

Private Well Drinking Water Quality Standards Research Memorandum

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This memorandum was prepared in Fall 2024 by SJC Rule 3:03 Certified Student Attorney, Brigid Splaine as a part of her casework in the Suffolk University Environmental Law & Policy Clinic. This memorandum was designed to support the Coalition for Safe Drinking Water's legislative advocacy. Research focuses on the drinking water quality standards for private wells. It provides information related to Massachusetts specific cost estimates and a comparative analysis of the statutes and regulations currently enacted in other states.

Research Memo
Safe Drinking Water Coalition

Massachusetts Testing and Repair Costs for Private Wells

I. TESTING PROCESS

A. Overview

- This information related to the process of testing for drinking water contamination in private wells is based on a conversation with the owner and report generator from SafeWell Corporation.¹
- SafeWell Corporation is a water testing service located in Bolton Massachusetts that currently conducts both testing and repairs of local private wells throughout the Commonwealth.²

B. Sample Collection

- For testing in relation to an upcoming real estate transaction. SafeWell typically recommends either a health scan test or an Essentials Scan test be performed.³
 - Health Scan
 - Designed to provide a baseline testing and treatment design. It tests for 25 different analytes including bacteria, nitrates and nitrites, and minerals including arsenic iron and manganese.⁴
 - Also provides information relating to the physical characteristics and quality of the water including pH, hardness, color and odor.⁵
 - Essentials Scan
 - Provides for annual water quality monitoring and tests for 17 different analytes, including bacteria, nitrates, nitrites and different minerals.⁶
 - Also provides information relating to the physical characteristics of the water including pH and hardness.⁷
- SafeWell collects the testing samples themselves in order to reduce any possible sampling errors.⁸
 - At time of the sample collection, SafeWell will also inspect the well and document the system in both writing and pictures.⁹

¹ Interview with Dan Gaffney and Elizabeth Schoepke, SafeWell Corporation, October 29, 2024.

² https://safewell.us/water-treatment/?gad_source=1&gclid=EAlaIqObChMln9OLrPTKiQMVfkX_AR1bCgiOEAAAYASAAEgLmi_D_BwE

³ Interview with Dan Gaffney and Elizabeth Schoepke, SafeWell Corporation, October 29, 2024.

⁴ https://safewell.us/water-treatment/?gad_source=1&gclid=EAlaIqObChMln9OLrPTKiQMVfkX_AR1bCgiOEAAAYASAAEgLmi_D_BwE

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Interview with Dan Gaffney and Elizabeth Schoepke, SafeWell Corporation, October 29, 2024.

⁹ Id.

C. Sample Testing

- Testing of the samples is conducted by a state-certified laboratory who will pick up the samples directly from SafeWell's office after collection.¹⁰

D. Testing Results

- Upon receipt of the testing results from the laboratory, SafeWell will draft a report explaining the results in simpler terms that are easier for customers to understand. This report will explain which contaminants are present, the potential health effects of the contaminant, and possible remediation and repair options for addressing the contamination in the well.¹¹
- For repeat customers, this report will also include comparisons with previous testing results to show any trends in the well's water quality.¹²

II. TESTING COSTS

A. Non-PFAS Contaminants

- Health Scan Test ~\$394.00.¹³
- Essentials Scan Test ~\$249.00.¹⁴

B. PFAS Contaminants

- Standard PFAS Test ~ \$400.00 per test.¹⁵
- Cyclopure Testing ~ \$169.00 per test.¹⁶

III. REPAIR AND REMEDIATION COSTS

A. Non-PFAS Contaminants

- Timeline: typically takes about a week for repairs to be made to the private well once chosen by the customer.¹⁷
- Cost: Varies
 - There is no one size fits all treatment and/or repair solution for a private well for greatly depends on the type of contamination and the severity of the contamination.¹⁸
 - For instance, for bacteria contamination the most often repair solution is replacement of the well cap which costs around \$300.00.¹⁹

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Id.

