

McGREGOR & LEGERE

ATTORNEYS AT LAW, P.C.

15 COURT SQUARE – SUITE 660
BOSTON, MASSACHUSETTS 02108
(617) 338-6464
FAX (617) 338-0737

MICHAEL J. O'NEILL, ESQ.
E-mail: moneill@mcgregorlaw.com
(617) 338-6464 ext. 125

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

August 9, 2021

**Notice Pursuant to G.L. c. 214, sec. 7A of Violation of Law to Prevent
Damage to the Environment and Intent to File Suit**

Ronald Amidon, Commissioner
Department of Fish and Game
Executive Office of Energy and Environmental Affairs
251 Causeway Street
Suite 400
Boston, MA 02114

Kathleen A. Theoharides, Secretary
Executive Office of Energy and Environmental Affairs
100 Cambridge Street
Suite 900
Boston, MA 02114

Tori Kim, Director
Massachusetts Environmental Policy Act Office (MEPA)
100 Cambridge Street
Suite 900
Boston, MA 02114

Mark Tisa, Director
Natural Heritage and Endangered Species Program
1 Rabbit Hill Road
Westborough, MA 01581

Maura T. Healy, Attorney General
Commonwealth of Massachusetts
McCormack Building
One Ashburton Place
Boston, Massachusetts 02108

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James F. Kane, President and CEO
A.D. Makepeace Company
c/o A.D. Makepeace Co.,
158 Tihonet Road
Wareham, MA 02571

Michael F. Hogan
President and CEO
Agawam Development Company
c/o A.D. Makepeace Company
158 Tihonet Road
Wareham, MA 02571

Dear Sirs and Madams:

This Firm represents ten or more persons domiciled in the Commonwealth of Massachusetts (collectively, the "Ten Persons").¹

This is a notification of intent to sue pursuant to M.G.L c. 214, sec. 7A (the "Citizen Suit Law") to prevent ongoing irreparable harm to the environment, stemming from A.D. Makepeace Company's ("ADM") violation of a statute, ordinance, bylaw, or regulation, the major purpose of which is prevent or minimize damage to the environment.

Mass. G.L. c. 214, sec. 7A defines "damage to the environment" as any destruction, damage, or impairment, actual or probable, to any of the natural resources of the Commonwealth.

The statute provides that damage to the environment shall include, but not be limited to, air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds or other water resources, destruction of seashores, dunes, wetlands, open spaces, natural areas, parks or historic districts or sites.

The statute further provides that ten persons domiciled in the Commonwealth can bring an action for equitable or declaratory relief to restrain action causing damage to the environment in violation of a statute, ordinance, bylaw, or regulation the major purpose of which is to prevent or minimize damage to the environment. The Ten Residents intend to bring such an action.

¹ Leslie Edwards, 8 Trinity Lane, Wareham, MA; Wendy O'Brien, 3 Red Pine Lane, Wareham, MA; Karen Riberio, Plymouth, MA; Glenn Ayers, Greenfield, MA; Birgitta E. Kuehn, 18 Edgewater Drive, Plymouth, MA; Joseph Tripp, 314 North Avenue, Rochester, MA; Pine DuBois, 83 Elm Street, Kingston, MA; Peggy Gallagher, 83 Elm Street, Kingston, MA; Rebecca Lipton, 30 Prospect Road, Plympton, MA; Jeff Landry, 77 Birch Street, Plymouth, MA; Jimmy Powell, 83 Elm Street, Kingston, MA.

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The salutary purpose of the Citizen Suit Law, besides being a prerequisite to suit, is to give the violator an opportunity to cure and to give enforcement agencies opportunity to take enforcement action.

ADM is and has been engaged in industrial scale development and massive commercial earth mining of millions of cubic yards of earth in the Towns of Plymouth, Carver and Wareham, Massachusetts which has caused and is continuing to cause the destruction of natural areas, including the complete obliteration of vast areas of globally rare Atlantic Coastal Pine Barrens. The Atlantic Coastal Pine Barrens are one of only three Pine Barrens on earth, including Pitch Pine and Scrub Oak Forest, largely untouched for millenia.

ADM's development known as the "ADM Tihonet Mixed Use Development" (TMUD) on over 6,000 acres since 2008 has required review by the Secretary under the Massachusetts Environmental Policy Act (MEPA), which established a Special Review Procedure under 301 CMR 11.09. The development has required other state permits including at least eight Conservation and Management Permits (CMP) under the Massachusetts Endangered Species Act (MESA), G.L. c. 131A and its regulations at 321 CMR 10.00. Since 2009, the Division of Fish and Wildlife (MassWildlife) of the Commonwealth of Massachusetts has issued at least eight CMPs for the taking of over eleven Pine Barrens species listed as "Special Concern", "Threatened" or Endangered" in order to allow Makepeace to undertake extensive land development including ground mounted industrial solar utilities and alleged "agricultural" projects.

