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COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

SUPERIOR COURT

C.A. NO. 2008-2331

TOWN OF BOXFORD by and through its
BOARD OF HEALTH,

Plaintiff

v.

MASSACHUSETTS HIGHWAY
DEPARTMENT and MASSACHUSETTS
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Defendant



VERIFIED COMPLAINT

INTRODUCTION

1. This is an enforcement action by the Town of Boxford (the "Town"), by and through its Board of Health (the "Board"), to enforce a Cease and Desist Order and enjoin violations of G.L. c. 111, §122, and violations of G.L. c. 214, §7A, at the Massachusetts Highway Department ("MassHighway") salt shed located on Topsfield Road, Boxford, Massachusetts (the "salt shed"). Specifically, the Town seeks a Preliminary Injunction requiring MassHighway to cease and desist all salt shed operations at that location, or in the alternative, to cease and desist all salt shed operations until such a time as MassHighway can demonstrate that the salt shed operations will not release salt into the environment and will not present a threat injurious to public health. Additionally, the Town seeks a Preliminary Injunction ordering MassHighway to take immediate action to abate the public health nuisance resulting from the release of salt into the environment, and specifically the groundwater aquifer and private drinking water wells in and around the location of the salt shed.

2. Additionally, the Town seeks to enjoin violations of G.L. c. 111, §31 by MassHighway for the improper installation of replacement wells on properties that have been contaminated on the grounds that the replacement wells are not in compliance with Boxford Code §202-3. The Town seeks a Preliminary Injunction ordering MassHighway to apply for permits from the Board, in compliance with Boxford Code §202-3, for all replacement wells that are the responsibility of MassHighway.

3. This action also seeks relief in the nature of mandamus pursuant to G.L. c. 249, §5 to require the defendant Massachusetts Department of Environmental Protection (“DEP”) to institute an enforcement action against defendant MassHighway for violations of G.L. c. 85, §7A, due to the storage of sodium chloride in a manner and place that subjects a groundwater supply to the risk of contamination, and to require the defendant DEP to issue regulations as to place or manner of storage of such chemicals, or in the alternative, to regulate the place where such chemicals can be stored in this specific case.

PARTIES

4. The Town is a municipal corporation with a principal place of business at Town Hall, 7A Spofford Road, Boxford, Massachusetts. The Town acts by and through its Board of Health.

5. Defendant MassHighway is an agency of the Commonwealth, with a principal place of business at 10 Park Plaza, Suite 3170, Boston, Massachusetts.

6. Defendant DEP is an agency of the Commonwealth, with a principal place of business at One Winter Street, Boston, Massachusetts.

JURISDICTION

7. The Court has jurisdiction to hear and adjudicate this matter pursuant to G.L. c. 111, §187, which gives the Superior Court jurisdiction to enforce orders of boards of health relative to

public health; G.L. c. 214, §1, which gives the Superior Court general equity jurisdiction; G.L. c. 214, §7A, which authorizes the Superior Court to restrain persons from causing damage to the environment; and G.L. c. 249, §5, which give the Superior Court jurisdiction to issue a writ of mandamus.

FACTS

8. MassHighway owns and operates a salt shed located on Topsfield Road, Boxford, Massachusetts. MassHighway uses the salt shed for the storage of sodium chloride, calcium chloride, chemically treated abrasives and/or other chemicals used for the removal of snow or ice on highways (collectively referred to herein as “salt”). The salt shed is operated for purposes of storing salt and loading salt onto trucks for use in treating road surfaces along Interstate 95 and state highway Route 97, with operations additionally taking place at a staging area in and around Exit 53 of Interstate 95 (the “staging area”).

9. MassHighway’s operation of the salt shed has resulted in the release of salt into the environment and specifically into the groundwater aquifer and the private drinking water wells in and around the salt shed and in and around the staging area. See MassHighway Interoffice Memo from Leo C. Stevens, Jr. P.E., to Lawrence M. Vazzana, dated September 25, 1999, ¶1, attached hereto as Exhibit 1.

10. MassHighway’s release of salt into the environment has resulted in contamination of private drinking water wells in the residential areas surrounding the salt shed and staging area. Id.

11. MassHighway has admitted that it is at fault for the contamination of private drinking water wells. Id.

12. These violations are particularly significant in the Town of Boxford as there is no public water supply, and residents must depend on private drinking water wells for drinking water.

13. Over the past ten years, at least 30 private drinking water wells in the general area of the salt shed and staging area have been contaminated.