¹⁵ Id. (This estimated testing costs is from SafeWell, but is in line with PFAS testing costs in other states. Standard PFAS test currently tests for both the PFAS 8 regulated by the EPA and the PFAS 6 regulated by Massachusetts. However, additional PFAS testing beyond these are available. This standard PFAS test is performed by a State Certified Laboratory).

¹⁶ Id. (This is an additional type of PFAS testing currently offered by SafeWell that examines fifty-five different characteristics. However, this laboratory is not currently certified by the Commonwealth of Massachusetts. SafeWell has submitted a proposal to the State to allow for the use of this kind of PFAS testing in their state projects. Additionally, SafeWell advocated that the Cyclopure testing is accurate and reputable, which they have confirmed by conducting their own tests to confirm the accuracy of these results.)

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

- Recent RCAP Solutions study found that for non-PFAS contamination in Massachusetts cost to repair the private well ranged from \$500.00 to \$5,000.00.²⁰

B. PFAS Contaminants

- Timeline: same as timeline for non-PFAS contaminants – about one week for repairs to be installed.²¹
- Costs: \$1,200.00 to \$6,000.00
 - Repair costs range in price depending on which repair options is chosen, which in turn depends largely on the amount of PFAS present within the system.²²
 - Most common treatment option for PFAS contamination performed by SafeWell is the Dual Tank filtration system which costs around \$6,000.00.²³
 - Previous presentation given by SafeWell found that the average cost of the 300 hundred new PFAS contamination systems they installed during that time was around \$2,800.00.²⁴
- Maintenance Costs
 - Annual maintenance is needed in order to keep the PFAS treatment system up to date and working. Depending on the level of PFAS contamination, annual testing may also be required.²⁵
 - When factoring in the additional testing needed as routine maintenance for the PFAS system, maintenance can be almost as expensive as the initial testing costs.²⁶

New England State Funding Programs and their Applicability to Massachusetts

I. VERMONT

A. American Rescue Plan Act (ARPA) On Site Funding

- General Information
 - Vermont Agency of Natural Resources received nearly \$15million in funding through the American Rescue Plan Act (“ARPA”) to “provide safe and reliable drinking water sources and wastewater disposal systems for Vermonters disproportionately affected by COVID-19.”²⁷
 - This Program provides “financial assistance to residential property owners, including owner-occupied multi-family properties with up to 4 units for the repair or replacement of failing of inadequate on-site water and/or wastewater systems.”²⁸
 - Eligibility Requirements Eligible Applicants for funding under the ARPA On-Site Funding Program must...

²⁰ RCAP Solutions. “Estimated Incomes of Well-Reliant Towns in Massachusetts.” 2023, <file:///C:/Users/cl.hbs02785/Downloads/05-PW-Household-Income-Flyer-V3.pdf>

²¹ Interview with Dan Gaffney and Elizabeth Schoepke, SafeWell Corporation, October 29, 2024.

²² Id.

²³ Id.

²⁴ Gaffney, Dan. “Presentation for Senator Rausch – Residential Drinking Water Protection” *SafeWell Corporation*, 2022.

²⁵ Interview with Dan Gaffney and Elizabeth Schoepke, SafeWell Corporation, October 29, 2024.

²⁶ Id.

²⁷ <https://anr.vermont.gov/special-topics/arpa-vermont/funding-install-or-replace-water-or-wastewater-systems>

²⁸ Id.

- (1) have a failed or inadequate on-site drinking water or wastewater system (aka wells, springs, septic systems, septic tanks, leach fields, drywells or cesspools).
- (2) Own and live on a residential property with either a single-family home or an owner-occupied, multi-family with up to four units; and
- (3) Earn a household income of less than \$80,835 per year.²⁹
- Funding Tiers³⁰
 - Household Earns less than \$65k/year
 - Receive 100% of the reasonable costs of design / permitting and construction up to \$25,000.00. [\$5k of this is for design / permitting and the remaining is for construction costs]
 - To access additional funding above \$25k, applicant must submit reasonable justification for the high-cost project and receive approval from the State
 - Payments made directly to consultants / contractors who perform the work.
- Household earns between \$65,000-80,835/year
 - Receive 100% of the reasonable costs of design/permitting and construction up to \$20,000.00
 - Receive a rebate check upon completion of the work and proof of payment.

