LEGAL ISSUES IN ON-SITE WASTEWATER MANAGEMENT

John H. Schaeffer Special Deputy Attorney General North Carolina Department of Justice

1

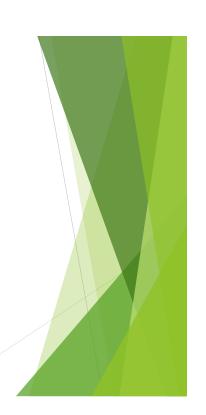
UPDATE ON THE HAPPENINGS AT DOJ

- ► John P. Barkley retired effective December 31, 2023.
- ► Took his 37 years of service, and more importantly, his 37 years' worth of knowledge, with him



MEET THE "NEW" TEAM

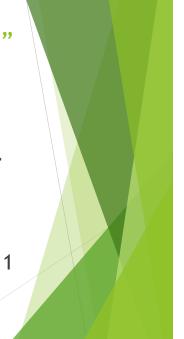
- ▶ John H. Schaeffer
- ▶ 6+ years with DOJ in Public Health
- ▶ 34 years of practicing law
- ► Hyrum Hemingway
- ▶ 1+ year with DOJ in Public Health
- ▶ 10 years of practicing law



2

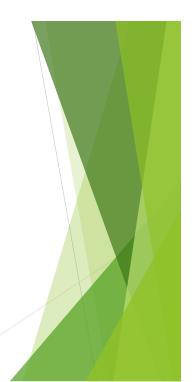
"WHAT'S THE DEAL WITH WASTEWATER?" - JERRY SEINFELD (POSSIBLY)

- Approximately 25% of all homes in the U.S. utilize a septic system
- North Carolina is in top 5 with nearly 50% using septic systems (in case you get to be a contestant on Jeopardy Vermont is No. 1 at 55%)



"YOU HAVE TO KNOW THE PAST TO UNDERSTAND THE PRESENT." - CARL SAGAN

- Let me tell you a story which involves:
 - Love
 - **►**Honor
 - **▶**Betrayal
 - Loss
 - **▶**Redemption



5

THE "STORY" OF 15A NCAC 18E (more like a brief history)

- ► First on-site wastewater treatment system rules adopted in 1977
- Last complete package update was 1990
- Some sections updated periodically in 1980s and 1990s



A BRIEF HISTORY OF 18E

- ▶ Over time we experienced technological advances, standardized terminology, and enhanced practical knowledge
- ▶ In the late 90s/early 2000s activities began to update and modernize the rules, but those efforts lost steam and no rulemaking process attempted



7

A BRIEF HISTORY OF 18E

- ► Then, in 2014, new efforts were made, rules were proposed, adopted by the Commission for Public Health, and ultimately approved by the Rules Review Commission in late 2018.
- "And there was much rejoicing." Narrator, Monty Python & the Holy Grail



"NOT SO FAST MY FRIEND" - ESPN'S LEE CORSO

- ► The state legislature disapproved
- A "Task Force" was created, modifications occurred, there was drafting, and re-drafting, "yada, yada, yada," and now we are here. A new complete overhaul.



9

SOME THINGS TO KNOW ABOUT 18E

- ▶ Went into effect on January 1, 2024
 - ► In late January, I received a case from OAH where a County evaluated a site earlier in the month and based its denial of an IP on .1900 rules
 - Hyrum just received a similar case last week involving another January inspection involving a different County



SOME THINGS TO KNOW ABOUT 18E

- It is not a perfect set of rules
 - ► As noted in the prior presentation, the legislature passed 3 Session Laws in 2023
 - ► Each involved their attempt to address one issue without worrying about the impact on all the other rules
 - ▶In short, there are some inconsistencies



SOME THINGS TO KNOW ABOUT 18E

- ► A solution may be at hand
 - ►The "powers that be" have been made aware of these inconsistencies, incongruities, and abnormalities and there is a hope of new legislation that will fix it



SOME THINGS TO KNOW ABOUT 18E

- ▶ Until then . . .
 - It will be bumpy and confusing as we navigate through these waters
 - ► The REHS should consult with their supervisors & the Regional Soil Scientists
 - ▶ DPH and DOJ will help with support and hopefully provide some clarity



