

# PACE ENVIRONMENTAL LITIGATION CLINIC

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October 10, 2023

Kevin J. McCaffrey, Presiding Officer  
Suffolk County Legislature  
William H. Rogers Building  
725 Veterans Memorial Highway  
Smithtown, NY 11787

RE: Violations of NY CONST. Art 1, § 19.

Dear Presiding Officer McCaffrey:

We write on behalf of Save the Sound, Group for the East End, and Peconic Baykeeper to draw your attention to the negative human health and environmental impacts that nitrogen pollution has caused and is continuing to cause in Suffolk County and how Suffolk County's failure to remedy these issues constitutes a violation of NY CONST. Art 1, § 19 ("the Green Amendment"). As you are doubtless aware, the Green Amendment grants "[e]ach person ... a right to clean air and water, and a healthful environment." Despite measures already agreed to that could begin to remedy these issues if they were implemented, the people of Suffolk County continue to lose access to clean water or a healthful environment. For these reasons, our clients urge the legislature to take immediate and meaningful action to address nitrogen pollution in Suffolk County and come into compliance with the mandate of the Green Amendment.

## I. HISTORY OF VIOLATIONS

For decades Suffolk County has been facing a severe nitrogen pollution problem at a scale seen in few other parts of this country. The New York State Department of Environmental Conservation ("DEC") and the U.S. Environmental Protection Agency ("EPA") have formally recognized that virtually all of Suffolk County's coastal waters and tributaries are not meeting state water quality standards and are not supporting important uses such as swimming, fishing, boating, and shellfish consumption because of nitrogen pollution.

The primary source of this nitrogen polluting Suffolk County is wastewater from septic systems.<sup>1</sup> Nitrogen released from septic systems contaminates groundwater, the only drinking water source for County residents.<sup>2</sup> Further, a great deal of nitrogen is conveyed through groundwater into the surface waters of Suffolk County, including the Great South Bay, Peconic Bay, Long Island Sound, and their tributaries.<sup>3</sup>

This nitrogen pollution causes a multitude of direct health and environmental impacts. Excess nitrogen in coastal waters triggers algal blooms that reduce oxygen levels and water clarity, release foul odors, damage aquatic vegetation, kill fish, and produce toxic “red tides” and “brown tides” that endanger human health and make shellfish inedible.<sup>4</sup> These algal blooms “have [] been identified as a primary contributor to the destruction of the once great shellfishing industry including a devastating reduction in the annual harvest of hard clams and scallops.”<sup>5</sup> Damage to coastal communities linked to nitrogen pollution was also found to have exacerbated destruction from SuperStorm Sandy in 2012.<sup>6</sup>

The County's own studies have clearly identified conventional septic systems as the primary cause of these unhealthful impacts. Septic tanks and cesspools, both large and small, are significant contributors to the nitrogen problem. Suffolk County has an extraordinary number of large septic systems: out of approximately 4,500 such systems statewide, more than 2,000 are in Suffolk County. Moreover, “[i]n Suffolk County, approximately 74 percent of homes are unsewered and discharge sanitary wastewater containing elevated nitrogen levels to the underlying groundwater that provides the sole source of potable supply for County residents and groundwater baseflow to the County’s surface water features.”<sup>7</sup>

While Suffolk County and others have collaborated to address nitrogen pollution issues through the Long Island Nitrogen Action Plan (LINAP), eight years have passed since LINAP was implemented and there has been no meaningful impact on nitrogen. As one instructive example demonstrates, despite the efforts of LINAP’s collaborators, nitrogen pollution in the Long Island Sound (“LIS”) has not decreased. At best it is stagnating and at worst it is deteriorating. In 2001, the U.S. Environmental Protection Agency (“EPA”) approved new Total Maximum Daily Load standards for the Long Island Sound, which mandated a 58.5% reduction in human-generated nitrogen.<sup>8</sup> In 2021 the portion of the LIS suffering from nitrogen pollution induced hypoxia was roughly the same as 2001.<sup>9</sup> The portion suffering from hypoxia this past year, 2022, was roughly double the size of that in 2015, the year LINAP was implemented.<sup>10</sup>

Additionally, Suffolk County’s own modeling shows that if nothing changes nitrogen concentrations in the shallow upper glacial aquifer, the Island’s only source of drinking water,

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<sup>1</sup> SUFFOLK COUNTY, SUFFOLK COUNTY SUBWATERSHED WASTEWATER PLAN 1-1 (2020).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Nitrogen Pollution in Long Island Sound*, NEIWPCC, <https://neiwpc.org/our-programs/pollution-control/lis-tmdl/>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

will exceed New York State's Maximum Contaminant Levels in several regions and exceed the Suffolk County Sanitary Code Article 6 density goals in a many of the developed areas of Suffolk County.<sup>11</sup> Exceeding these levels can lead to serious health implications for those relying on the contaminated aquifers for drinking water, especially children, who can develop potentially fatal conditions such as blue baby syndrome.<sup>12</sup>

