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2006 LEGISLATION AFFECTING ENVIRONMENTAL HEALTH

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This past year was an extraordinarily busy one in the environmental health arena. Legislation was enacted in many of the key fields of environmental health practice, including drinking water, on-site wastewater, food and lodging, and childhood lead poisoning. This Bulletin summarizes this legislation, with a particular focus on how the new and amended laws will affect local health departments and their employees.

Drinking Water

Private Wells

Arguably the most significant public health legislation enacted this past session was a new mandate for local governments to develop programs to regulate private drinking water wells.[1] Under the law, a "private drinking water well" (or private well) is one that (a) serves or is proposed to serve 14 or fewer service connections or (b) serves or is proposed to serve 24 or fewer individuals.[2] Prior to the adoption of this new law, the operation of private drinking water wells was not subject to regulation by the state. Since 1967, state law has included construction standards for private wells, but there

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[1] S.L. 2006-202 (H 2873); S.L. 2006-259, sec. 51 (S 1523) (amending G.S. 87-97(h)).

[2] The full definition of "private drinking water well" is "any excavation that is cored, bored, drilled, jetted, dug, or otherwise constructed to obtain groundwater for human consumption and that serves or is proposed to serve 14 or fewer service connections or that serves or is proposed to serve 24 or fewer individuals. The term 'private drinking water well' includes a well that supplies drinking water to a transient noncommunity water system as defined in 40 Code of Federal Regulations § 141.2 (1 July 2003 Edition)." S.L. 2006-202 (amending G.S. 87-85).

was little oversight of the construction or enforcement of the standards in most counties.[3]

All local health departments are involved with private wells to some extent. State law requires each local health department to have a program for collecting water samples from private wells and submitting the samples for laboratory testing. [4] This sampling and testing is typically done in response to a property owner's or resident's request or in response to a disease or outbreak investigation. Some local governments had gone even further, however, by establishing local permitting programs for private wells and actively enforcing the state construction standards.[5] Under North Carolina General Statutes Chapter 87, local boards of health are authorized to implement such programs by adopting the Environmental Management Commission's well regulations by reference and incorporating more stringent provisions when necessary to protect the public health.[6]

Under the new law, all local health departments are now required to implement programs for permitting, inspecting and testing wells. Local programs must be operational by July 1, 2008. The statute outlines some of the basic requirements applicable to these local programs, but many of the details will be explained in the coming months in regulations to be adopted by the EMC.[7] Once the state regulations are in place and the local environmental health specialists are enforcing the state regulations, the specialists will be considered agents of the Department of Environment and Natural Resources (DENR) for liability and insurance purposes.[8]

Permitting and Inspection

State law establishes two new types of private well permits: construction permits and repair permits.[9] A construction permit is required if a person is installing a new well. A repair permit is required for maintenance work that involves breaking or opening of the well seal. A permit is not required if the repair involves only the repair or replacement of a pump or tank.

The statute provides some limited guidance about the permitting process, but the details – such as the procedure for applying for permits – will likely become clearer once the EMC issues regulations. In summary, the statute provides the following guidance:

- *Initial investigation*: The health department must conduct a field investigation to evaluate the site for the well.

[3] *See* GS Chapter 87, Article 7 (North Carolina Well Construction Act). DENR and the Environmental Management Commission do exercise some oversight of other types of wells, such as those with designed capacity of 100,000 gallons per day or greater. G.S. 87-88(a). Smaller private drinking water wells, such as those governed by this new legislation, were included in the state permitting system only if they were located in a geographical area where the EMC concluded that the groundwater needed additional protection. *Id.* The state also has a system in place to certify well contractors. G.S. Chapter 87, Article 7A (Well Contractors Certification).

[4] State regulations require local health departments to establish, implement, and maintain written policies that include provisions for (1) inspecting and testing individual water supplies upon request and identifying needed improvements, and (2) investigating complaints and suspected outbreaks associated with water supplies. 10A NCAC 46.0210(a). See also G.S. 130A-1.1(b)(2)b (providing that water safety and sanitation is a mandated public health service under state law).

[5] According to DENR, approximately 33 health departments had local well programs in August 2006. Oral report of Terry Pierce, Director of the Division of Environmental Health, at the meeting of the North Carolina Association of Local Health Directors (August 17, 2006).

[6] G.S. 87-96.

[7] S.L. 2006-202, sec. 2 (amending G.S. 87-87; subsection (7) requires the Environmental Management Commission to adopt regulations governing private wells).