B. Applicability to Massachusetts

- Vermont's program was established and funded under the federal American Rescue Plan Act. In order to create an exact replica of this model Massachusetts would have also needed to receive funding for these kinds of projects under the ARPA.
- However, Massachusetts could implement a similar administration scheme for the how funding, wherever it will ultimately come from, will be distributed and for what projects.
 - This would include implementing a yearly application process, establishing eligibility criteria and a funding scheme based on household income.

II. NEW HAMPSHIRE

A. Drinking Water and Ground Water Trust Fund ("DWGTF")

- General Program Information
 - The DWGTF was established in 2016 in order to receive the "\$276 million settlement funds from Exxon Mobil for MtBE contamination to the state's drinking water and groundwater resources."³¹
 - Program is run by the DWGTF Board in conjunction with the New Hampshire Department of Environmental Services, who administers "several loan and grant programs with the money to achieve" the Trust's mission.³²
 - DWGTF's Mission is to "provide for the protection, preservation and enhancement of drinking water and groundwater resources of New Hampshire."³³

²⁹ Id.

³⁰ Id.

³¹ <https://www.dwgtf.des.nh.gov/>

³² Id.

³³ <https://www.dwgtf.des.nh.gov/about>

- DWGTF awards grants, loans and matching funds on a “competitive basis to projects that protect important supply lands, create and improve water infrastructure and support private well viability.”³⁴
- Current DWGTF Funding Programs.³⁵
 - (1) Construction Project Assistance Program
 - (2) Source Water Protection Grants
 - (3) Consolidation Study Grants
 - (4) Lead Remediation for Schools

B. Applicability to Massachusetts

- The most relevant funding DWGTF program for purposes of comparing private well funding models would be the Source Water Protection Grants. As the program is currently administered, private well owners likely would not be able to apply for funding through this program since eligible projects only include those that “permanently protect high priority water supply lands or future drinking water supply sources.”³⁶
 - Additionally, private homeowners with private wells would not be eligible candidates for funding under this New Hampshire program as the list currently only includes “state agencies or municipalities, public water systems, land trusts or other non-profits that have conservation as one of its goals or other entities approved by the Advisory Commission.”³⁷
 - While this program does provide funding for “wellhead protection areas”, it appears that this is only in relation to community wells servicing multiple homes or individuals, not for a private well providing drinking water to a singular homeowner.³⁸
- The DWGTF funding program is likely not a great fit for adoption in Massachusetts as it currently does not provide funding to individual homeowners with private wells, and it was solely created in order to receive settlement funds from the ExxonMobil lawsuit.

III. MASSACHUSETTS

A. Clean Water Trust – State Treasurer’s Office

- General Information
 - The Clean Water Trust (the “Trust”) is administered by the Trust Board in collaboration with MassDEP to “help communities build or replace water infrastructure that enhances ground and surface water resources, ensures the safety of drinking water, protects public health and develops resilient communities.”³⁹

³⁴ Id.

³⁵ <https://www.dwgtf.des.nh.gov/>

³⁶ Id.

³⁷ Id.

³⁸ Id.

