systems to a different standard than owners of non-conforming septic systems on individual lots. This requirement unfairly subjects owners who have maintained their septic systems in good working order to the costly and unexpected expense of upgrading their systems simply because one of their neighbors has a failed system.

The proposed rule is unfair because it would burden affected property owners to a greater extent than other property owners in Town without justification. The lack of justification is due to the restriction being based on the form of property ownership, not based on public health, safety, and environmental protection. CCIAOR recommends that this section should be removed from the Amended regulations.

VI. Section 601.4 Requiring property owners to abandon functioning septic systems and connect to the public sewer system.

This section was revised from the prior draft regulations to make the requirement more restrictive to force property owners with properly functioning sewer systems to abandon their existing passing system and hook up to the sewer. There has been no public explanation for this change.

In a prior Amended Regulations draft, the BOH would have allowed owners of properties in sewer districts to continue using their properly functioning septic system even when sewer became available. This version was reasonable and practical. Under that version of the Amended Regulations, a sewer connection would only have been required upon the occurrence of one of the “Triggering Events” in Section 601.2, such as a sale of the property, a change in its use that increases design flow or a failure of the septic system.

The current version of the Section 601.4 requires that if property is in an existing Sewer Service District and sewer is available for connection, the existing septic system must be abandoned, and the property must be connected to the sewer system within twelve months or “unless the Board orders a different time frame.”

There are **no exemptions** in the regulations to these connection requirements. Even someone who recently upgraded their septic system prior to the arrival of sewer would have to incur the expense of the lateral connection from the building to the sewer in the street (which has been estimated at an average of \$11,550) and paying any associated betterment assessment and system development charge.

CCIAOR recommends that the BOH restore the language from a prior draft to this Section, which would mandate that a property with a passing Title 5, BANRT or non-BANRT system, in a sewer district, only be required to connect to the sewer when a triggering event occurs. In addition, the Town should allow a two-year compliance window that matches the time period Wellfleet will allow properties with cesspools to install a BANRT system [Section 601.2 (5)].

Restoring prior language will allow for a more equitable requirement that is fair to homeowners who invested in a well-functioning system prior to the creation of the sewer district. The current language poses an unfair and unnecessary substantial financial burden on property owners.