

LEGAL ISSUES IN ON-SITE WASTEWATER MANAGEMENT

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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

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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

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“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%)

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“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

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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

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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 rule-making process attempted

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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

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“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.

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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

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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

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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

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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

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SOME THINGS TO KNOW ABOUT 18E

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

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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

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EOP and AOWE 130A-336.1 and 336.2

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

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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

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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)

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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

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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))

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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

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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

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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).

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QUESTIONS, BUT MAYBE NO ANSWERS

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

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