[8] S.L. 2006-202, sec. 7 (amending G.S. 143-300.8). Under this statute, an environmental health specialist enforcing state regulations is treated as if she is a state employee. If sued based on enforcement of those regulations, the specialist may be represented by the Attorney General's office, the claim may fall within the State Tort Claims Act and be heard by the Industrial Commission and all or a portion of any judgment may be paid by the state. Note that if the specialist is not acting within the scope of her agency (i.e., not enforcing the state regulations but enforcing local rules or policies), she will most likely not be considered an agent of the state and therefore will not be represented by the Attorney General's office. *See* Cates v. N.C. Dept. of Justice, 346 N.C. 781 (1997) (concluding that a specialist conducting preliminary soil evaluations is not enforcing state regulations and therefore is not entitled to representation from the Attorney General's office).

[9] S.L. 2006-202, sec. 4 (establishing new G.S. 87-97).

- *Permit*: The health department must issue a construction or repair permit if it determines that the well can be operated in compliance with state law. The health department may impose conditions on the issuance of a construction or repair permit if necessary to ensure compliance with the state law. Permits are valid for five years except that the health department may revoke a permit at any time if it determines that there has been a material change in any fact or circumstance upon which the permit was issued.
- *Inspection and certificate of completion*: When the construction or repair is complete, the health department must inspect the well to determine whether it is in compliance with the permit and applicable law. If it is in compliance, the health department must issue a certificate of completion.[10]

Water Testing

After the health department has issued a certificate of completion, it has thirty days to either (1) take a sample of the water and send it to a laboratory for testing or (2) ensure that the water has been sampled and tested by a certified laboratory.[11] The Commission for Health Services is required to adopt regulations governing the sampling and testing of the water and reporting of the results.[12] The State Laboratory of Public Health may charge a fee of up to fifty-five dollars ($55.00) for analyzing these samples.[13]

The health department is required to provide a copy of the test results to the owner and, if possible, to any leaseholder or other facility served by the well. It also must maintain a registry of the location of all permitted wells and the test results. In the regulations to be adopted regarding water testing, the Commission for Health Services is required to provide for "corrective action and retesting where appropriate." It is possible that those rules could impose additional requirements on health departments as part of the permitting process.

Fees

Local health departments may charge fees associated with their private well programs.[14] As with other health department fees, state law requires that the fees be based upon a plan recommended by the local health director, approved by the local board of health, and approved by the board(s) of county commissioners. The fees must be "cost-related" and must be deposited in the local health department's account and used for public health purposes.[15]

Local Well Rules

As discussed above, local boards of health have had the authority to adopt local rules governing drinking water wells for many years under G.S. 87-96. This general rulemaking authority has not changed. However, local boards of health that have existing well rules or that are interested in adopting local rules will need to take steps to harmonize those rules with the new state law and the forthcoming regulations.

The EMC is expected to adopt state regulations governing the private well programs by July 1, 2008.

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[10] The law states that "[n]o person shall place a private drinking water well into service without first having obtained a certificate of completion. No person shall return a private drinking water well that has undergone repair to service without first having obtained a certificate of completion." G.S. 87-97(g).

[11] G.S. 87-97(h). Note that this new statute was added by S.L. 2006-202 but was amended later in the session in the technical corrections bill, S.L. 2006-259, sec. 51. The original version would have required local health departments to do the sampling but the amended version now allows laboratories certified in accordance with regulations issued by the Commission for Health Services to do the sampling and testing.

[12] The law specifies that the water must be tested for arsenic, barium, cadmium, chromium, copper, fluoride, lead, iron, magnesium, manganese, mercury, nitrates, nitrites, selenium, silver, sodium, zinc, pH, and bacterial indicators. G.S. 87-97(h). The Commission for Health Services may mandate additional testing by regulation if the Commission makes a specific finding that additional testing is "necessary to protect the public health." G.S. 87-97(i).

[13] S.L. 2006-66, Sec. 10.20(a). The General Assembly provided the state laboratory with some funding for equipment and supplies ($226,000) and authorized the creation of three new positions to be funded through fee receipts. North Carolina General Assembly, Joint Conference Committee Report on the Continuation, Capital and Expansion Budgets (S 1741) at G-3 (June 20, 2006).

[14] S.L. 2006-202, sec. 6 (amending G.S. 130A-39(g)).

[15] G.S. 130A-39(g). In multi-county district health departments, the boards of all county commissioners within the district must approve the fees.

After the state regulations are in place, local boards of health will still be allowed to retain existing local well rules or adopt new local rules. In order to do so, the board must first adopt the Environmental Management Commission regulations by reference and then add any more stringent provisions it deems "necessary to protect the public health."[16] For those jurisdictions that already have local well programs in place, the current local program and rules will have to be compared to the state regulations to determine whether the local program should either be (1) eliminated or (2) modified by adopting the state regulations by reference and incorporating those more stringent provisions deemed necessary to protect the public health.

It is important to note that if a local board of health chooses to adopt local well rules, the board must adopt all the state well regulations by reference. From a liability perspective, doing so would mean that the environmental health specialists enforcing the local well rules would not be considered agents of the state and therefore would not have the benefit of the State Tort Claims Act, state insurance policies, and representation from the Attorney General's office.

