




# STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Richard F. Daines, M.D.  
Commissioner

Wendy E. Saunders  
Chief of Staff

March 28, 2008

Mr. Paul Reck  


Re: Canandaigua Lake Water Commission

Dear Mr. Reck:

In your October 5, 2007 letter you expressed concern over practices of the Canandaigua Lake Water Commission ("CLWC"). In particular you questioned the CLWC's involvement with the Ontario Soil and Water Conservation District ("SWCD"), the authority to charge fees to review septic system plans, the category of the systems being regulated and the qualifications of the person reviewing those plans. You also wrote the N.Y.S. Department of Agriculture and Markets about these issues and our file reflects their December response to you, which clarified a number of these points.

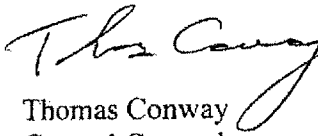
Pursuant to Public Health Law §§ 1100 et seq. the N.Y.S. Department of Health may adopt regulations to protect public supplies of potable waters and water supplies from contamination. Specific regulations protecting Canandaigua Lake and its tributaries are found in 10 NYCRR § 132.1. As the commission having the management and control of the potable water supply, the CLWC may take actions to protect the watershed, including approving plans for certain sewage systems pursuant to health regulations at 10 NYCRR § 132.1(d) and Part 75 (Standards for Individual Water Supply and Individual Sewage Treatment Systems). CLWC may take such actions directly or may contract or agree with others, such as the Ontario Soil and Water Conservation District ("SWCD"), to act on its behalf. I note that the Department of Agriculture and Markets' December letter to you indicated that "the activities of the Ontario SWCD with respect to the CLWC are included in the SWCD's 2006 annual plan of work, which was submitted to and approved by New York State Soil and Water Conservation Committee. Pursuant to Soil and Water Conservation District Laws § 9(3) and (8), SWCDs are authorized to assist, among others, local governments with the control and abatement of nonpoint sources of water pollution."

With respect to the CLWC's authority to charge for the cost of the inspection service it provides, NYS courts have historically held that entities with the power to regulate have the implied authority to impose fees reasonably related to the cost of such regulation. In this case, the CLWC is a board composed of the municipalities that are public water purveyors of the

Canandaigua Lake watershed. The official purpose of CLWC is the "enforcement and updating of watershed rules and regulations as required and necessary." Relevant case law on the authority to set fees includes Suffolk County Builders Association, Inc. v. Suffolk County, 46 N.Y.2d 613 (1979), which involved an unsuccessful challenge to site inspection charges imposed by the Suffolk County Department of Health Services. No specific language had granted the Department the ability to set fees. The Court held that such authority could be implied from broad delegations. The appropriateness of fees charged is addressed in Valentino et al. v. County of Tompkins, 45 A.D.3d 1235 (3d Dep't 2007), in which fees charged by Tompkins County to the Southern Cayuga Lake Inter Municipal Water Commission were challenged. The court stated "(W)here a fee is properly imposed, the amount thereof must be based on reliable factual studies and statistics and must bear a reasonable correlation to the average, associated cost of the service provided," quoting Matter of Phillips v. Town of Clifton Park Water Authority, 286 A.D. 2d 834, 835 (3d Dep't 2001).

I hope this background related to the authority to set fees and the calculation of fees is informative to you. However, the Department of Health does not directly regulate the fee setting activity of the Commission. You may wish to approach the Commission and/or municipalities involved with respect to your concerns regarding the appropriate calculation of attendant inspection costs.

Very truly yours,

  
Thomas Conway  
General Counsel

cc: Patrick Hooker  
Richard F. Daines M.D.  
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