14. The contamination has resulted in making the water from these wells unsafe, undrinkable and corrosive to pipes and household appliances. As a result, significant unfair health and financial burdens have been placed on the affected residents.

15. Over the years, scientific studies and testing have revealed a gross increase in sodium and chloride levels in area private drinking water wells, rising in some specific cases from less than 20ppm sodium¹ to more than 500ppm sodium, and chloride contents exceeding 1000ppm; and indicator compounds such as calcium and manganese have also significantly increased in data from wells in the salt shed area, and thus indicating a high salt concentration in the wells. See March 27, 2006, Correspondence from the Board to Mr. Glen Haas, DEP, ¶2, attached hereto as Exhibit 2.

16. By MassHighway's own admission, what started as an investigation into a single complaint of a contaminated private well uncovered a major problem regarding contamination of major portions of the groundwater along Route 95 in Boxford. See Handwritten Notes from MassHighway, dated October 12, 1993, ¶1, attached hereto as Exhibit 3.

17. MassHighway even investigated its own private drinking water well located on the MassHighway salt shed property, and determined that its well was contaminated. This prompted MassHighway to provide personnel working at the salt shed with bottled water. See

¹ 20ppm sodium is the guideline for sodium in drinking water established by the Massachusetts DEP, and 20ppm sodium is in line with the limit applies to bottled water by the United States Environmental Protection Agency for low sodium water.

MassHighway Interoffice Memo from Leo C. Stevens, Jr., P.E. to Sherman Eidelman, P.E., dated October 30, 1995, attached hereto as Exhibit 4.

18. MassHighway's investigation of its private drinking water well, as well as its investigation of residential private drinking water wells in the area, revealed that all of the properties would need replacement wells. See Exhibit 1, ¶1; Exhibit 4.

19. The investigation of private drinking water wells in the vicinity of Topsfield Road and exit 52 of Interstate 95, in Boxford, has remained ongoing as additional residents have submitted contamination complaints to MassHighway.

20. By June of 2004, MassHighway informed residents of the Town of Boxford that MassHighway was investigating a permanent solution for the residents with contaminated wells. See July 1, 2004, Correspondence from the Board of Selectmen to Attorney William F. M. Hicks, MassHighway, ¶1, attached hereto as Exhibit 5; September 24, 2004, Correspondence from John Blundo, P.E., MassHighway, to Board of Selectmen, ¶2, attached hereto as Exhibit 6.

21. MassHighway presented a proposal which only included possible improvements to the salt shed and possible improvements to the management of the salt shed. See Exhibit 6, Page 3, ¶3.

22. There has been ongoing communication and requests for assistance by the Town to MassHighway, and additionally to DEP and the Governor's office, since the contamination first came to light. The Town has been actively seeking a resolution to this problem, and in response has received nothing more than cursory acknowledgment of its concerns.

23. As of July of 2004, MassHighway had not implemented any of the promised improvements to the salt shed and/or its management thereof. Accordingly, the Board of

Selectmen requested that MassHighway relocate the salt shed to an area, not in the immediate vicinity of private drinking water wells. See Exhibit 5, ¶4,

24. The Town's representatives to the Massachusetts General Court have made similar requests to MassHighway, the Attorney General's Office, DEP and the Governor's Office regarding the relocation of the salt shed. See Correspondence from Representative Bradford R. Hill and Senator Bruce E. Tarr, attached hereto as Exhibit 7.

25. In September of 2004, MassHighway acknowledged the existence of other parcels of MassHighway-owned land in the general vicinity of the salt shed. See Exhibit 6, Page 3, ¶1.

26. These alternative locations are not in close proximity to any private wells and the locations are as close as 5.35 miles away from the current location. Id.

27. MassHighway has refused to relocate the salt shed.

28. In 2005, MassHighway did install an addition to the salt shed building so that operations associated with the salt shed could be conducted under cover; however, this remedy has not adequately addressed the problem. See July 27, 2005, Correspondence from John Blundo, P.E., MassHighway to Board of Selectmen, ¶1, attached hereto as Exhibit 8.

29. By February of 2006, MassHighway had admitted on multiple occasions that the salt contamination in the private drinking water wells was its fault, and it had begun work to install replacement wells at the residences affected by the contamination from the salt shed. See February 3, 2006, Correspondence from Henry L. Barbaro, MassHighway to Ross M. Povenmire, Director of Conservation, ¶1, attached hereto as Exhibit 9.