13

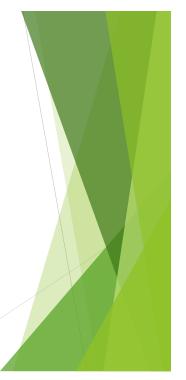
SOME THINGS TO KNOW ABOUT 18E

- ▶ Biggest issues:
 - ► Applicability rule (.0102)
 - Existing systems inspections (.0206)
 - ▶ Use of BPJ (.1306)
 - ► Setbacks (.0601)



OTHER OPTIONS

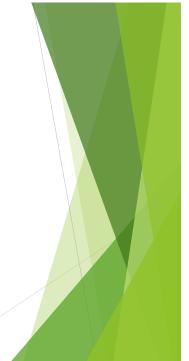
- Minimizing/Eliminating gov't involvement efforts are ongoing
 - ► Engineered Option Permit ("EOP") NCGS 130A-336.1
 - Authorized On-Site Wastewater Evaluator ("AOWE") NCGS 130A-336.2
 - ► Hybrid/Licensed Soil Scientist model (NCGS 130A-335(a2)
 - LHDs now have even less responsibility



15

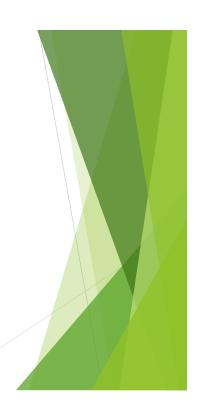
EOP and AOWE 130A-336.1 and 336.2

- ► LHDs no longer required to check for completeness or participate in postconstruction conference
- Now, revoke existing permits for site, file documents, review any performance and operation reports, and perform any .1305 inspections



HYBRID MODEL (130A-335(a2)

- ► The private sector may issue the IP, CA, and/or OP
- ▶ The LHD may issue the IP, CA, and/or OP
- ► LHD must do a completeness review on these
- ► All these options end up being very confusing for everyone involved



17

15A NCAC 18E .1305 & .1306

- ▶ .1305 deals with Local Health Department responsibilities for wastewater system operation and maintenance
- ▶ .1306 concerns system malfunctions and repair and the Local Health Department's role (also discusses BPJ)



TELL ME MORE INTERESTING INFORMATION, PLEASE

- ► As a vast majority of OAH contested cases involve on-site wastewater, DOJ and DHHS taking a new approach to defending these actions
- As you may know, almost all Petitioner's are unrepresented by counsel
- ▶ Utilize OAH website to prepare Petition and file it with OAH to start the case



19

OAH CASES & WASTEWATER

- Many name the County Health Department as the Respondent, instead of DHHS
- ▶ Only a State Agency, such as DHHS, can be sued at OAH (NCGS 150B-2)
- ► Additionally, the Petition must be "served" for OAH to have personal jurisdiction (NCGS 1-76.4 and Civil Rule 4(j)



OAH & WASTEWATER

- ► The term "service" has a very specific meaning personal service or certified mail
- ► However, the OAH online Petition form says the Petitioner can send it "via U.S. mail" to DHHS' General Counsel
- ► Hyrum and I have been filing Motions to Dismiss over the past several months on this issue



21

OAH & WASTEWATER

- Unfortunately, have yet to get a ruling clarifying the service issue
- ► Another key point Petitioner must serve Julie Cronin as DHHS General Counsel
- ▶ They cannot serve the County Health Department. If they serve County instead of DHHS, it can be dismissed



OAH WASTEWATER CASE PAYOUTS

- ► For period of 2019 through 2023:
- ► 54 on-site cases in OAH and/or Superior Court
- ► Over \$2.1 million paid out in settlement agreements (Avg: \$38,888)
- ▶ Nearly \$1.4 million paid by State
- Approx. 700k paid by Counties (more than half by one county for one subdivision).



23

QUESTIONS, BUT MAYBE NO ANSWERS

Any questions that you want to ask me that I can have Jon Fowlkes answer?



CONTACT INFORMATION

- ▶ John H. Schaeffer
- ▶ N.C. Department of Justice
- ▶ 114 W. Edenton Street, P.O. Box 629
- ► Raleigh, NC 27602-0629
- ► E-mail: <u>jschaeffer@ncdoj.gov</u>
- ▶ Office: (919) 716-6843