The General Assembly provided DENR with some initial funding to distribute to counties that need assistance setting up local programs to enforce the statewide well construction standards.[17] The total appropriation for assistance to counties was $827,550 (nonrecurring funds).

Emergency Drinking Water Fund

In addition to stepping up the regulation of private drinking water wells, the state also passed legislation establishing a new "Emergency Drinking Water Fund" within DENR. The fund is intended to help support individuals and businesses served by private drinking water wells. If a private well is located within 1,500 feet of known groundwater contamination and the well is at risk from the contamination, assistance might be available from this new emergency fund.

The General Assembly appropriated $300,000 in nonrecurring funds for this initiative. The funds may not be used to remediate contamination, but they may be used to pay for:

- notification of residents and businesses served by the private well about the potential contamination,
- testing of wells for contamination, or
- provision of alternative drinking water supplies.

When making funding decisions, DENR is required to consider both financial need and the potential risk to public health. According to DENR representatives, the agency is currently in the process of developing the application for funding and establishing criteria for evaluating applications.

On-Site Wastewater

Permitting Pilot Program

Over the last few years, the public health community has discussed the possibility of integrating private sector soil scientists into the on-site wastewater permitting process in order to possibly expedite the permitting process. During recent legislative sessions, several pieces of legislation have been introduced that would have made these and other changes to the current permitting system.[18] In 2006, the General Assembly did not pass a comprehensive change to the current system but it did pass legislation

[16] Boards of health should make specific written findings regarding the need for more stringent provisions. Board of health rules regulating swine farms were invalidated in large part because the board failed to articulate clear and specific reasons for the local variation. *See* Craig v. County of Chatham, 356 N.C. 40, 51, 565 S.E.2d 172, 179 (2002) (invalidating board of health rules adopted under the general rulemaking authority of G.S. 130A-39, which includes similar qualifying language related to protecting the public's health); *see also* Aimee N. Wall, *The Rulemaking Authority of North Carolina Local Boards of Health*, Health Law Bulletin No. 81, UNC School of Government (November 2003) (available at http://ncinfo.iog.unc.edu/pubs/electronicversions/pdfs/hlb81.pdf).

[17] North Carolina General Assembly, Joint Conference Committee Report on the Continuation, Capital and Expansion Budgets (S 1741) at H-5 (June 20, 2006) (providing "funds for technical support and enforcement assistance to counties as they enforce statewide private water supply well construction standards"). In addition to this technical assistance funding for counties, the General Assembly provided DENR with funding for five new staff positions to support the new well program.

[18] During the 2005-06 session, the primary vehicles for this discussion were H 900 and S 902.

authorizing DENR to establish a pilot program to test out such a system in certain counties.[19]

The pilot program is an option only in a county that meets the following three conditions:

- The county's population must be 25,000 or less (according to the most recent census).
- The county must have more than 900 on-site wastewater applications (improvement permits or construction authorizations) pending before the health department on July 19, 2006.
- The county's board of commissioners and board of health must approve a resolution authorizing the county's participation in the pilot program.

In August, both the board of health and the board of county commissioners in Cherokee County approved resolutions requesting participation in the pilot program and the county health department and DENR are currently moving forward with implementation.[20] The pilot program is scheduled to expire on July 1, 2011.[21]

Under the current permitting system, there are three distinct stages – the improvement permit, the construction authorization and the operations permit. Each stage has its own permitting requirements, processes and forms. An environmental health specialist is not allowed to issue an improvement permit or construction authorization for an on-site wastewater system until he has conducted a site and soil evaluation.[22]

Under the pilot program, a property owner will have the choice of either asking the health department or a private soil scientist to conduct the site and soil evaluation. If a health department receives a completed soil and site evaluation that is signed and sealed by a licensed soil scientist, the department is allowed to issue an improvement permit.[23] If the department issues a permit, the permit must include specific language indicating that a private soil scientist conducted the evaluation and the scientist's name and license number. If the department denies the permit, the denial must include a written report specifically identifying the law upon which the denial is based.[24]

Under the pilot program, health departments are allowed to charge an additional fee of up to $200 for the costs of reviewing permit applications that include soil evaluations conducted by private scientists.[25] Private soil scientists who participate in this pilot program by submitting completed soil and site evaluations must have liability insurance with at least one million dollars in coverage per claim.[26] The policy must remain in force for at least six years after

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[19] S.L. 2006-136.

[20] Telephone conversation with Elaine Russell, Cherokee County Health Director (September 18, 2006). At the time the legislation was enacted, the public health community generally believed that Cherokee would be the only county in a position to take advantage of the pilot program.

[21] S.L. 2006-136, sec. 4.

[22] G.S. 130A-336; 15A NCAC 18A .1939.