³⁹ <https://www.mass.gov/orgs/the-massachusetts-clean-water-trust>

- The Trust accomplishes these goals by “providing low-interest loans and grants to cities, towns, and water utilities through State Revolving Funds (SRFs)” including the Clean Water and Drinking Water SRFs.⁴⁰
- Applicability to Massachusetts
 - As the Trust is currently administered and structured, improvements to private wells supplying drinking water to individual homeowners would not qualify for funding under this program. The Trust currently accepts applications from “municipally owned wastewater systems and public drinking water suppliers.”⁴¹
 - It is also not likely that the Trust could expand their funding program to cover improvements to private wells, as the Trust was established in part to provide financial assistance “in the manner contemplated by Title VI of the Clean Water Act, to local governments as beneficiaries of the Trust to finance the cost of water pollution abatement projects as provided in and as necessary to implement the provisions of this chapter.”⁴²
 - Since the Clean Water Act does not apply to private wells, it is unlikely that this program could be amended in order to provide funding to private well improvements and testing.

B. MassHousing Septic Loan Program

- General Information
 - Program provides loans to owners of single or multi-family homes and condominiums to help address the financial costs of repairing a failing or non-compliant septic system.⁴³
 - In order to qualify for the loan, the homeowner must have an annual income of \$127,000.00 or less.⁴⁴
 - Loans range in amounts from \$1,000.00 to \$25,000.00 with a term of 15 years. The loans are also low interest, with interest rate ranging from 0% to 2.5%.⁴⁵
 - List of participating lenders is available on the program website.⁴⁶
- Applicability to Massachusetts
 - It is possible that this Loan Program could be extended to include covering the costs of private well repairs.
 - Enabling legislation described the program as a means for homeowners to “comply with the revised state environmental code for subsurface disposal of sanitary waste...”⁴⁷.

⁴⁰ Id.

⁴¹ <https://www.mass.gov/info-details/getting-state-revolving-fund-financial-assistance>

⁴² M.G.L. c.29C §3

⁴³ <https://www.masshousing.com/home-ownership/homeowners>

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ <https://www.masshousing.com/home-ownership/homeowners/septic-lenders>

⁴⁷ “Ch. 85: An Act Relative to Bond Authorization for Certain Emergency Capital Projects of the Commonwealth.” (1994); see also Open Space Bond Bill (1996); see also “Ch. 204: An Act Making Appropriations for the Fiscal Year 1996 to Provide for Supplementing Certain Existing Appropriations and For Certain Other Activities and Projects.” (1996)

- After MassDEP were to revise the state environmental code to include drinking water quality standards for private wells, could expand the program through an amendment.
- However, it does appear that expansion of the funding program would need to be approved by the legislature, and it not something MassDEP could do on its own.
- Legislature would need to amend the program through legislation or possibly a budget amendment

Comparative Analysis of Currently Enact State Private Well Programs

I. GENERAL OVERVIEW

A. Rhode Island

- Authority was granted to Rhode Island’s Office of Private Well Water Contamination within the State’s Department of Health, by R.I. General Laws s. 23-1-5.2-5.3 in 1988.⁴⁸
 - Overall, the Legislation itself is broad, and provides a wide variety of authority to the office to develop regulation and rules that are “necessary to establish drinking water quality standards for private wells...”⁴⁹.
 - Does include specific provisions regarding which contaminants are to be tested for during a real estate transfer, as well as require such disclosures during a real estate transfer.⁵⁰ (see Real Estate Transfer Provisions below for more details).
- Current regulations passed by the Office of Private Well Water Contamination can be found under 216 RICR 50-05-02.

B. Oregon

- Oregon passed the Domestic Well Testing Act in 1989.⁵¹ Statute requires that during a real estate transaction, the seller must test the private well’s water quality and share the results and the form with the buyer.⁵²
 - Overall, the language in the statute requiring this testing is broad, and provides the Oregon Health Authority with additional powers to use during the administration of this law.
- Oregon does not provide any additional tenant protections within the statute or the regulations. The State also does not provide any type of financial assistance programs to help cover the costs of the testing.

C. New Jersey

- New Jersey passed the Private Well Testing Act in 2001, which required testing of private well water for specific contaminates when a property is sold or leased.⁵³
- In addition to the testing requirement, the Statute also includes provisions related to what contaminants are to be tested for as well as additional protections for tenants in the form of landlord disclosure requirements.