30. MassHighway, however, refused to comply with minimum standards for the installation of private drinking water wells, as codified in Boxford Code §202-3. See February 14, 2006, Correspondence from the Board to Patricia A. Leavenworth, P.E., MassHighway, ¶1, attached

hereto as Exhibit 10; March 6, 2006, Correspondence from David J. White, MS, CHMM, MassHighway to the Board, ¶3, attached hereto as Exhibit 11; September 28, 2006, Correspondence from the Board to David J. White, MS, CHMM, MassHighway, ¶2, attached hereto as Exhibit 12.

31. Wells installed by MassHighway without regard to Boxford Code §202-3 resulted in non-approved wells, which were constructed without a well permit. See Exhibit 10.

32. Additionally, the wells drilled without permits caused extensive environmental damage, including but not limited to: damage/destruction of mature trees and vegetation; routing of large volumes of high salt-containing water into wetlands; violation of wetland buffer zones; and creation of large areas of well drilling debris which has been left in place.

33. In February and March of 2006 the Town Conservation Commission issued five enforcement orders for violations of the Wetlands Protection Act in association with the replacement wells. See Conservation Commission Enforcement Order, dated March 16, 2006, attached hereto as Exhibit 13, which represents one of the five enforcement orders.

34. The situation has worsened as now it is obvious that the replacement wells, which draw from the same aquifer as the contaminated wells, are rapidly becoming contaminated themselves.

35. The only solutions that MassHighway has proposed are shallow wells, and whole-house treatment (reverse osmosis) systems, but these proposals only amount to temporary relief for the residents, or in the alternative, long term and unfair costs for the residents. See November 16, 2007, Correspondence from Frank A. Tramontozzi, P.E., MassHighway to Karen Rando and Glen McInnis, Page 2, ¶2 & 3, attached hereto as Exhibit 14.

36. Shallow wells are prohibited under Boxford Code §202-3E(1) and, therefore, would only be permissible upon the granting of a variance. See June 12, 2008, Correspondence from the Board to David White, MassHighway, ¶2, attached hereto as Exhibit 15.

37. Shallow wells are highly susceptible to contamination from multiple sources, including from the salt associated with the salt shed.

38. The variance process puts the responsibility and burden on the homeowner, which is an unfair hardship the homeowner must undertake to resolve the problem created by MassHighway. See Exhibit 15, Page 2, ¶4.

39. The Town of Boxford is concerned both with the continued problem of residents with contaminated wells, and with the likely contamination of additional wells, including a public drinking water supply near the salt shed at Andrews Farm in Boxford, serving 53 homes.

40. On August 25, 2005, the Board contacted Ms. Susan Robert with the Division of Watershed Management at DEP, seeking assistance in resolving the contamination issues. See August 25, 2005, Correspondence from the Board to Susan Robert, DEP, attached hereto as Exhibit 16.

41. The August 25, 2005, request for assistance did not receive a response.

42. The Board submitted a notice of violation and request for enforcement, pursuant to G.L. c. 85, §7A, to Mr. Glen Hass, the Acting Assistant Commissioner of DEP, on March 27, 2006. See Exhibit 2.

43. After receiving no response, the Board resubmitted its notice of violation and request for enforcement, pursuant to G.L. c. 85, §7A on July 28, 2006. See July 28, 2006, Correspondence from the Board to Glen Haas, DEP, attached hereto as Exhibit 17.

44. Mr. Haas of DEP responded to the Board's request by correspondence dated August 9, 2006, in which DEP mistakenly relied on a lack of "any regulations in place to address private well road salt contamination issues" as a reason it could not pursue enforcement under G.L. c. 85, §7A. See August 9, 2006, Correspondence from Glen Haas, DEP, to the Board, attached hereto as Exhibit 18.

45. The Board again addressed Mr. Haas of DEP in correspondence dated August 11, 2006, in which the Board clarified that it was not seeking an enforcement action for the contamination of private drinking water wells, but rather, enforcement of G.L. c. 85, §7A which prohibits storage or use of salt in a manner such that it contaminated groundwater supply. See August 11, 2008, Correspondence from the Board to Glen Haas, DEP, attached hereto as Exhibit 19.

46. MassHighway continues to operate the salt shed at the Topsfield Road location.

47. Because it was unable to resolve this matter with MassHighway and DEP, the Board issued a Cease and Desist Order on November 21, 2008, ordering MassHighway to cease and desist all operations at the salt shed within seven day of receipt of the letter. See Cease and Desist Order, dated November 21, 2008, attached hereto as Exhibit 20.