[23] It appears that the law allows licensed soil scientists to be involved only in the improvement permit stage of the process. For example, the law requires the health department to issue an improvement permit after it either receives a soil and site evaluation from a licensed soil scientist or an authorized agent of DENR. S.L. 2006-136, sec. 2(b). It details the elements that must be included in an improvement permit. S.L. 2006-136, sec. 2(d). The law also states that the health department must issue a construction authorization "when it has determined after a field investigation that the system can be installed and operated in compliance" with state law. *Id*. at sec. 2(f).

There may be some ambiguity in the law, however, regarding the role of the licensed soil scientists in the construction authorization stage of the permitting process. For example, the law states: "When a local health department denies an application for an improvement permit or *authorization to construct* prepared by a licensed soil scientist…." *Id*. at sec. 2(g) (emphasis added). Based on that language and other similar statements in the law, one might argue that the law also allows a health department to rely on a soil scientist's site and soil evaluation in the construction authorization stage without conducting its own evaluation. While the references to the construction authorization stage may be somewhat confusing, they do not clearly allow the health department to rely upon a soil and site evaluation conducted by a private soil scientist in the construction authorization stage of the permitting process.

[24] DENR is required to establish uniform procedures for the review of an application prepared by a licensed soil scientist. S.L. 2006-136, sec. 2(j).

[25] Local health departments participating in the pilot program are also specifically allowed to employ or contract with a soil scientist to assist in review of applications for improvement permits and construction authorizations. S.L. 2006-136, sec. 2(i). These soil scientists must also have liability insurance with at least one million dollars of coverage per claim.

[26] S.L. 2006-136, sec. 2(c).

the date on which the improvement permit is approved.

Beginning in October 2007, DENR is required to submit annual evaluations of the pilot program to the General Assembly. The evaluations must examine whether the pilot program (1) reduced the amount of time for processing applications, (2) resulted in an increased number of on-site system failures; and (3) resulted in new or increased environmental impacts.

Certification of Contractors and Inspectors

State law provides a comprehensive certification program for persons who install and repair drinking water wells[27] and for registered sanitarians,[28] but until just recently, it did not have a similar certification system for people involved with installing or inspecting on-site wastewater systems. This past legislative session, the General Assembly enacted a comprehensive new law that sets out a certification system for on-site wastewater contractors and inspectors.[29] In summary, the law:

- establishes a new certification board;
- authorizes the board to adopt regulations and oversee the certification process;
- requires persons to be certified at different grade levels that will vary based on design capacity, complexity, projected costs, etc.; and
- outlines the basic requirements for certification.

The provisions establishing the new certification board went into effect on July 10, 2006 but the provisions requiring certification by the new board do not go into effect until January 1, 2008.

Food Safety

Two new laws relate to food safety. One expands the authority of public health officials to embargo unsafe food and drink and the other requires certain stakeholders to develop a plan to protect the food supply from intentional contamination.

[27] G.S. Chapter 87, Article 7A (Well Contractors Certification).

[28] G.S. Chapter 90, Article 4 (Registrations of Sanitarians).

[29] S.L. 2006-82 (enacting new G.S. Chapter 90A, Article 5).

Embargo

For many years, environmental health professionals have voiced frustration over the fact that they did not have the direct authority to embargo – or hold – unsafe food or drink they discovered in restaurants and other regulated establishments. The law granted the North Carolina Department of Agriculture and Consumer Services (DACS) broad embargo authority and provided that DENR and local public health officials could embargo food or drink (with the exception of milk and shellfish)[30] only if DACS delegated the authority to them.[31]

Typically, if an environmental health specialist encountered unsafe food or drink in a regulated establishment, he or she would ask the owner or manager not to serve it to the public. If the owner or manager insisted upon serving it, the specialist could:

- contact DACS and request the agency's assistance in embargoing the item;[32]
- immediately suspend or revoke the establishment's permit on the ground that the item presented an imminent hazard to the health of the public;[33] or
- ask the State or local health director to declare the food or drink an imminent hazard and proceed with an abatement of the hazard under G.S. 130A-20.[34]

[30] The law provides both DENR and local health directors with the authority to embargo milk, scallops, shellfish and crustacea. G.S. 130A-21(b) (milk) & (c) (shellfish). This authority is typically delegated to local environmental health specialists who work directly with milk and shellfish. G.S. 130A-6 ("Whenever authority is granted by this Chapter upon a public official, the authority may be delegated to another person authorized by the public official.").

[31] G.S. 106-125 (embargo authority of the North Carolina Department of Agriculture and Consumer Services); G.S. 130A-21(a) (authorizing the delegation of the authority to the Secretary of the Department of Environment and Natural Resources).

[32] G.S. 130A-21.

[33] G.S. 130A-23.

[34] The term "imminent hazard" is defined as "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." G.S. 130A-2(3). Environmental health specialists are authorized to suspend or revoke permits immediately only when an imminent hazard exists. G.S. 130A-23(d).

