

May 25, 2023

*via E-Mail and U.S. Mail*

Secretary Kody Kinsley  
North Carolina Department of Health and Human Services  
2001 Mail Service Center  
Raleigh, NC 27699-2000

Re: Collapsing Houses and Exposed Septic Tanks at Rodanthe

Dear Secretary Kinsley:

The Southern Environmental Law Center, on behalf of the North Carolina Coastal Federation, writes to ask you to enforce your existing laws, policies, and rules to address the imminent threats to public health, welfare, and North Carolina's valuable natural resources created by collapsing houses and exposed, abandoned septic tanks that are leaking sewage onto the public beach at the village of Rodanthe.

Five different houses have collapsed in Rodanthe since 2020, four of which have fallen within the last 15 months. Each has left a miles-long debris field in its wake, littering the beaches of Cape Hatteras National Seashore and neighboring properties with dangerous nails, boards, and an array of hazardous materials that have included insulation foam, drywall, asphalt shingles, household chemicals, fiberglass shards, and items potentially containing lead and asbestos. Other oceanfront houses in Rodanthe are damaged, leaning, and on the verge of collapse, creating safety hazards for beachgoers. And as those oceanfront houses at Rodanthe have become increasingly unstable, their septic tanks have also become exposed and unmoored, often before the house itself collapses—directly discharging sewage onto public beaches and into ocean waters.

This untenable situation poses unacceptable health and safety risks to residents of Rodanthe and visitors alike, and the Department of Health and Human Services (“DHHS”) has an obligation to safeguard the public health and welfare of all persons in the affected area. Furthermore, three of the five house collapses that occurred in Rodanthe since 2020 have happened during the month of May when tourists are already flocking to the state's beaches in large numbers. As in prior years, the number of visitors to the area can be expected to grow tremendously over the next several months as well.<sup>1</sup> It is therefore imperative that DHHS act

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<sup>1</sup> More than two-thirds of the roughly 2.86 million visitors to Cape Hatteras National Seashore in 2022 visited between May and September. See National Park Service, Public Statistics Office, [https://irma.nps.gov/Stats/SSRSReports/Park%20Specific%20Reports/Summary%20of%20Visitor%20Use%20By%20Month%20and%20Year%20\(1979%20-%20Last%20Calendar%20Year\)?Park=CAHA](https://irma.nps.gov/Stats/SSRSReports/Park%20Specific%20Reports/Summary%20of%20Visitor%20Use%20By%20Month%20and%20Year%20(1979%20-%20Last%20Calendar%20Year)?Park=CAHA).

swiftly to address these deteriorating houses and unsanitary septic conditions before even more people are put at risk.

Specifically, we ask that DHHS: (1) enforce its existing septic regulations to protect the public from improperly-sited, exposed, damaged, or malfunctioning septic systems at the beach; and (2) utilize the Secretary's authorities to identify and abate public health nuisances and imminent hazards to address the imminent dangers to public health and safety created by oceanfront houses at risk of collapse, coastal debris fields created by collapsed houses, and exposed or detached septic tanks on any portion of the beach.

### **Background**

Due to the rapid rates of shoreline erosion at Rodanthe, approximately six to fourteen feet of beachfront is being lost each year, depending on the precise location.<sup>2</sup> Houses that were once built comfortably inland are now precariously exposed on the wet sand beach. On May 29, 2020, a house on 23238 Sea Oats Drive in northern Rodanthe disappeared into the ocean in the middle of the night. Then, in 2022, three different houses from the same street toppled into the sea—the first at 24183 Ocean Drive on February 9, 2022, and the next two at 24235 Ocean Drive and 24265 Ocean Drive, both on May 10, 2022. Most recently, yet another Rodanthe house fell on March 13, 2023, at 23228 East Point Drive, leaving a debris field in its wake that stretched a whopping 21 miles south to the village of Avon.<sup>3</sup> Dare County officials have identified multiple oceanfront houses in Rodanthe that remain in danger of collapse.

Septic systems are another casualty of coastline erosion. Septic tank systems that were once adequately buried with their septic fields above the water table are now inundated daily by the tides. In other words, many of the septic systems associated with oceanfront houses at Rodanthe are located hazardously close to the ocean, in violation of DHHS regulations,<sup>4</sup> where they become prone to failure because of both rising groundwater from underneath and tidal flooding from above. Depending on their condition, they may be discharging human waste directly onto the sandy beach or into the ocean.<sup>5</sup>

Unfortunately, the barrier island beaches of the Outer Banks are particularly vulnerable to increases in sea level rise, hurricanes, and erosion, and these threats are only getting progressively worse because of climate change. Increases in global temperatures are linked to increases in sea level rise,<sup>6</sup> and accelerating sea level rise along the Atlantic coast will further

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<sup>2</sup> Online GIS Layer, *Erosion Rates (2020) – Oceanfront*, N.C. Div. Coastal Mgmt., <https://ncdenr.maps.arcgis.com/home/item.html?id=64fe39e71e5747e4859c44b42f7ad7a4>.

