

DEFENSE OF ENVIRONMENTAL HEALTH STAFF & LEGAL REMEDIES

2025 LOCAL HEALTH DIRECTORS' LEGAL CONFERENCE

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PART ONE – DEFENSE OF ENVIRONMENTAL HEALTH WORKERS

- How does the enactment of Session Law 2024-49 (revising NCGS 143-300.8) impact the defense of REHS staff?

FOLLOW THE ADVICE OF GOVERNESS MARIA



“LET’S START AT THE VERY BEGINNING, A VERY GOOD PLACE TO START” – MARIA VON TRAPP

- Look at the origins of 143-300.8
- Look at the impact of Local Rules in 130A
- Look at the appeal process for Rules set by the Commission for Public Health (“CPH”) and the appeal process for Local Rules

“SHERMAN, SET
THE WAYBACK
MACHINE TO
1987.”



A Spartan warrior, likely from the movie 300, stands in a battle formation. He is wearing a bronze helmet with a large crest and a red cape. He is holding a spear in his right hand and a shield in his left. The background shows a dense line of spears and shields, suggesting a large army. The lighting is dramatic, with a bright light source behind the warrior, creating a silhouette effect.

DEFEND THE SANITARIANS!

SESSION LAW 1987-654

- "§ 143-300.8. **Defense of local sanitarians.** - Any local health department sanitarian enforcing rules of the Commission for Health Services under the supervision of the Department of Human Resources pursuant to G.S. 130A-4(b) shall be defended by the Attorney General, subject to the provisions of G.S. 143-300.4, and shall be protected from liability in accordance with the provisions of this Article in any civil or criminal action or proceeding brought against the sanitarian in his official or individual capacity, or both, on account of an act done or omission made in the scope and course of enforcing the rules of the Commission for Health Services. The Department of Human Resources shall pay any judgment against the sanitarian, or any settlement made on his behalf, subject to the provisions of G.S. 143-300.6."

WHO OR WHAT IS A “SANITARIAN?”

H. B. 755 CHAPTER 1271 (1959)

The General Assembly of North Carolina do enact:

Section 1. Definitions, (a) For the purpose of this Act, "Sanitarian" means a person who is qualified by education and experience in the biological and sanitary sciences to engage in the promotion and protection of the public health by the application of technical knowledge to solve problems of a sanitary nature and the development of methods for the control of man's environment for the protection of health, safety, and well-being.

I 98 I UPDATED VERSION

“Sanitarian” is a public health professional qualified by education in the arts and sciences, specialized training, and acceptable environmental health field experience to effectively plan, organize, manage, execute and evaluate one or more of the many diverse elements comprising the field of environmental health. (NCGS 90A-5 I)

BACK TO 1987 AND 143-300.8

- KEY POINTS:
 - Any Local Health Department Sanitarian
 - Enforcing the Commission's rules
 - Under the supervision of the Department (DHHS)
 - Shall be defended by the Attorney General
 - And protected from liability
 - For acts and/or omissions done
 - While enforcing the Commission's rules

NUMEROUS REVISIONS OVER THE YEARS

- SESSION LAW 1989-727
- SESSION LAW 1997-443
- SESSION LAW 2006-202
- SESSION LAW 2007-182
- SESSION LAW 2011-145
- SESSION LAW 2011-391

SESSION LAW 2011-391

"§ 143-300.8. Defense of local sanitarians.

- Any local health department sanitarian enforcing rules of the Commission for Public Health under the supervision of the Department of Health and Human Services pursuant to G.S. 130A-4 shall be defended by the Attorney General, subject to the provisions of G.S. 143-300.4, and shall be protected from liability in accordance with the provisions of this Article in any civil or criminal action or proceeding brought against the sanitarian in his official or individual capacity, or both, on account of an act done or omission made in the scope and course of enforcing the rules of the Commission for Public Health. The Department of ~~Environment and Natural Resources~~ Health and Human Services shall pay any judgment against the sanitarian, or any settlement made on his behalf, subject to the provisions of G.S. 143-300.6."

WHEN IS THIS APPLICABLE?