In the spring of 2006, a legislative study committee made several recommendations related to public health preparedness for bioterrorism.[35] One of the recommendations was to "enhance the embargo authority of the Secretary of Environment and Natural Resources and local health directors."[36] The General Assembly subsequently enacted legislation recommended by the committee.[37]

In short, the new law revises the existing embargo statute (G.S. 130A-21) to supplement the embargo authority of DACS by providing both DENR and local health directors with the authority to embargo food and drink in regulated establishments. There are several important limitations on this authority with respect to the scope of the authority and the limitations on delegation.

Scope of Authority

This new embargo authority may be used only with respect to food or drink that is either adulterated or misbranded (as defined by state law)[38] and found in establishments that are either:

- regulated by DENR pursuant to Chapter 130A (the public health chapter of the General Statutes); or
- the subject of a foodborne illness outbreak pursuant to G.S. 130A-144.

Regulated establishments include, for example, restaurants, food carts and hotels.[39] Establishments that are exempt from regulation, such as private clubs and certain nonprofit corporations, are also not subject to this new embargo authority.

Delegation and Consultation

The law grants this embargo authority to the Secretary of DENR and local health directors. Many of North Carolina's public health laws provide legal authority or responsibility to the Secretary of DENR or the Department of Health and Human Services (DHHS) or a local health director. In practice, however, local environmental health staff members typically perform the functions, such as inspecting restaurants.[40] State law specifically authorizes delegation of such responsibilities and authority to local environmental health specialists.[41]

The embargo law is different. It states that the new embargo authority "shall not be delegated to individual environmental health specialists in local health departments."[42] The new law grants this authority to two groups of individuals:

- local health directors; and
- DENR regional environmental health specialists and their superiors.

Local health directors may not act alone when seeking to exercise embargo authority. The director *must* consult with a regional environmental health specialist before issuing an embargo order.

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[35] Interim Report of the Subcommittee on Public Health and Bioterrorism, Joint Study Committee on Emergency Management and Disaster Management, North Carolina General Assembly, at 4 (April 2006).

[36] *Id.*

[37] S.L. 2006-80.

[38] The public health embargo authority in Chapter 130 relies upon the definitions of the terms "adulterated" and "misbranded" used by DACS. G.S. 106-129 (foods deemed to be adulterated); 106-130 (foods deemed to be misbranded). Public health officials will most likely exercise embargo authority when they determine that food is adulterated because, for example, it contains substances why may make it injurious to health, or it was prepared or held in unsanitary conditions.

[39] Some establishments, such as grocery stores, are regulated by both DENR and DACS. For example, DENR regulates and an environmental health specialist is authorized to inspect meat market areas where meat is cut and packaged but DACS regulates pre-packaged meat products, such as hot dogs. In these establishments, the new embargo authority will only extend to those areas where DENR has authority to regulate; it will not extend to the entire establishment.

[40] For example, state law provides that the "Secretary [of DENR] shall inspect each food service establishment…[and] shall leave a copy of the inspection form and a card or cards showing the grade of the establishment…." G.S. 130A-249. Local environmental health specialists, rather than the Secretary or even the staff of DENR, usually conduct these inspections. In most cases, they are authorized agents of the state and have been delegated the authority to perform these inspections.

[41] G.S. 130A-4 ("When requested by the Secretary, a local health department shall enforce the rules of the Commission under the supervision of the Department. The local health department shall utilize local staff authorized by the Department to enforce the specific rules."); G.S. 130A-6 ("Whenever authority is granted by this Chapter upon a public official, the authority may be delegated to another person authorized by the public official.").

[42] G.S. 130A-21(a). Note that this restriction on delegation does *not* apply to the pre-existing embargo authority for milk and shellfish.

While a local environmental health specialist will not be able to take many of the official steps necessary to embargo food or drink, he or she will almost certainly be involved in the process. For example, the specialist may:

- be the first to identify the problem food or drink in the course of a regular inspection or an investigation in response to a complaint or foodborne illness outbreak;
- engage the person responsible for the establishment in a conversation about the safety of the food or drink in an effort to discourage the person from serving the food or drink to the public; and
- act as a liaison between the health director, the regional environmental health specialist and the establishment in the course of an embargo procedure.

Given the connection between local environmental health specialists and the regulated industries, specialists will obviously be a critical partner in the embargo process under this new law.

Embargo Procedure

When faced with a potential embargo, a person in charge of a regulated establishment may voluntarily agree to destroy the food or drink that the local health department or DENR identifies as problematic.[43] If the person does not voluntarily dispose of the food or drink, then the health director or DENR staff has the authority to move forward with the embargo. This means that the health director (in consultation with DENR) or a DENR representative can take immediate steps to detain the item and subsequently go to court seeking an order requiring the person to destroy it.[44]

The first step will be to "tag" or otherwise mark the item to indicate that the item is, or may be, adulterated or misbranded. If the item is tagged based on a suspicion of adulteration or misbranding, the public health official should take steps to confirm the condition of the item before taking the next step in the embargo process. For example, laboratory testing may be required for some items. If the public health official determines that the item is not adulterated or misbranded, he must remove the tag. Note that once an item is tagged, no one may remove or dispose of the item until the public health official (e.g., a local health director or regional environmental health specialist) or a court grants permission to do so.