<sup>3</sup> National Park Service, *News Release: Cape Hatteras National Seashore Implements Response to March 13 House Collapse* (March 14, 2023), <https://perma.cc/VWV9-Y6JG>; see also Cape Hatteras National Seashore Flickr – 23228 East Point Drive, <https://perma.cc/9SWZ-4FEW>.

<sup>4</sup> 15A N.C. Admin. Code 18A .1950(a)(5), (i).

<sup>5</sup> See, e.g., Catherine Kozak, *A cycle of septic repairs, washouts on park service beaches*, Coastal Review Online (Nov. 4, 2022), <https://coastalreview.org/2022/11/a-cycle-of-septic-repairs-washouts-on-park-service-beaches/>.

<sup>6</sup> William V. Sweet et al., *Sea Level Rise*, in *Climate Science Special Report: Fourth National Climate Assessment*, Volume I, 333 (Donald J. Wuebbles et al. eds., 2017).

increase coastal erosion rates.<sup>7</sup> The National Oceanic and Atmospheric Administration 2022 Sea Level Rise Technical Report shows that under the most likely modeling scenarios, Cape Hatteras will experience between approximately 1.7 to 2.1 feet of sea level rise by 2060 and 4.0 to 5.4 feet by 2100.<sup>8</sup> Coastal erosion will also be exacerbated by other climate-induced changes such as increased storm intensity and changes in prevailing currents, both of which are projected to lead to increased erosion and beach loss. The Atlantic coast already sees more Category 4 and Category 5 hurricanes now compared to the 1980s, and North Carolina ranks second among U.S. states for the number of tropical storms and hurricanes that have affected its shores.<sup>9</sup> Even a single hurricane or major storm can remove considerable amounts of sand from a beach, particularly if that beach has been artificially filled.<sup>10</sup>

### **DHHS Must Protect Public Health and Safety at the Coast**

DHHS must act immediately to abate the exposed or abandoned septic tanks that are currently endangering the health of the public and the environment in Rodanthe to prevent beachgoers from being exposed to raw sewage. DHHS must also act immediately to mitigate public health hazards created by debris from the March 13, 2023, house collapse and by debris remaining from prior collapses. In addition, since the threats of collapsing houses and exposed septic tanks currently observed at Rodanthe will only become more pervasive as a result of sea level rise and stronger storms in the face of climate change, DHHS must develop and implement a systematic approach to addressing these dangers *before* another house falls onto the foreshore or another septic tank spills onto the beach or floats into the ocean.<sup>11</sup> It is imperative that DHHS use the furthest extent of its legal authorities to prevent and mitigate the public health hazards created by unstable homes before they predictably become dangerous and unmanageable debris fields.<sup>12</sup> Below, we outline various means by which we believe DHHS should exercise its authorities to protect the health and safety of residents and visitors to Outer Banks beaches with high erosion rates, including Rodanthe.

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<sup>7</sup> See Stephen P. Leatherman et al., *Sea Level Rise Shown to Drive Coastal Erosion*, 81 EOS 55, 56 (2000); Roshanka Ranasinghe et al., *Climate Change Impact Assessment for Inlet-Interrupted Coastlines*, 3 Nature Climate Change 83 (2013).

<sup>8</sup> Sea Level Rise Viewer for Cape Hatteras, NC, <https://coast.noaa.gov/slr/#/layer/slr> (select “local scenarios;” then search “Cape Hatteras, NC”; Intermediate and Intermediate-High modeling scenarios) (last visited May 24, 2023) (see <https://perma.cc/EDS3-ENNR>).

<sup>9</sup> Brian Donegan, *North Carolina Second Only to Florida for U.S. Tropical Storms and Hurricanes*, The Weather Channel (Sept. 11, 2018), <https://weather.com/storms/hurricane/news/2018-06-05-map-shows-how-many-tropical-storms-hurricanes-struck-each-state>.