48. On December 1, 2008 and December 2, 2008, there was activity at the salt shed when a truck entered the property and MassHighway personnel were using heavy equipment on the property, possibly in violation of the Cease and Desist Order. See Boxford Police Department Incident Report, dated December 3, 2008, attached hereto as Exhibit 21.

49. MassHighway has responded to the Cease and Desist Order and has expressed an intent not to comply with the Order. MassHighway has responded to the Cease and Desist Order by referencing the 2005 addition to the salt shed building and the replacement wells installed by MassHighway, which have proven to be inadequate. Additionally, MassHighway references

plans to replace the existing salt shed building, but these plans have yet to be implemented. See December 1, 2008, Correspondence from Monica Conyngham, MassHighway General Counsel to the Board, attached hereto as Exhibit 22.

COUNT I

MassHighway Violations of G.L. c. 111, §122 – Public Nuisance

50. The Town repeats and incorporates the allegations of paragraphs 1 through 49 as if fully set forth herein.

51. Under G.L. c. 111, §122, the Board of Health is a municipal authority authorized to examine into all nuisances, sources of filth and causes of sickness within its town and to order abatement thereof.

52. The Superior Court may enjoin the maintenance of such nuisance until the matter is decided or the injunction is dissolved. G.L. c. 111, §130.

53. The Board of Health determined that the MassHighway salt shed and operations associated with the delivery, storage, loading and transfer of salt at and from that facility, present a public health nuisance in violation of G.L. c. 111, §122.

54. In its present state, the salt shed constitutes a nuisance, source of filth and cause of sickness in the Town of Boxford, and the operations associated with the salt shed are willful violations of G.L. c. 111, §122 and the orders of the Board made pursuant thereto.

55. Accordingly, the Town seeks a Preliminary Injunction, ordering MassHighway to cease and desist all salt shed operations at the location on Topsfield Road, Boxford, Massachusetts, or in the alternative, ordering MassHighway to cease and desist all salt shed operations until such a time as MassHighway can demonstrate that the salt shed operations will not release salt into the environment and will not present a threat injurious to public health. Additionally, the Town seeks a Preliminary Injunction ordering MassHighway to take immediate action to abate the

public health nuisance resulting from the release of salt into the environment, and specifically the groundwater aquifer and private drinking water wells in and around the location of the salt shed.

COUNT II
MassHighway Violations of G.L. c. 214, §7A

56. The Town repeats and incorporates the allegations of paragraphs 1 through 55 as if fully set forth herein.

57. Pursuant to G.L. c. 214, §7A, “the superior court for the county in which damage to the environment is occurring or is about to occur may, upon . . . an action by any political subdivision of the commonwealth, determine whether such damage is occurring or is about to occur and may, before the final determination of the action, restrain the person causing or about to cause such damage; provided, however, that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment.”

58. MassHighway is causing or is about to cause substantial harm to the environment by its operation of the salt shed, which is causing the release of salt into the environment, and specifically into the groundwater aquifer and private drinking water wells in the location of the salt shed.

59. The substantial health impacts to the residents whose private drinking water wells are contaminated by the salt constitute irreparable damage, from which immediate action must be taken.

60. Due to the irreparable damage which result unless this immediate action is taken, the prior written notice requirement and twenty-one day period should be waived.

61. Accordingly, the Town seeks a Preliminary Injunction, ordering MassHighway to cease and desist all salt shed operations at the location on Topsfield Road, Boxford, Massachusetts, or

in the alternative, ordering MassHighway to cease and desist all salt shed operations until such a time as MassHighway can demonstrate that the salt shed operations will not release salt into the environment and will not present a threat injurious to public health. Additionally, the Town seeks a Preliminary Injunction ordering MassHighway to take immediate action to abate the public health nuisance resulting from the release of salt into the environment, and specifically the groundwater aquifer and private drinking water wells in and around the location of the salt shed.

COUNT III

MassHighway Violations of G.L. c. 111, §31 – Violations of Boxford Code §202-3

62. The Town repeats and incorporates the allegations of paragraphs 1 through 61 as if fully set forth herein.

63. Under G.L. c. 111, §31, the Board is a municipal authority authorized to make reasonable health regulations.

64. The Board properly adopted Private Water Supply Regulations, codified in Boxford Code §202-3, as reasonable health regulations.

65. These regulations apply to all wells that are installed, repaired, or replaced in the Town.

66. MassHighway has not complied with the Private Water Supply Regulations in the installation of the replacement wells that it has agreed to install for residents of the Town.

