

Second review by Attorney Jeff Graff based on the July 11, 2016 version of the law.
Watershed responses to Attorney Jeff Graff's major points are shown in red.

RILEY & GRAFF, LLP

ATTORNEYS AT LAW
26 EAST MAIN STREET
P.O. BOX 604

CLIFTON SPRINGS, NEW YORK 14432 -0604

JOHN F. RILEY
JEFFREY D. GRAFF

LEGAL ASSISTANTS:
COURTNEY R. SPRAGUE
ROBYN L. HANNA

Tel. No. (315) 462-3010
Fax No. (315) 462-5039

To: Town of Gorham, Fred Lightfoote, Supervisor
Town of Middlesex, Wayne Dunton, Supervisor
Town of South Bristol, Daniel Marshall, Supervisor

From: Jeffrey Graff, Town Attorney

Date: November 17, 2016

Subject: Draft Model On-Site Individual Wastewater Treatment System Law
July 11, 2016 Version

This memo will provide my comments, as attorney for the Towns of Gorham, Middlesex and South Bristol, on the revised, July 11, 2016 Version of the Draft Model On-Site Individual Wastewater Treatment System Law. In addition to reviewing this revised draft and comparing it with the previous February 22, 2016 Version and my April 14, 2016 memo, I have reviewed the written responses and comments of Kevin Olvany to my memo as well as the public information session notes based on the July 11, 2016 and August 15, 2016 meetings.

My overall comment is that this is a much-improved and tighter law that has addressed all of my areas of concern in positive ways. While it is ultimately up to each Town how they want to balance the needs of protecting the Lake and the public with the financial hardship imposing such protections would place on property owners, I feel the revisions strike a fair compromise in balancing such competing interests. I believe there are valid arguments for making either side of that balancing test more onerous – as several of the comments from the public illustrate – but there is no obvious right or wrong approach. Any of the participating Towns could opt to change this model draft to alter this balance prior to adoption. My hope is that the Watershed Council and the participating municipalities regularly (every year or two perhaps) review this law, once adopted, and collectively discuss what is working well and what is not and the concerns that practical application of this law since it was last reviewed would indicate would be appropriate revisions to this law.

As with any law, especially one of this complexity and length, there are always areas that can be further cleaned up, clarified or refined and, in the spirit of putting forth as clean a law as possible, I offer the following comments:

1. Relative to definitions in Article 2:

A. BEDROOM AND/OR BEDROOM EQUIVALENT. As this term has been changed from “bedroom” to “bedroom and/or bedroom equivalent”, all references in this law to just “bedroom” need to add “and/or bedroom equivalent”. Line 2 of this definition itself is one place this change is needed. The other section that needs this changed is 3.2 3. a., b. and c. (opening paragraph and i, ii, iii, iv, v and vi).

Completed

Also, in this definition, the language from the International Residential Code and the Town of Canandaigua Code needs to be deleted as written – unless certain aspects are incorporated into the definition itself.

Completed

B. CONVEYANCE OF REAL PROPERTY

1) For Middlesex, the County reference will need to be changed to “Yates County” when this law is in final form.

2) Because “immediate family member” is not a defined term and for purposes of alleviating other legal concerns, I recommend some modifications to this definition so that it reads as follows:

CONVEYANCE OF REAL PROPERTY - shall mean the transfer of the title of real estate ~~from one to another non-immediate family member~~, in the form of a deed or other legal instrument, filed in the Office of the ~~Ontario~~ _____ County Clerk, which involves none of the transferors of such deed or other legal instrument remaining in possession of such real estate. Non-arm’s-length sales transfers of title, transfers of property an interest in title without change of possession where one or more of the transferors remain in possession of such real estate and sales transfers of title to immediate family members a spouse and/or one or more children, including transfers from a transferor’s estate, shall not be considered a conveyance of real property under this law.

Cleaned up, this would read:

CONVEYANCE OF REAL PROPERTY - shall mean the transfer of the title of real estate, in the form of a deed or other legal instrument, filed in the Office of the _____ County Clerk, which involves none of the transferors of such deed or other legal instrument remaining in possession of such real estate. Non-arm’s-length transfers of title, transfers of an interest in title where one or more of the transferors remain in possession of such real estate and transfers of title to a spouse and/or one or more children, including transfers from a transferor’s estate, shall not be considered a conveyance of real property under this law.

Completed

C. FAILURE. In the second line, delete the word “are”.

Completed

D. GREY WATER – The word “house” was changed to “building”. As not all “structures” are “buildings”, are there any “structures”, perhaps fountains, pools, something agriculturally related, that could discharge wastewater such that this definition should read, “all wastewater from a building or structure . . .”?

We suggest that we stay with building. If we go to structure, we don’t want to consider discharge from pools, fountains etc...as grey water.