<sup>10</sup> See, e.g., Michalis I. Voutsoukas et al., *Sandy Coastlines Under Threat of Erosion*, 10 Nature Climate Change 260, 263 (Mar. 2, 2020); Jennifer M. Johnson et al., *Recent Shifts in Coastline Change and Shoreline Stabilization Linked to Storm Climate Change*, 40 Earth Surface Processes and Landforms 569 (2014).

<sup>11</sup> The N.C. General Assembly declared the purposes of the public health system to include: preventing health risks and disease; identifying and reducing health risks in the community; detecting, investigating, and preventing the spread of disease; and promoting a safe and healthful environment. N.C. Gen. Stat. § 130A-1.1(a).

<sup>12</sup> See, e.g., *House Collapse in Rodanthe Leads to Large Debris Field Along the Beach*, Island Free Press (May 29, 2020), <https://islandfreepress.org/outer-banks-news/oceanfront-house-collapse-in-rodanthe-leads-to-large-debris-field-along-the-beach/>.

## I. DHHS Jurisdiction

The North Carolina General Statutes mandate that DHHS protect the public from health risks and disease, identify and reduce health risks in the community, and promote a safe and healthful environment in North Carolina.<sup>13</sup> Here, that authority extends to taking actions to protect public health at the beach in Rodanthe and elsewhere in the Outer Banks. While the National Park Service may own the wet-sand beach at Rodanthe, it manages Cape Hatteras National Seashore under concurrent jurisdiction—meaning that North Carolina statutes, such as those enforced by DHHS, apply within its bounds.<sup>14</sup> DHHS additionally has clear jurisdiction to act to abate public health threats stemming from the non-federally owned property in the area as well. We further urge DHHS to coordinate with local health departments to expedite the implementation of both the immediate response actions needed to address current sewage discharges from exposed septic systems and hazards from recent debris fields and to coordinate with local health departments on long-term strategies to address these issues before they reach the crisis point already observed in Rodanthe.

## II. Enforcing Specific Laws and Regulations on Septic Tanks

The DHHS Secretary has a duty to administer and enforce public health statutes promulgated by the North Carolina General Assembly, including the statutes governing septic systems and rules adopted pursuant to those statutes.<sup>15</sup> Here, DHHS has multiple rules at its disposal that were specifically written to protect public health and welfare from hazards created by malfunctioning, damaged, or inappropriately-located septic systems, and it should enforce those rules to immediately address hazardous septic tanks that have been strewn across the Rodanthe beach. For example, DHHS can bring an enforcement action and impose administrative penalties<sup>16</sup> against homeowners whose septic tanks are visible on the beach if those septic systems are partially or totally destroyed and/or discharging directly onto the beach or into groundwater or surface waters.<sup>17</sup> DHHS can order the septic system to be repaired, if possible,<sup>18</sup> or more likely under the circumstances at Rodanthe, pumped and removed from the shore.<sup>19</sup> Likewise, DHHS implements regulations governing owners' responsibilities for the

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<sup>13</sup> See N.C. Gen. Stat. § 130A-1.1(a).

<sup>14</sup> See National Park Service, 2022 Superintendent's Compendium for Cape Hatteras National Seashore (Oct. 31, 2022), <https://www.nps.gov/caha/learn/management/lawsandpolicies.htm>.

<sup>15</sup> Public health laws governing septic are found under Article 11 of Chapter 130A of the N.C. General Statutes (130A N.C. Gen. Stat. §§ 130a-333–130a-339), and rules adopted pursuant to that chapter may be found at 15A N.C. Admin. Code 18A .1900–1971. See also 15A N.C. Admin. Code 10 .0101(2)(a). The DHHS Secretary may also request that a local health department administer DHHS rules under DHHS supervision. N.C. Gen. Stat. § 130A-4.

<sup>16</sup> N.C. Gen. Stat. § 130A-22(c); 15A N.C. Admin. Code 18A .1968. For septic system violations, each day of a continuing violation constitutes a separate violation for which a penalty of not more than \$50/day may be assessed. N.C. Gen. Stat. § 130A-22(c).

<sup>17</sup> See 15A N.C. Admin. Code 18A .1961(l).

<sup>18</sup> See *id.* (a septic tank “that creates or has created a public health hazard or nuisance . . . shall be repaired within 30 days of notification by the state or local health department unless the notification otherwise specifies a repair period in writing”).