When a health director or DENR representative decides to go forward with an embargo, DACS must be immediately notified. The law does not specify exactly when this notification must take place, but it is clear that it must happen very early in the process.

The next step will be to file a petition in either district or superior court asking the court to order condemnation of the adulterated or misbranded item. The court will likely hold a hearing on the petition to allow both the public health official and the person responsible for the tagged item to be heard. If the court concludes that the item is adulterated or misbranded, it must issue an order directing the responsible person to destroy the item under the supervision of the public health official. The responsible person must pay all expenses related to destruction of the item and must also pay court costs and fees associated with the embargo petition.

In some instances, an adulterated or misbranded item can be corrected so that it is no longer in violation of the law. If so, a court has the option of allowing the item to be returned to the responsible person to be corrected (under the supervision of a public health official) rather than destroyed. In such cases, the responsible person will be required to post a bond which will be refunded after the item is no longer adulterated or misbranded.[45]

Food Defense

The same legislative subcommittee that recommended enhancing public health's embargo authority also called for development of a broader food defense plan. As a result, a short statute was enacted that directs DACS, DENR and DHHS to "jointly develop a plan to protect the food supply from intentional contamination."[46] According to DENR, a joint task force with representatives from all three agencies is currently in the process of

[43] Informal conversations with staff members from DENR, DACS, and local health departments who have experience with embargo authority (e.g., shellfish, milk) suggest that very few situations actually require an official embargo action involving a court. The vast majority of situations are resolved through voluntary compliance.

[44] G.S. 106-125.

[45] Before refunding the bond to the responsible person, the court must be satisfied that (1) the item is no longer adulterated or misbranded and (2) any costs incurred by the public health officials while supervising the correction of the item have been paid. G.S. 106-125(c).

[46] S.L. 2006-80 (adopting new G.S. 130A-481).

developing a three-part plan that will address protection of food, plants and crops, and livestock.

Confidentiality of Lead Records

Local health departments and DENR both keep extensive records related to childhood blood lead level testing, results, investigation and remediation.[47] Over the last several years, health departments and DENR have both received numerous public record requests for copies of results from childhood blood lead testing. Public health officials were usually uncomfortable releasing the information in a manner that identified the child or the family because the information was health-related. Given that medical records held by local health departments are confidential under state law and are therefore exempt from the public records law,[48] many assumed that lead screening and investigation records were also confidential.

Prior to this last legislative session, the law in this area was not entirely clear. First, no specific confidentiality laws appeared to protect the blood test results that are collected and maintained by DENR. In the absence of a law making such information confidential, the information should be a public record under state law.[49]

When the information was maintained by local health departments, some argued that G.S. 130A-12, the statute that protects the confidentiality of much of the medical information maintained by health departments, applied to the lead screening and investigation information, at least with respect to the name of the child. But a close read of the statute and other laws suggested otherwise. Specifically, the law protected two types of records:

- Records containing privileged patient medical information; and
- Records containing information protected under the HIPAA[50] Privacy Rule (often called "protected health information" or PHI).

The child lead investigation records created by local health departments and shared with DENR are typically neither privileged information[51] nor PHI.[52]

Because the law was not clear, the General Assembly enacted legislation amending G.S. 130A-12 to make confidential all records collected under the authority of the state's child lead screening and investigation program.[53] Therefore, all records

[47] All laboratories in the state are required to report the results of all childhood blood lead tests to DENR. G.S. 130A-131.8. As a result, DENR maintains a large database containing individually identifiable test results. Local health departments maintain this type of information in at least two capacities. First, they would have information in a medical record for a child that is receiving testing and care through the clinical arm of the department. Second, the environmental health arm of the department would hold information related to investigations of children within its jurisdiction.

[48] G.S. 130A-12.

[49] G.S. 132-1(b) (state and local governments' duty to make records available to the public). For more information about public records law, see David M. Lawrence, PUBLIC RECORDS LAW FOR NORTH CAROLINA LOCAL GOVERNMENTS, Institute of Government (1997 and 2003).

[50] "HIPAA" refers to the Health Insurance Portability and Accountability Act of 1996. 42 U.S.C. 1320(d) – 1320d-8. The Administrative Simplification section of the HIPAA law directed the U.S. Department of Health and Human Services to promulgate regulations governing the privacy of individually identifiable health information. 42 U.S.C. 1320d-2 (note). These regulations are typically referred to as the HIPAA Privacy Rule.