67. Accordingly, the Town seeks a Preliminary Injunction ordering MassHighway to apply for permits from the Board, in compliance with Boxford Code §202-3, for all replacement wells that are the responsibility of MassHighway.

COUNT IV

G.L. c. 249, §5 as to DEP

68. The Town repeats and incorporates the allegations of paragraphs 1 through 67 as if fully set forth herein.

69. G.L. c. 85, §7A states “[n]o person shall store sodium chloride, calcium chloride or chemically treated abrasives or other chemicals used for the removal of snow or ice on roads in such a manner or place as to subject a water supply or groundwater supply to the risk of contamination ... The department of environmental protection, hereinafter called the department, in consultation with the department of highways, may issue regulations as to place or manner of storage of such chemicals and may, by specific order, in a particular case regulate the place where such chemicals may be used for such purpose.”

70. The DEP’s failure to institute an enforcement action against defendant MassHighway for violations of G.L. c. 85, §7A, due to the storage of sodium chloride in a manner and place that subjects a groundwater supply to the risk of contamination, constitutes a failure of justice for which the Town has no adequate remedy under G.L. c. 85, §7A.

71. The DEP’s failure to issue regulations as to place or manner of storage of such chemicals, or in the alternative, to regulate the place where such chemicals can be stored in this specific case, constitutes a failure of justice for which the Town has no adequate remedy under G.L. c. 85, §7A.

72. Accordingly, the Town seeks relief in the nature of mandamus pursuant to G.L. c. 249, §5 to require the DEP to institute an enforcement action against defendant MassHighway for violations of G.L. c. 85, §7A, and to require the defendant DEP to issue regulations as to place or manner of storage of such chemicals, or in the alternative, to regulate the place where such chemicals can be stored in this specific case.

PRAYERS FOR RELIEF

WHEREFORE, the Town respectfully requests that the Court:

1. Issue a Short Order of Notice for a hearing on the Town's Motion for a Preliminary Injunction;
2. After a hearing, enter a Preliminary Injunction which:
 - a. Orders MassHighway to cease and desist all salt shed operations at the location on Topsfield Road, Boxford, Massachusetts, or in the alternative, ordering MassHighway to cease and desist all salt shed operations until such a time as MassHighway can demonstrate that the salt shed operations will not release salt into the environment and will not present a threat injurious to public health;
 - b. Orders MassHighway to take immediate action to abate the public health nuisance resulting from the release of salt into the environment, and specifically the groundwater aquifer and private drinking water wells in and around the location of the salt shed;
 - c. Orders MassHighway to apply for permits from the Board, in compliance with Boxford Code §202-3, for all replacement wells that are the responsibility of MassHighway; and
 - d. Orders DEP to institute an enforcement action against defendant MassHighway for violations of G.L. c. 85, §7A
3. After an adjudication on the merits, enter a Permanent Injunction in the form set forth in Payer 2;

4. After an adjudication on the merits, order DEP to institute an enforcement action against defendant MassHighway for violations of G.L. c. 85, §7A;
5. After an adjudication on the merits, order DEP to issue regulations as to place or manner of storage of such chemicals, or in the alternative, to regulate the place where such chemicals can be stored in this specific case;
6. After an adjudication on the merits, award to the Town all of its costs and reasonable attorneys' fees incurred during the prosecution of this matter; and
7. Award such other relief as the Court deems just and equitable.

THE TOWN OF BOXFORD by and
through its BOARD OF HEALTH

By its attorneys,



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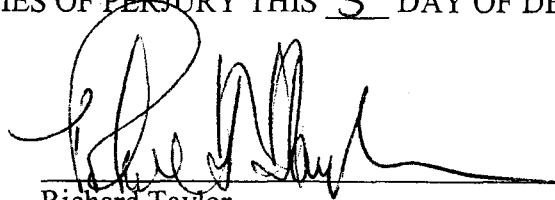
Date: 12-3-08

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VERIFICATION

I, Richard Taylor, Chair of the Town of Boxford Board of Health, hereby certify that I have read the foregoing Verified Complaint and that the facts contained therein are based upon my personal knowledge or my review of the records of the Town of Boxford Board of Health and are true to the best of my knowledge and belief.

SIGNED UNDER THE PENALTIES OF PERJURY THIS 3rd DAY OF DECEMBER, 2008.

A handwritten signature in black ink, appearing to read 'Richard Taylor', written over a horizontal line.

Richard Taylor
Board of Health, Chair