<sup>19</sup> 15A N.C. Admin. Code 18A .1961(m).

malfunctioning of a septic system,<sup>20</sup> the improper location of the system,<sup>21</sup> or any other applicable rules, by, for instance, holding the owner responsible for remediating the non-complying condition.<sup>22</sup> The Secretary may also suspend or revoke any septic permits upon the finding of a violation,<sup>23</sup> and the violation may be charged as a misdemeanor.<sup>24</sup>

We ask that you vigilantly enforce these rules at the coast, particularly in rapidly-eroding areas like Rodanthe, where the public health hazards created by septic tanks in the face of sea level rise are twofold. First, rising sea levels cause rises in groundwater, which in turn can impair the ability of a septic system to filter and drain, causing it to fail.<sup>25</sup> Second, storms, erosion, and tidal flooding are unearthing septic tanks and allowing them to discharge directly onto the sandy beach or into the ocean at high tide. DHHS’s septic regulations aim to guard against these public health hazards from coastal flooding by, for example, requiring that “[e]very sanitary sewage treatment and disposal system *shall* be located at least . . . 100 feet” from the “mean high water mark” for waters classified as S.A. (that is, for tidal waters used for “shellfishing for market purposes”<sup>26</sup>) and at least 50 feet from the “mean high water mark” for “[o]ther coastal waters.”<sup>27</sup> The same regulation further provides in part that “[s]eptic tanks . . . and other pretreatment systems shall not be located in areas subject to frequent flooding (areas inundated at a ten-year or less frequency) unless designed and installed to be watertight and to *remain operable* during a ten-year storm.”<sup>28</sup>

Despite these DHHS regulations, many of the septic tanks and other components of the septic systems serving the oceanfront houses at Rodanthe are submerged by the ocean at high tide, sometimes daily and certainly more frequently than once every ten years. It is not uncommon for septic tanks located near or on the beach to become exposed or inoperable by frequent flooding, despite being “designed” to “be watertight” and to “remain operable.” These septic tanks are repaired only to become exposed or inoperable again. The frequent and often futile efforts to repair and replace the septic tanks demonstrate that septic tanks should not be located in these frequently-flooded areas under the regulation. These violations, and resulting failures of the septic systems, are creating health hazards on public beaches at Rodanthe, including on beaches that are part of a treasured National Seashore.

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<sup>20</sup> 15A N.C. Admin. Code 18A .1961(a).

<sup>21</sup> 15A N.C. Admin. Code 18A .1950(a)(5).

<sup>22</sup> See 15A N.C. Admin. Code 18A .1938(b) (the “person owning or controlling the system shall be responsible for assuring compliance with the laws, rules, and permit conditions regarding system location, installation, operation, maintenance, monitoring, reporting, and repair”).

<sup>23</sup> N.C. Gen. Stat. § 130A-23.

<sup>24</sup> N.C. Gen. Stat. § 130A-25; see also 15A N.C. Admin. Code 18A .1968.

<sup>25</sup> See, e.g., Kendra Pierre-Louis, MIT Technology Review, *How Rising Groundwater Caused by Climate Change Could Devastate Coastal Communities* (Dec. 13, 2021), <https://www.technologyreview.com/2021/12/13/1041309/climate-change-rising-groundwater-flooding/>.

<sup>26</sup> 15A N.C. Admin. Code 02B .0221.

<sup>27</sup> 15A N.C. Admin. Code 18A .1950(a)(1), (5) (emphasis added).

<sup>28</sup> 15A N.C. Admin. Code 18A .1950(i) (emphasis added). Moreover, mechanical or electrical components of such treatment systems must be above the 100-year flood level or otherwise protected against a 100-year flood. *Id.*

The regulations discussed above govern the ongoing location and functionality of the septic system, not merely the location and design at the time of installation. We ask that you enforce these requirements, working with local health department officials and the Division of Coastal Management as appropriate. Furthermore, while we encourage strong and immediate enforcement of these existing regulations, we additionally support the Coastal Resources Commission’s ongoing rulemaking to govern the repair and replacement of septic systems to provide important additional authority and guidance to help protect the coast.