[51] In general, the term "privilege" applies to information that was generated as part of a physician/patient relationship or a nurse/patient relationship and is used in the course of caring for the patient. See, e.g., G.S. 8-53 (physician privilege); 8-53.13 (nurse privilege). The lead-related information collected by DENR or the environmental health arm of a local health department is not generated through such clinical relationships.

[52] Information is PHI only if it is held by an entity or person that is regulated by HIPAA (a "covered entity"). DENR is not a covered entity under HIPAA and therefore lead-related medical information in DENR's custody is not considered PHI.

While all North Carolina local health departments are covered entities, the environmental health arms of many health departments are not subject to HIPAA. Health departments have option of carving out non-health care components (i.e., those components of the entity not providing patient care), such as environmental health, from the covered entity so as to minimize the department's compliance responsibilities. *See* 45 C.F.R. 164.105(a). Many departments have chosen to carve out their environmental health arms and, as a result, the environmental health records – including lead reports and investigations – would not be considered PHI.

[53] S.L. 2006-255, Sec. 13.2 (S 1587). G.S. 130A-12 was amended so that it now applies to three types of information: privileged patient medical information, information protected by HIPAA and information collected

containing such information in the custody of local health departments, DHHS or DENR are now clearly not public records. It is worth noting that the confidentiality protection in G.S. 130A-12 extends to the *entire record* that contains information collected through the state's lead program. It is not limited to the medical information.

Conclusion

Implementation of many of the new and amended laws discussed above will be evolving over the coming months and years. This bulletin provides a basic overview of the legislation but it is not a complete reference guide. In order to stay abreast of all new developments related to these laws, local health departments and others should pay close attention to new information as it comes forth from DENR's Division of Environmental Health, DHHS's Division of Public Health and the relevant rulemaking bodies.

through the state's lead program as provided in Chapter 130A, Article 5, Part 4 of the General Statutes.

Appendix: Selected New and Revised Statutes

§ 87-97. Permitting, inspection, and testing of private drinking water wells.

(a) Mandatory Local Well Programs. Each county, through the local health department that serves the county, shall implement a private drinking water well permitting, inspection, and testing program. Local health departments shall administer the program and enforce the minimum well construction, permitting, inspection, repair, and testing requirements set out in this Article and rules adopted pursuant to this Article.

(b) Permit Required. Except for those wells required to be permitted by the Environmental Management Commission pursuant to G.S. 87-88, no person shall:

(1) Construct or assist in the construction of a private drinking water well unless a construction permit has been obtained from the local health department.

(2) Repair or assist in the repair of a private drinking water well unless a repair permit has been obtained from the local health department, except that a permit shall not be required for the repair or replacement of a pump or tank.

(c) Permit Not Required for Maintenance or Pump Repair or Replacement. A repair permit shall not be required for any private drinking water well maintenance work that does not involve breaking or opening the well seal. A repair permit shall not be required for any private drinking water well repair work that involves only the repair or replacement of a pump or tank.

(d) Well Site Evaluation. The local health department shall conduct a field investigation to evaluate the site on which a private drinking water well is proposed to be located before issuing a permit pursuant to this section. The field investigation shall determine whether there is any abandoned well located on the site, and if so, the construction permit shall be conditioned upon the proper closure of all abandoned wells located on the site in accordance with the requirements of this Article and rules adopted pursuant to this Article. If a private drinking water well is proposed to be located on a site on which a wastewater system subject to the requirements of Article 11 of Chapter 130A of the General Statutes is located or proposed to be located,

the application for a construction permit shall be accompanied by a plat, as defined in G.S. 130A-334.

(e) Issuance of Permit. The local health department shall issue a construction permit or repair permit if it determines that a private drinking water well can be constructed or repaired and operated in compliance with this Article and rules adopted pursuant to this Article. The local health department may impose any conditions on the issuance of a construction permit or repair permit that it determines to be necessary to ensure compliance with this Article and rules adopted pursuant to this Article.

(f) Expiration and Revocation. A construction permit or repair permit shall be valid for a period of five years except that the local health department may revoke a permit at any time if it determines that there has been a material change in any fact or circumstance upon which the permit is issued. The foregoing shall be prominently stated on the face of the permit. The validity of a construction permit or a repair permit shall not be affected by a change in ownership of the site on which a private drinking water well is proposed to be located or is located if the location of the well is unchanged and the well and the facility served by the well remain under common ownership.

(g) Certificate of Completion. – Upon completion of construction of a private drinking water well or repair of a private drinking water well for which a permit is required under this section, the local health department shall inspect the well to determine whether it was constructed or repaired in compliance with the construction permit or repair permit. If the local health department determines that the private drinking water well has been constructed or repaired in accordance with the requirements of the construction permit or repair permit, this Article, and rules adopted pursuant to this Article, the local health department shall issue a certificate of completion. No person shall place a private drinking water well into service without first having obtained a certificate of completion. No person shall return a private drinking water well that has undergone repair to service without first having obtained a certificate of completion.