Since at least 2012, ADM changed the TMUD development from "a model of smart growth" and "open space" protection to industrial sand mining, energy generating utilities and forest clear-cuts without filing a Notice of Project Change, in violation of MEPA, G.L. c. 30, sec. 61.

Violations of Conservation and Management Permits

MassWildlife has failed to enforce many of the conditions in eight CMP permits issued to ADM. This includes failing to require timely payments into escrow accounts for habitat protection, execution and recording of conservation restrictions, reporting on the start of construction and conclusion of construction, inspections and recording of permits.

The CMPs include #011-183-DFW for the Wankinko Cranberry Bog Expansion issued on June 9, 2011. ADM has obtained this Conservation and Management Permit pursuant to 321 CMR 10.23 under the false pretense that the work was for "agriculture" namely construction of a 32-acre cranberry bog and tailwater recovery pond. MassWildlife determined that the agricultural project would result in a "take" of the Special Concern species, the Eastern Box Turtle. That Conservation and Management Permit includes strict provisions intended to compensate for the

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take, including limiting the work to 32 acres and putting 47 acres of land into permanent protection pursuant to a Conservation Restriction as “mitigation”. CMP #011-183-DFW required Makepeace to complete the bogs and tailwater recovery construction within five (5) years of the date of issuance of the permit, namely by June 2016. ADM has neither built the agricultural project that was the stated reason for MassWildlife’s issuance of the “take” permit, nor complied with other conditions of the Permit, including mitigation. ADM has instead conducted commercial earth mining on the 32-acre parcel and expanded earth mining beyond the Limit of Work in CMP #011-183-DFW.

Currently, ADM is actively conducting earth mining operations in the area on or near the Eastern Box Turtle habitat that is the subject of the #011-183-DFW CMP permit for the Wankinko Bog Expansion. It has expanded its operations beyond the 32-acre Eastern Box Turtle habitat identified as the “limit of work” in CMP #011-183-DFW.

On information and belief, ADM has not informed MassWildlife nor obtained a CMP amendment. MassWildlife has failed to act to address Makepeace’s abuse of the MESA permit process by claiming the “take” permit was necessary for an agricultural project which it never started or completed. Instead, MassWildlife has sat idly by while Makepeace destroyed the Eastern Box Turtle habitat for commercial mining operations all while failing to comply with permit conditions.

Worse yet, despite the blatant and obvious failure of Makepeace to comply with #011-183-DFW MassWildlife proceeded to issue six more MESA take permits allowing Makepeace to conduct additional industrial development projects:

- June 15, 2011 #011-185.DFW for Charlotte Furnace Solar Project (50 acres of pristine Pine Barrens destroyed);
- September 16, 201 #013-224.DFW for Phase C2 Cranberry Bogs/Infrastructure 217 acres of habitat destroyed² for an industrial sand mining of operation of 6.5 million cubic yards; alleged “agricultural project” not completed;
- August 4, 2015 #009-139.DFW Tihonet West Solar Project 83 acres of land cleared;³
- September 21, 2015 #015-270.DFW Tihonet East Solar Project 49.5 acres of land cleared, 21.2 acres of priority habitat; permit allowed the “take” of one Endangered Species, two Threatened Species and five Special Concern Species;
- December 15, 2015 #011.185.DFW Master Millwork Project;

² See, EENF 13940, March 15, 2021, Table 4-1: Phase C-2 habitat alteration of 217+/- acres; habitat includes mapped and unmapped but identified habitat (Table 4-1, footnote 25)

³ Id., Phases C4 and C7 total land altered is 83 acres.

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- April 19, 2017 #017-301.DFW Master Eastern Box Turtle Permit 45 acre development;

Currently, MassWildlife is considering an amendment of CMP #015-270 in order to allow ADM to develop another 50 plus acre ground-mounted industrial solar energy generation station and storage facility. This facility is adjacent to the Tihonet East Solar Project and another industrial solar project at 140 Tihonet Road.


The Secretary issued a MEPA Certificate on June 9, 2021 finding that no environmental impact report was required and finding that "According to NHESP, it is anticipated that the projects [140 Tihonet Road, 150 Tihonet Road, and 27 Charge Pond Road] will meet the CMP performance standards by providing a long-term net benefit to the impacted species by permanently protecting appropriate habitat in the vicinity of previously designated conservation areas near Myles Standish State Forest and providing funding for pine barrens, research, habitat management and restoration to benefit state-listed pine barrens species." Certificate page 10. In issuing the CMP, the Secretary deliberately and intentionally ignored and failed to address ADM's ten-year history of violations of MESA and CMPs issued by MassWildlife. In doing so, the Secretary is enabling ADM to continue to carry out the destruction of hundreds of more acres of globally rare Pine Barrens ecosystems.

I. Intent to File Suit

The Ten Persons request the government addressees of this letter to immediately take enforcement action against ADM. Pursuant to G.L. c. 214, Sec. 7A, the Ten Residents may file suit in Superior Court for declaratory and injunctive relief twenty-one days after this Notice. They intend to do so.

Thank you.

Yours very truly,



Michael J. O'Neill