### III. Abating Public Health Nuisances

The DHHS Secretary also possesses a broad inherent authority to order the abatement of public health nuisances across the state.<sup>29</sup> This authority exists independently from the authority of local health directors, such that an order of abatement may issue from either entity.<sup>30</sup> Here, the Secretary should use his authority to determine that the collapsing houses, debris fields, and exposed septic tanks at Rodanthe each constitute a public health nuisance.<sup>31</sup> Upon making such a determination, the Secretary can “issue an order of abatement directing the owner, lessee, operator or other person in control of the property to take any action necessary to abate the public health nuisance.”<sup>32</sup> If the person responsible for the property refuses to comply with the order, the Secretary can institute an action in superior court to enforce the order, which will be scheduled for trial within 60 days.<sup>33</sup> The court may either order the owner to abate the nuisance or direct the Secretary to abate the nuisance, in which case a lien will be put on the property for the costs of abatement.<sup>34</sup> While it may be more efficient for the Secretary to directly enforce regulations on septic systems, where applicable, the broad nature of the public nuisance abatement authority can be used to cover a wider array of threats. Additionally, the expedited hearing process provides fair notice and opportunity to be heard by a property owner where abatement of a nuisance involves contentious issues of real property. The Secretary’s public nuisance abatement authority thus provides an important tool that DHHS should utilize to protect public health and safety from the unstable homes and compromised septic tanks threatening Rodanthe. Furthermore, while this letter focuses on the immediate situation at Rodanthe, this authority to abate public nuisances across the state may become increasingly important as increases in sea level rise and erosion create similar hazards elsewhere on the coast.

### IV. Abating Imminent Hazards

Finally, the DHHS Secretary and local health directors also share authority to order the abatement of an “imminent hazard,” which is defined by statute to mean “a situation that is likely to cause an immediate threat to human life, an immediate threat of serious physical injury, an immediate threat of serious adverse health effects, or a serious risk of irreparable damage to the

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<sup>29</sup> N.C. Gen. Stat. § 130A-19(a).

<sup>30</sup> *Id.*

<sup>31</sup> N.C. Gen. Stat. § 130A-19(a); N.C. Gen. Stat. § 130A-2.

<sup>32</sup> N.C. Gen. Stat. § 130A-19(a).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

environment if no immediate action is taken.”<sup>35</sup> The collapsing houses at Rodanthe, as well as their debris fields and failing septic systems, create immediate threats in each of these categories.

While the Secretary’s exclusive authority has recently been limited to ordering the abatement of “statewide” imminent hazards, or those that exist in at least two-thirds of counties, local health directors retain authority to order the abatement of imminent hazards on specific identified properties.<sup>36</sup> After a reasonable attempt to notify the owner, lessee, operator, or other person in control of the property, the local health director can enter onto the identified property and take any action necessary to abate the imminent hazard.<sup>37</sup> A lien will then be placed on the property for the cost of abatement of the imminent hazard.<sup>38</sup> This authority may be particularly important in areas like Rodanthe, where repeated attempts to contact the out-of-state investors who own dangerously unstable houses have previously failed.

As described above, the houses at Rodanthe that are on the verge of collapse, as well as the exposed, leaking septic tanks accompanying them and the dangerous debris fields produced by collapses, each constitutes imminent hazards because they are likely to cause an immediate threat of serious injury, an immediate threat of serious adverse health effects, or a serious risk of irreparable damage to the environment if no immediate action is taken.<sup>39</sup> We accordingly urge DHHS to work with the Dare County health director to take any actions necessary to abate these imminent hazards.

### **Conclusion**

Dare County officials have identified several houses on the shoreline of Rodanthe that are at risk of collapse, and additional houses that pose similar hazards are being identified each year. The shoreline is littered with exposed and abandoned septic tanks that create a sanitation hazard and are likely to discharge human waste onto the beach. The ocean beaches that should be freely used and enjoyed by residents and visitors as part of the common, constitutionally-protected heritage of the State<sup>40</sup> are instead becoming a threat to the health and safety of North Carolinians. Furthermore, the public health hazards posed by houses on the brink of collapse, exposed septic tanks, and post-collapse debris at Rodanthe will only become more common at Rodanthe and elsewhere in the Outer Banks in the face of climate change. If left unaddressed, the threats to public health and safety currently observed at Rodanthe will only become more severe and more difficult to enforce against, as it will become increasingly difficult to identify the property owner responsible for an individual septic tank or area of debris against a backdrop of mixed debris fields from multiple collapses. We accordingly urge you to consider the authorities outlined above and take immediate action to abate these hazards.

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<sup>35</sup> N.C. Gen. Stat. § 130A-2(3).

<sup>36</sup> See S.L. 2021-180 § 19E.6(d), eff. Jan. 1, 2023.

<sup>37</sup> N.C. Gen. Stat. § 130A-20(a).

<sup>38</sup> *Id.*

<sup>39</sup> N.C. Gen. Stat. § 130A-2(3).


<sup>40</sup> N.C. Const. art. XIV, §5.

Secretary Kody Kinsley

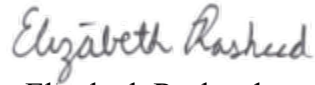
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Sincerely,



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*cc (via e-mail only):*

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