⁴⁸ R.I. Gen. Laws § 23-1.5.2

⁴⁹ R.I. Gen. Laws § 23-1.5.3(5)

⁵⁰ R.I. Gen. Laws § 23-1-5.3(6)(iii)-(iv)

⁵¹ Or. Rev. Stat. § 448.271

⁵² Id.

⁵³ N.J. Stat. Ann. § 58:12A-26

- New Jersey also does provide a couple of financial assistance programs to aid the costs associated with testing and repairs.

II. FINANCIAL ASSISTANCE PROGRAMS

A. Rhode Island

- No additional funding or financial assistance programs
- State provides a 15% off coupon for well testing packages completed by state-certified labs.⁵⁴

B. Oregon

- No additional funding or financial assistance programs.

C. New Jersey

- The state administers two programs that provide financial assistance to help cover the testing costs and potential remediation / repair costs associated with well testing.
 - (1) Spill Fund Program
 - Provides financial assistance to “innocent parties suffering from direct or indirect damages resulting from the discharge of a hazardous substance.”⁵⁵ There are some additional eligibility requirements and qualifications for receiving funding under this program, but they are available for review on the program’s website.⁵⁶
 - (2) NJ Housing & Mortgage Finance Agency Potable Water Loan Program
 - This program makes funds available to “owners of single-family residence whose source of potable water exceeds NJ State Drinking Water Standards, including lead and mercury.”⁵⁷ Program also provides findings for iron and manganese contamination despite these contaminants not having a statewide pollution standard.⁵⁸
 - Maximum loan amount is \$10,000.00, and is secured by a second mortgage lien on the property which will remain until it is paid off in full. Loan is for a term of 10 years at a 1% interest rate and requires a \$75 application fee.⁵⁹

III. TESTING REQUIREMENTS FOR REAL ESTATE TRANSACTIONS

A. Rhode Island

- Statute
 - Requires testing for “coliform bacteria, fluoride, iron, lead, manganese, nitrate, nitrite, and turbidity of all private wells in service or capable being placed in service, as a source of drinking water, prior to the sale of a property upon which they are located or serviced.”⁶⁰

⁵⁴ https://web.uri.edu/wp-content/uploads/sites/61/No_Expiration_Date_Coupon_2024_reduced-1.pdf

⁵⁵ <https://www.nj.gov/dep/srp/finance/eca.htm>

⁵⁶ Id.

⁵⁷ https://www.nj.gov/dca/hmfa/consumers/docs/ho_potablewater_fs.pdf

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ R.I. Gen. Laws § 23-1-5.3(6)(iii)

- Statute also requires that the “property owner disclose the results of any previous well water testing prior to the sale or leased of a property upon which the wells are located or serviced.”⁶¹

- Regulations

- Implements R.I. Gen. Laws § 23-1-5.3(6)(iii) -(iv)’s requirement that well water be tested “during the transfer or sale of any real property, served by a well(s) or which has a well(s) capable of being placed into service as a drinking water source” for “at minimum, those contaminants contained in § 2.12.2 and any other contaminants detected during previous testing.”⁶²
- Also requires the existing owner at the time of sale provided “any and all letter reports supporting data in owner’s possession that relate to water quality of the property in question for the prior 10 years” to the potential buyer / transferees.⁶³

B. Oregon

- Language requiring testing of private well water at the time of a real estate transaction are included within the statute itself.⁶⁴
 - Requires that “in any transaction for the sale or exchange of real estate that includes a well that supplies ground water for domestic purposes, the seller of the real estate shall, upon accepting an offer to purchase real estate, have the well test for arsenic, nitrates, and total coliform bacteria.”⁶⁵ Seller must submit the results of this test to the buyer within 90 days of receiving the results.⁶⁶
 - Also grants the Oregon Health Authority the ability to “require additional tests for specific contaminants in specific areas of public health concern.”⁶⁷
- Statute also provides language stating that the conveyance of the property is “not invalidated” if the seller fails to comply with the testing requirement.⁶⁸