(h) Drinking Water Testing. Within 30 days after it issues a certificate of completion for a newly constructed private drinking water well, the local health department shall test the water obtained from the well or ensure that the water obtained from the well has been sampled and tested by a certified laboratory in accordance with rules adopted by the Commission for Health Services. The water shall be tested for the following parameters: arsenic, barium, cadmium, chromium, copper, fluoride, lead, iron, magnesium, manganese, mercury, nitrates, nitrites, selenium, silver, sodium, zinc, pH, and bacterial indicators.

(i) Commission for Health Services to Adopt Drinking Water Testing Rules. The Commission for Health Services shall adopt rules governing the sampling and testing of well water and the reporting of test results. The rules shall allow local health departments to designate third parties to collect and test samples and report test results. The rules shall also provide for corrective action and retesting where appropriate. The Commission for Health Services may by rule require testing for additional parameters if the Commission makes a specific finding that testing for the additional parameters is necessary to protect public health.

(j) Test Results. The local health department shall provide test results to the owner of the newly constructed private drinking water well and, to the extent practicable, to any leaseholder of a dwelling unit or other facility served by the well at the time the water is sampled.

(k) Registry of Permits and Test Results. Each local health department shall maintain a registry of all private drinking water wells for which a construction permit or repair permit is issued. The registry shall specify the physical location of each private drinking water well and shall include the results of all tests of water from each well. The local health department shall retain a record of the results of all tests of water from a private drinking water well until the well is properly closed in accordance with the requirements of this Article and rules adopted pursuant to this Article.

(l) Authority Not Limited. This section shall not be construed to limit any authority of local boards of health, local health departments, the Department of Health and Human Services, or the Commission for Health Services to protect public health.

§ 130A-12. Confidentiality of records.

All records containing privileged patient medical information, information protected under 45 Code of Federal Regulations Parts 160 and 164, and information collected under the authority of Part 4 of Article 5 of this Chapter that are in the possession of the Department of Health and Human Services, the Department of Environment and Natural Resources, or local health departments shall be confidential and shall not be public records pursuant to G.S. 132-1.

Information contained in the records may be disclosed only when disclosure is authorized or required by State or federal law. Notwithstanding G.S. 8-53 or G.S. 130A-143, the information contained in the records may be disclosed for purposes of treatment, payment, or health care operations. For purposes of this section, the terms "treatment," "payment," and "health care operations" have the meanings given those terms in 45 Code of Federal Regulations § 164.501.

§ 130A-21. Embargo.

(a) In addition to the authority of the Department of Agriculture and Consumer Services pursuant to G.S. 106-125, the Secretary of Environment and Natural Resources or a local health director has authority to exercise embargo authority concerning food or drink pursuant to G.S. 106-125(a), (b) and (c) when the food or drink is in an establishment that is subject to regulation by the Department of Environment and Natural Resources pursuant to this Chapter or that is the subject of an investigation pursuant to G.S. 130A-144; however, no such action shall be taken in any establishment or part of an establishment that is under inspection or otherwise regulated by the Department of Agriculture and Consumer Services or the United States Department of Agriculture other than the part of the establishment that is subject to regulation by the Department of Environment and Natural Resources pursuant to this Chapter. Any action under this section shall only be taken by, or after consultation with, Department of Environment and Natural Resources regional environmental health specialists, or their superiors, in programs regulating food and drink pursuant to this Chapter. Authority under this section shall not be delegated to individual environmental health specialists in local health departments otherwise authorized and carrying out laws and rules pursuant to G.S. 130A-4. When any action is taken pursuant to this section, the Department of Environment and Natural Resources or the local health director shall immediately notify the Department of Agriculture and Consumer Services. For the purposes of this subsection, all duties and procedures in G.S. 106-125 shall be carried out by the Secretary of the Department of Environment and Natural Resources or the local health director and shall not be required to be carried out by the Department of Agriculture and Consumer Services. It shall be unlawful for any person to remove or dispose of the food or drink by sale or otherwise without the permission of a Department of Environment and Natural Resources regional environmental health specialist or a duly authorized agent of the Department of Agriculture and Consumer Services, or by the court in accordance with the provisions of G.S. 106-125.

(b) *[Embargo authority for milk – omitted from this reprint].*

(c) *[Embargo authority for scallops, shellfish and crustacean – omitted from this reprint]*

(d) Nothing in this section is intended to limit the embargo authority of the Department of Agriculture and Consumer Services. The Department of Environment and Natural Resources and the Department of Agriculture and Consumer Services are authorized to enter agreements respecting the duties and responsibilities of each agency in the exercise of their embargo authority.

(e) For the purpose of this section, a food or drink is adulterated if the food or drink is deemed adulterated under G.S. 106-129; and food or drink is misbranded if it is deemed misbranded under G.S. 106-130.