2. Throughout this law there are references to distances to Canandaigua Lake. There needs to be consistency as to what the distance to the Lake is being measured from if it is intended for different provisions to be measuring from the same starting point (parcel, absorption area, system generally). I find the following:

We have made several changes to be more consistent with the different provisions and associated measurements from Canandaigua Lake, however a couple of the distances had to be based on the parcel instead of the absorption area.

Both the 5- year inspection cycle requirements (4.2; 4.2.1;) and the substandard system requirements (3.1.4; 3.4.1; 3.4.2; 3.4.3; 6.2.5) were altered to ensure they were consistently referring to the absorption area within 200 feet of the lake. However, we also added the requirement for inspections if the holding tank was within 200 feet of the lake. In addition, we did add that parcels within 200 feet of the lake with no records would still need an inspection during the first cycle, so they can determine the location of the absorption area or holding tank and the overall condition of the system. The design standards were changed to refer to the onsite system being within 200 feet of the lake (3.2.3 a and b). The 100 feet distance for failure did not change. We focused on the onsite system/holding tank and the absorption area within 200 feet of the lake. We feel that this level of consistency reaches a balance of accomplishing water quality goals, not being too confusing, and not overreaching.

- A. In the definition of “Failure”, # 7 and # 8 refer to “the absorption area” and “access lid” respectively being located within 100 feet of the Lake. These appear to be fine.
No change
- B. Section 3.1 4 refers to the “system” generally within 200 feet of the Lake.
Changed to absorption area
- C. Section 3.2 3. a. and b. refer to parcels that are more than 200 feet or within 200 feet from the Lake.
Changed to system
- D. Section 3.4 1. refers to “substandard systems” generally located within 200 feet of the Lake, whereas 3.4 1. a. refers to the absorption area of substandard systems being located within 200 feet of the Lake.
Changed 3.4.1 to absorption area
- E. Section 3.4 2 refers to the absorption area of substandard systems being located within 200 feet of the Lake.
No change
- F. Section 3.4 3 refers to “substandard systems” generally located more than 200 feet from the Lake.
Changed to absorption area

G. The heading of Section 4.2 along with 4.2 1. and 4.2 5. refer to parcels wholly or partially within 200 feet of the Lake.

Section 4.2 and 4.2.1 were changed to reflect the absorption area and holding tank. Section 4.2.5 (now Section 4.2.3) was amended to refer to systems that require an inspection through Section 4.2.1, so this stays consistent with the absorption area and holding tank.

H. Section 4.2 4. refers to absorption areas greater than 200 feet from the Lake.

This section was removed as it is no longer needed. It was replaced with the new Section 4.2.2, which states that parcels within 200 feet of the lake will need an inspection if the authority having jurisdiction lack records on the location of the absorption area or holding tank. Any parcel located wholly or partially within 200 feet could have an absorption area or holding tank within 200 feet of the lake.

I. Section 6.2 5 refers to "substandard systems" generally located within 200 feet from the Lake.

Changed to absorption area

(References to the system as a whole, to me, means any part of the system, not just the absorption area.)

Also, in one of the comments relative to slopes, it was answered that the distance is a horizontal measurement, not a vertical measurement. This needs to be set forth somewhere in the law or in each reference to the distance measurement.

A line was added to the definition of Canandaigua Lake to ensure measurements were a horizontal distance.

3. Section 3.1 5. – In the list of things prohibited in lines 3 and 4, the word "structures" is listed once on line 3 and then again on line 4. One of these should be deleted.

Completed

4. In section 3.5 1, I was recommending the second sentence be amended to correct a misplaced modifier so as to read as follows: "Within 10 days of an inspection, a written report, which documents the results of the inspection and provides a written certification from the certified manufacturer's representative that the unit is fully functional and operating properly and is under a service contract, shall be sent to the authority having jurisdiction."

Completed

5. Section 4.3 1. (c) The term "work area" in the third line should be defined as that seems like a vague term and could be open to interpretation.

We have included a definition of work area, which comes from the 2015 International Existing Building Code.

6. In Section 4.4 3., I recommend that letters stating the inspection is adequate should also be issued so owners are not left wondering what the Town's determination is. To that end, I recommend the opening sentence of this section be the same as in section 4.5 3 – "The authority having jurisdiction shall have 30 days to review the inspection report and notify the parcel owner of their findings."

We notify property owners through 4.5.3.

7. Section 8.2 2. a. lists items to be considered on a variance and, based on Mr. Olvany's reply, this list was to match the waiver list in section 3.4 2. a. In that other section there is a fifth item to be considered that should be added to the list in 8.2 2. a that says, "The extent to which the limitations are self-created."

8.2.2.f was altered to show more consistent language.

Please let me know if anyone has any questions. Again, my compliments to all involved for the hard work, time and thoughtful consideration to all aspects of the implications of this law.

Very truly yours,

RILEY & GRAFF, LLP

Jeffrey D. Graff

jgraff@rileygraff.com

c: Kevin Olvany, Watershed Program Manger
George Barden, Watershed Inspector