- Does not come into play with administrative appeals to OAH
 - Those involve only DHHS as Respondent (even when Petitioners name the County Health Department as a party).
- Going to be a concern with cases filed in a North Carolina Superior Court or U.S. District Court
 - When an employee is named as a Defendant

THE PROCESS

- Need to make DOJ (preferably me) aware of the lawsuit as soon as possible
- DOJ will send a standard letter for you to sign “requesting” representation
- The returned form request gets reviewed by DOJ Administration with input from DHHS
- DOJ generates letter evidencing acceptance of representation

WHEN WILL DOJ NOT DEFEND ENVIRONMENTAL STAFF

- Not acting within the course and scope as a State agent
- Acts committed by fraud, corruption, and/or malice
- If an ethical conflict of interest exists between employee and State
- Providing a defense would not be in the State's best interests
- Employee does not want State to defend but wants to hire (and pay) own attorney

WHAT ABOUT THE IMPACT OF LOCAL RULES?

- The General Assembly is silent about local rules in the defense of sanitarians original statute and all the subsequent amendments from 1987 through 2011

LHD AUTHORITY TO IMPLEMENT LOCAL RULES

- I 30A-39(B): A Local Board of Health may adopt a more stringent rule in an area regulated by the Commission for Public Health ... where, in the opinion of the Local Board of Health, a more stringent rule is required to protect the public health ...
- I 30A-39(F): A Local Board of Health, may, in its rules, adopt by reference, ... any rule. ... adopted by any Agency of the State

WHAT ARE YOU SAYING, JOHN?

- I 30A-39 existed in its current form prior to the General Assembly enacting I 43-300.8
- Logically, the General Assembly did not intend for the Attorney General to defend Sanitariums when enforcing Local Rules

MAKES SENSE WHEN CONSIDERTING THE APPEALS PROCESSES IN NCGS 130A-24

- 130A-24(a): Appeals concerning enforcement of the Commission's Rules or concerning the suspension and revocation of permits by the Secretary, shall be governed by 150B (the Admin. Procedures Act).
- 130A-24(b): Appeals concerning the enforcement of rules from a Local Board of Health shall be conducted in accordance with subsections (c) and (d) of this section. (emphasis added).

THE QUANDRY AKA “THE PICKLE”

- What happens when you have local rules and Commission rules adopted by reference, what is the procedure?
- The Detroit Pistons of the 1980s had “The Jordan Rules” but DOJ has ...

THE BARKLEY RULES



THE BARKLEY RULES

- If you have any local rules, then all your rules are “local rules”
- If it appeal letter instructs the person to appeal to OAH as part of the Administrative Act, then no local rule can be involved because OAH would not have jurisdiction.
- Conversely, if the appeal letter instructs the person to appeal to the Local Health Department, the LHD can consider both local rules and the Commission’s rules since they were adopted by reference (Supported by language in 130A-24(b)).

THE NEWLY REVISED 143-300.8 SESSION LAW 2024-49 (SB 166)

- Numerous Changes & Additions
 - Eliminates “Sanitaricians” and add “Registered Environmental Health Specialists” as well as “Interns” and “Associates.”
 - Requires LHDs to enter “Annual Agreements” with DHHS
 - LHD to provide environmental health services
 - Shall include a requirement for quality assurance for all services

DEFENSE OF REHS, INTERNS & ASSOCIATES

- 143-300.8(c): Similar to what has existed before, but with updated terminology and definitions.
- Importantly, adds that the LHD employing the REHS, will pay half of any judgment or settlement. Also, DHHS may agree with LHD to pay more than half depending upon the individual circumstances of the case.

DEFENSE OF REHS, INTERNS & ASSOCIATES

- 143-300.8(d): If no Annual Agreement between LHD and DHHS, or failure to abide by the Annual Agreement, then the Attorney General will not defend and DHHS will not pay part of the judgment or settlement, and the LHD will be responsible for the entire settlement or judgment (emphasis added).

DEFENSE OF REHS, INTERNS & ASSOCIATES

- I 43-300.8(e): A REHS, REHSI, or REHSA, shall not be defended by the Attorney General or protected from liability, for any claim arising from any act or omission made in enforcing a local rule adopted pursuant to I 30A-335(c).
- I 30A-335 involves septic, but what about other local rules such as pools, tattoo parlors, etc.?

THE BARKLEY RULES STRIKE BACK



“PLUS ÇA CHANGE, PLUS C’EST LA MÊME CHOSE.” –
RUSH (“CIRCUMSTANCES”)



“The more that things
change, the more they stay
the same.”

Meaning, the Barkley Rules
still apply.

“MAIS JEAN, POURQUOI?”

- One, the driving force behind the changes were the Home Builders Association, who are naturally concerned with septic, and not so much with other environmental health issues
- Two, it may have been added due to the current language of I 30A-39(b), which allows local rules for certain septic systems per I 30A-335(c).