Despite acknowledging these issues, studying them, and consistently decrying nitrogen pollution as “the largest single cause of degraded water quality”<sup>13</sup> on Long Island, Suffolk County has failed to remedy its own contributions to nitrogen pollution. Just this year, it took an EPA enforcement action for Suffolk County to agree to correct a series of Safe Drinking Water Act violations that were introducing large amounts of nitrogen into the environment.<sup>14</sup>

Similarly, despite facing these current and impending problems Suffolk County's primary contributions to LINAP have been the Suffolk County Subwatersheds Wastewater Plan, the Suffolk County Wastewater Management District Feasibility Study, the Septic Improvement Program, and the Coastal Resiliency Initiative.<sup>15</sup> These initiatives can be organized into two groups: 1) preliminary studies which set commendable and aspirational goals, but did nothing to directly address Nitrogen Pollution; and 2) initiatives to implement sewer systems and improve septic infrastructure that have stagnated and remain unfunded by Suffolk County as it relies on other governmental entities to address these issues.

Put simply, nitrogen pollution is destroying the environment of your community, and the cause of that pollution is known. A comprehensive and widely supported solution has already been studied and agreed-upon in the county's most comprehensive, fact-based, science-driven wastewater management plan in more than four decades.<sup>16</sup> Unfortunately, to date, the Suffolk County Legislature has made a conscious decision not to authorize the single most significant action necessary to implement this clean water solution.

As you know, the pending ballot measure, IR-1573-23, which has already been the subject of several overwhelmingly positive public hearings, would provide the Suffolk County electorate with the opportunity they deserve and require to fund and implement Suffolk County's regional wastewater management plan. Once enabled, one of the region's most pervasive environmental problems will be on a pathway to a meaningful and measurable recovery. By failing to implement this and/or other measures to actually reduce nitrogen levels, such as prohibiting the permitting of new conventional, non-innovative and alternative onsite wastewater treatment systems (non-I/A WOT), septic systems, the County is depriving its own citizens of their constitutional right to clean water and a healthful environmental. Given the minimal financial burdens on Suffolk County residents and the significant federal funds available at this moment to assist, we believe that implementation of the regional wastewater management plan is

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<sup>11</sup> SUFFOLK COUNTY, SUFFOLK COUNTY SUBWATERSHED WASTEWATER PLAN 1-2-1-3 (2020).

<sup>12</sup> *Estimated Nitrate Concentrations in Groundwater Used for Drinking*, EPA, <https://www.epa.gov/nutrient-policy-data/estimated-nitrate-concentrations-groundwater-used-drinking>.

<sup>13</sup> *Septic Improvement Program*, SUFFOLK COUNTY, <https://reclaimourwater.info/Septic-Improvement-Program>.

<sup>14</sup> UNITED STATES OF AMERICA, Plaintiff, v. COUNTY OF SUFFOLK, Suffolk County Department of Parks and Recreation, and Suffolk County Department of Public Works, Defendants., 2023 WL 5167649 (E.D.N.Y.).

<sup>15</sup> *LINAP Initiatives*, DEC, <https://www.dec.ny.gov/lands/108654.html>.

<sup>16</sup> SUFFOLK COUNTY, SUFFOLK COUNTY SUBWATERSHED WASTEWATER PLAN (2020).

by far the best environmental, social, and economic solution available to the County to meet its obligations.

## II. THE GREEN AMENDMENT

The Green Amendment requires each branch of government, including Suffolk County, to “conserve and maintain” the environment by imposing a duty to prevent and remedy the degradation, diminution, or depletion of public natural resources, such as clean water.<sup>17</sup> While it is beyond question that legislative and executive action is discretionary, that discretion is not without limits. The County “lacks the discretion to violate the Constitution,”<sup>18</sup> and cannot sit idly by in hopes that others will fulfill its duties to protect its citizens. We urge Suffolk County to expediently take meaningful and substantial action to rectify the violations detailed above.

We recognize that the Constitution cannot ordinarily dictate that any specific discretionary action be taken. However, the situation presented here in Suffolk County is unique as the potential discretionary actions have been studied and agreed upon yet have not been taken. Suffolk County has plainly stated that “[r]eversing degradation of water quality will depend on replacement of existing systems with new, individual Innovative and Alternative Onsite Wastewater Treatment Systems.”<sup>19</sup> This determination, along with the findings in the Subwatersheds Wastewater Plan and Wastewater Management District Feasibility Study, already guides the way. But even putting aside the specific actions to be taken, one thing is clear: sitting back and doing nothing is unconstitutional when the water the community relies upon continues to be degraded and rendered unusable.

## III. CONCLUSION

Suffolk County must expediently take action to address the issue of nitrogen pollution and correct a history of violating the Green Amendment.

Sincerely,



Todd Ommen  
Managing Attorney



Joseph Beletti-Naccarato  
Student Attorney

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<sup>17</sup> Robinson Twp., Washington Cnty. v. Com., 623 Pa. 564, 655 (2013).

<sup>18</sup> Fresh Air for the Eastside, Inc. v. State, No. E2022000699, 2022 WL 18141022, at \*8 (N.Y. Sup. Ct. Dec. 20, 2022)

<sup>19</sup> *Septic Improvement Program*, SUFFOLK COUNTY, <https://reclaimourwater.info/Septic-Improvement-Program>.