C. New Jersey

- Requires that every purchase and sale contract for qualifying properties with private wells for drinking water, “shall include a provision requiring, as a condition of the sale, the testing of that water supply for at least” the contaminants listed within sections 3 and 4 of the statute.⁶⁹
 - Also requires that both the buyer and the seller of the property must receive a review a copy of the water test results in order for the sale to continue moving forward and the closing of the title on the sale to take place.⁷⁰

⁶¹ R.I. Gen. Laws § 23-1-5.3(6)(iv)

⁶² 26 RICR 50-05-02.12.4(a)

⁶³ 26 RICR 50-05-02.12.4(d)

⁶⁴ Or. Rev. Stat. § 448.271

⁶⁵ Or. Rev. Stat. § 448.271(1)

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Or. Rev. Stat. § 448.271(2)

⁶⁹ N.J. Stat. Ann. § 58:12A-27

⁷⁰ Id.

IV. SANTIONS / PENALTIES FOR NON-COMPLIANCE WITH TESTING REQUIREMENT

A. Rhode Island

- The state statute provides information relating to non-compliance with the testing requirements
 - Statute states that the “failure to include” the private well testing provisions within the Purchase and Sale agreement as well as the failure to “provide the results of any previous testing” does not create any defect in title.⁷¹
 - However, despite not creating any defects in the title, the statute does provide the purchaser / prospective buyer with remedies for violation of this testing requirement.
 - For instance, the failure to include the private well testing requirement provision within the purchase and sale agreement “entitles the purchaser to void the purchase and sale agreement by providing notice, in writing, to the seller prior to the transfer of the title at the closing.”⁷²
- Beyond the provisions of the statute, there is no additional enforcement mechanism for failure to comply with the testing provision.

B. Oregon

- No additional enforcement mechanism included within the statute.

C. New Jersey

- Under state law, the real estate transactions may not “occur unless both the buyer and the seller have received and reviewed a copy of the water test results.”⁷³
 - In order for closing of title on the sale of the property to occur both parties must receive a copy of the water test results and they must both “certify in writing that they have received and review the water test results.”⁷⁴
- Beyond these provisions, there is no additional enforcement mechanism for ensuring that the private well testing is carried out before the closure of title on the sale of real property. As with other forms of disclosures, such as Title V and Lead Paint, it is possible that this requirement is further enforced by the lending financial institution or the title insurer, who will not carry out the transaction until they have all of the necessary documentation.

V. TENANT PROTECTIONS

A. Rhode Island

- Neither the state law or the current regulations include any explicit protections for tenants.

B. Oregon

- Neither the Statute nor the current regulations provide any explicit protections for tenants.

C. New Jersey

⁷¹ R.I. Gen. Laws §§ 5-20.8-12(b)-(c)

⁷² R.I. Gen. Laws § 5-20.8-12(d)

⁷³ N.J. Stat. Ann. § 58:12A-27(2)(b)

⁷⁴ Id.

- Statute provides additional tenant protections stating that “at least once every five (5) years..., the lessor of any real property the potable water supply for which is a private well for which testing of the water is not required pursuant to any other State law, shall test the water supply in the manner established pursuant to this act for at least the parameters required pursuant to sections 3 and 4 of this act.”⁷⁵

VI. TESTING COSTS

A. Rhode Island

- The State currently charges \$95 for an annual test, \$280 for a 3-5year test kit and \$410 for a 5-10-year test kit.⁷⁶
- In addition to the annual testing kit, the state also provides the option to add on additional tests for particular contaminants, which range in cost from \$5 to \$200 per test.⁷⁷

B. Oregon

- Requires that labs conducting water testing tests be certified under state standards.⁷⁸ Website provides a link to database for homeowners to use to find an approved laboratory to conduct water testing prior to real estate sales.⁷⁹
- No general form including costs for the tests, like in Rhode Island, but after looking at a couple of different approved laboratories, it looks like the required well water testing kit is around \$105.00.⁸⁰

C. New Jersey

- Provides a list of certified testing labs that carry out the necessary private well water drinking tests on their website, with multiple lab options per county.