WHY? CONTINUED

- Three, the General Assembly has a long and storied history of putting out legislation that is not “whole” and which may directly conflict with other legislation, or in this case ...

CONFLICT WITH THE SAME STATUTE

- If we read 143-300.8(e) strictly, then the AG does not provide a defense for some on-site local rules but will provide a defense with all other local rules (pools, tattoo, etc.)
- But 143-300.8(c), just two sections above, says the AG provides a defense when the REHS is enforcing the Commission's rules
- When such a conflict arises, courts look toward legislative intent and reasonableness

REASONABLENESS

- Did the legislature intend for the AG's office to provide a defense to any appeal of a local non-septic rule and appear before the local board of health, especially after just stating that the AG's office will provide a defense involving CPH rules?
- Or did the legislature intend for the enforcement of all local rules (more than just septic) to be outside the scope of AG representation?

WHAT ABOUT THIS SIMPLE PROPOSAL (THAT IS ACTUALLY NOT SO SIMPLE)

- How about this? Let's have the AG's office represent the REHS when a CPH rule is involved, and the County Attorney represent the REHS when a local rule is involved?"
- Creates logistical problems:
 - When does one determine what rule or rules are at issue?
 - Is it at filing?
 - Is it during discovery?

STILL MORE QUESTIONS

- Who represents the REHS initially?
- What forum should the case be in?
- What if the real rule at issue is different than the one initially raised on appeal?
- If multiple rules are at issue - some CPH and some local - are there two different appeals in two different forums?

QUITE SIMPLY, THE BARKLEY RULES, RULE

Despite the wording of 143-300.8(e), a County with local rules adopts/incorporates by reference the CPH rules and thus the entire set are now "local rules" where all appeals will be handled locally and via 130A-24(b),(c), and (d).

- There is no need to use special language such as "incorporates" or "adopts by reference" the CPH rules. Language such as "The local rules are in addition to the Commission's rules" will suffice. It will be understood the County is enforcing CPH rules and local rules as one.

ADDITIONAL SUPPORT FOR THE BARKLEY RULES

- Some local rules give the LHD Director the authority, in cases of conflict, to determine whether the Commission's rule or the Local rule applies.
- This implies ownership of the CPH rules and the permission to disregard them.
- Query - How would the AG defend this position since the AG is statutorily required to defend a REHS enforcing Commission rules?

THE HDSAI

- Health Department Self-Assessment Instrument (HDSAI) Interpretation Document for LHD Accreditation
- Activity 17.2 discusses local health department inspection and permitting practices pursuant to local rules, ordinances, or policies.
- It also states that since these are local health programs, no program letters will be sent through DHHS, signifying the State (including the AG) will not be involved.

STATE ASSISTANCE

- Both DOJ and DHHS remain available to provide consultation and assistance.
- If a County abandons local rules, and its REHS staff have received completion letters from DHHS, they would then become authorized. Also, if a REHS contracts with a county that doesn't have local rules, the REHS would be authorized.

A BRIEF INTERMISSION



PART TWO – A QUICK OVERVIEW OF LEGAL REMEDIES

- Types of “Adverse Actions”
 - Denial of an Application
 - Notice of Intent to Suspend/Revoke
 - Immediate Suspension/Revocation
 - Notice of Non-compliance or Notice of Violation (“Diet Adverse”)

DENIAL OF AN APPLICATION

- Most often in on-site wastewater matters
- Incomplete or insufficient information
- Inaccurate information
- Existing criteria not met

NOTICE OF INTENT TO SUSPEND/REVOKE (AN EXISTING PERMIT)

- “Notice of Intent” (NOI) much more common than Immediate Suspension/Revocation
- Provides the permit holder notice that a violation has been found
- Specifies the violation(s)
- Gives the permit holder 30 days to correct the violation(s) or appeal, or else the permit will be suspended/revoked, and other legal action may be taken

IMMEDIATE SUSPENSION OR REVOCATION

- Not as common as Notices of Intent to Suspend/Revoke
- May involve instances of “Imminent Hazard” (NCGS 130A-23(d))
- An "Imminent Hazard" is a situation that is likely to cause an **immediate threat to human life**, an **immediate threat of serious physical injury**, an **immediate threat of serious adverse health effects**, or a **serious risk of irreparable damage to the environment** if no immediate action is taken."

NOTICE OF NON-COMPLIANCE

- Unique to on-site 18E rules
- A “Notice of Non-Compliance” shall be issued when the wastewater system is non-compliance with N.C.G.S. Section 130A, Article 11, 18E, or the performance standards or conditions in the OP or ATO
- Provides notice to the permit holder that their system is non-compliant in some specific manner
- Less drastic measure - has no appeal rights (thus, “Diet Adverse”)

NOTICE OF VIOLATION (NOV)

- Similar to Notice of Intent (NOI), but without the intent to take action and no appeal rights
- NOV - "If you don't fix the situation, we MIGHT take legal action"
- Versus NOI - "If you don't fix the situation, we WILL take action in 30 days."
- NOV should not have the appeal rights language in the form, but sometimes does

OTHER ALTERNATIVE MEASURES AVAILABLE

- Injunction/Abatement Order
- Embargo
- Criminal Penalties

INJUNCTION/ABATEMENT

- Can initiate an injunction action in Superior Court for violation of the **General Statutes** or **Rules** or a **condition** of the permit. (NCGS Section 130A-18).
- An "injunction" is a court order that stops a person from beginning or continuing an action that invades the legal right of another.
- In other words: STOP!

INJUNCTION/ABATEMENT

Abatement Orders

- Issued by the Local Health Director
- Can obtain a court order enforcing the abatement order

Injunctions

- Local Health Director may seek in court
- Superior Court Judge will decide whether to grant injunction

INJUNCTIONS

- Can be pursued by DHHS
- Often it is the County Attorney that will seek the injunction from the Court
- Matter of logistics: 100 counties, 87 health districts, and now, only one Special Deputy Attorney General
- Plus, local judges may not exactly be receptive to “Big Bad Raleigh” coming into town and telling them what to do

INJUNCTION/ABATEMENT

- So, roadside food stand that does not have a permit.
 - Seek injunction to tell them to STOP until they get one
- Wastewater system which owner has the resources to fix, but won't
 - Issue abatement to get them to TAKE ACTION
 - Seek Court order to enforce Abatement

EMBARGO (FOOD & LODGING – SO NO LOCAL RULES)

- An order from a public health official requiring a person to detain or hold food or drink that the official believes is adulterated or misbranded
- It's a “detention” order, not a “seizure” order
- Pre-2011, only the Department of Agriculture could use, then the statute (NCGS 130A-21) changed

EMBARGO

- Not REHS, must be Regional Specialist or Local Health Director
- **IMPORTANT:** REHS must **ASK** permit holder to dispose of items, and cannot force them to do so
- “You cannot serve that. Please throw it away.” – OK
- “You must throw that away.” – NOT OK
- Reason? Need a court order to require disposal

EMBARGO

- If they throw away, also need to do something to make it unusable (e.g., bleach)
- If they will not voluntarily dispose of the food, you can tag it so that it cannot be used.
- REHS and County Attorney can then go to Superior Court and have a hearing on whether the food is safe or not.
- Reality is that they will lose the food and have to pay court costs

CRIMINAL ACTIONS

- Any violation of the laws or rules is a criminal act and a misdemeanor. (NCGS 130A-25(a)).
- REHS has the option of taking the violation to the local District Attorney
- REHS will have to explain to the DA what happened and why it is serious enough for criminal action
- Reality is that the DA will not be interested unless severe
- REHS should discuss with supervisor before going to DA

CRIMINAL PENALTIES

- One example:
- Restaurant Grade Cards displayed
- “A” is always posted prominently
- “B” or “C” tends to sink to lower spots on the wall or may vanish completely
- A criminal summons served by a Deputy Sheriff can work to get the grade cards back up to where they need to be

OTHER REMEDIES

- Administrative Penalties
- Example: Wastewater system in violation, can either change site or system, but owner continues to be in violation.
- In Wake and Orange counties, LHD can implement Administrative Penalties because it is a violation of local rules
- All other areas, the penalties must come from the State
- < 480 g/day, single family dwelling = \$50 per day
- > 480 g/day, not single family = \$300 per day

DID I LEAVE ANY TIME FOR QUESTIONS? (IF I DID THEN I MESSED UP)

- Contact Information:
- John H. Schaeffer
- Special Deputy Attorney General
- jschaeffer@ncdoj.gov
- (919) 716-6843 (Office – I'm sometimes there, but it should forward)
- (919) 480-8022 (Special/Work mobile number)

PARTING
REMINDER: THE
KENTUCKY
DERBY IS MAY 3