Proposed Legislation in Other States

I. NEW YORK

A. Real Estate Testing Provision

- Requires that sale of any property that is “served by a private well that is the potable water supply for such property” shall include within the purchase and sale agreement a “provision requiring as a condition of sale, the testing of such water supply for at least the contaminants” listed within the bill.⁸¹
- Bill provides these types of testing shall be conducted by a “laboratory certified by the department” and shall test for at least the contaminants listed within the proposed statute.⁸² This list of contaminants is extensive and does include a number of PFAS contaminants.⁸³

B. Enforcement of Real Estate Testing Requirement

⁷⁵ N.J. Stat. Ann. § 58:12A-26(7)

⁷⁶ <https://health.ri.gov/forms/ordering/PrivateWellLabTest.pdf>

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ <https://alexinlabs.com/services>

⁸¹ <https://www.nysenate.gov/legislation/bills/2023/S1650>

⁸² Id.

⁸³ Id.

- Bill states that the “closing of title on the sale of such property shall not occur unless both the buyer and seller have received and review a copy of the private well water testing reporting form.”⁸⁴
- Both the buyer and the seller will be required at closing to “certify in writing that they have received and reviewed the water test results.”⁸⁵

C. Tenant Protections

- Proposed legislation requires that “within 2 years after the effective date of this section and at least once every 5 years thereafter, the lessor of any real property the potable water supply for which is a private well shall test that water supply in the manner established pursuant to this section for at least the contaminants required pursuant” to the list above.⁸⁶
 - Also requires that within 10 business days of receiving the private well testing results, the landlord shall provide a written copy of the testing results to each tenant.⁸⁷
- Landlord is also responsible for providing a written copy of the “most recent private well water testing report to a prospective tenant prior to the signing of a lease of a rental unit on the property.”⁸⁸

Comparison to Enabling Legislation for Title V Program

I. TITLE V PROGRAM IN MASSACHUSETTS

A. Enabling Statute

- The current systems in place for regulating sewer system throughout the Commonwealth was enacted 1975 and granted the Commissioner of Environmental Quality (now Massachusetts Department of Environmental Protection) the power to “adopt and from time to time amend, regulations to be known as the state environmental code.”⁸⁹
 - Environmental code would address matters “affecting the environmental and the well-being of the public of the Commonwealth over which the Department takes cognizance and responsibility including but not limited to, standards for swimming pools, bathing beaches, family type camp grounds and the disposal of sewage.”⁹⁰
- The language of the original statute is broad and grants sweeping authority to the Commissioner to develop and adopt regulations relating to the disposal of sewage, with no additional guidelines.

B. Amendments to Enabling Statute

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ St. 1975 c. 706 §79, “An Act Relative to the Executive Office of Environmental Affairs.”, 1975

<https://archives.lib.state.ma.us/server/api/core/bitstreams/4e9b4467-baa5-4d3b-96d5-2a88dd9c03b9/content>

⁹⁰ Id.

- Enabling statute creating the environmental code, which includes the Title V program, has been amended seven times since its initial adoption in 1975.⁹¹
- Most relevant amendment to the statute, for our purposes, occurred in 2004 and added the following paragraph relating to testing at the time of real estate transfers:
 - “The Department shall not require an inspection of a system for the treatment and the disposal of sanitary sewage below the ground surface if the transfer is of residential real property and is between the following relationships: (1) between current spouses, (2) between parents and children, (3) between full siblings and (4) where the grantor transferred the real property to be held in a revocable or irrevocable trust, where at least one of the designated beneficiaries is of the first degree of relationship to the grantor.”⁹²
- Appears that this 2004 amendment was in response to MassDEP’s decision to include testing at the time of transfer of property within the Title 5 regulations in 1994.⁹³

II. COMPARISON TO PROPOSED PRIVATE WELL LEGISLATION

A. Structure

- Both the enabling statute for the state environmental code and the proposed private well legislation are broad in their grants of authority to Massachusetts Department of Environmental Protection (“MassDEP”).
 - This broad authority would enable MassDEP to adopt regulations that they deem best based on their expertise and experience in the area.

B. No Specific Real Estate Testing Provision within the Statute.

- MassDEP was able to require testing at the time for real estate transfers under the Title V program via regulation in 1994.⁹⁴
 - This was done without specific authority from the legislature and the current Title V testing requirement remains in place, with only a small limitation imposed on it by the Legislature via an amendment to the statute in 2004.⁹⁵
- Current version of the proposed private well legislation also does not include a specific provision relating to a testing at the time of real estate transfer requirement and could call for such a requirement to be added later via regulations by MassDEP.
 - While it is possible for this requirement to be added later by regulation by MassDEP, there is nothing within the statute that would require MassDEP to do so.
 - It is also important to note that all of the other states with private well legislation currently enacted have included the testing at the time of real estate transfers requirement explicitly within the statute itself.⁹⁶

⁹¹ see St. 1977, c.274; St.1979 c.294; St. 1986 c.162 §1; St. 1987 c.1974; St.2004 c.149 §39; st.2014 c.259 §13

⁹² St. 2004 c.149 §39; see also Mass. Gen. Laws Ann. Ch. 21A §13

⁹³ 1994 Massachusetts Register, p. 290, September 23, 1994, <https://archives.lib.state.ma.us/handle/2452/858162>

⁹⁴ Id.

⁹⁵ St. 2004 c.149 §39; see also Mass. Gen. Laws Ann. Ch. 21A §13

⁹⁶ see R.I. Gen. Laws §23-1-5.3(6)(iii) ; see also Or. Rev. Stat. §448.271 ; see also N.J. Stat. Ann. §58:12A-27

Testing Requirements and Enforcement Mechanisms within Title V

- Real Estate Testing Requirement
 - As previously mentioned, testing at time of real estate transfers is not explicitly mentioned in Title V statute, but rather is a requirement enforced via regulation.
 - Under the current regulations, owner of a property with a septic system is required to conduct an inspection of the system within a certain timeframe before or after the sale occurs.⁹⁷
 - Failure to comply with this testing requirement “constitutes a violation of 310 C.M.R. 15.000.”⁹⁸
- Enforcement Provisions
 - Title V Regulation
 - Under the regulations, MassDEP has authority to “enforce the provisions of 310 C.M.R. 15.000 under applicable provisions of M.G.L. c. 21 s. 26-53; M.G.L. c.21A ss 13, 13A and 16 and any other applicable law...”⁹⁹
 - In addition to MassDEP, “local approving authorities” also have the power to “enforce the provisions of 310 C.M.R. 15.000 in the same manner in which local health rules and regulations are enforced.”¹⁰⁰
- Enabling Statute
 - Any violation of the state environmental code “(a) shall be punishable by a fine or not more than \$25,000.00 for each day that such violation occurs or continues or by imprisonment for not more than one year or both such fine and imprisonment or (b) shall be subject to a civil penalty not to exceed \$25,000.00 for each day that such violation occurs or continues.”¹⁰¹
 - Additionally, local boards of health also are able to enforce the environmental code “in the same manner in which local health rules and regulations are enforced.”¹⁰²

⁹⁷ 310 C.M.R. 15.301

⁹⁸ 310 C.M.R. 15.301(11).

⁹⁹ 310 C.M.R. 15.025(3)

¹⁰⁰ 310 C.M.R. 15.025(2)

¹⁰¹ Mass. Gen. Laws Ann. Ch.21A §13

¹⁰² Id.