OSS Seattle-King County Board of Health

Comments Regarding the Environmental Health Sciences Division (EHS) - Board of Health (BOH) Resolution No. 16.03 and Staff Report

Citizens’ Alliance for Property Rights (CAPR) June 8, 2016

WAC 246-272-0015 is the basis for the Seattle/King County BOH Resolution No. 16.03

I simply would ask the Resolution to be tabled until the concerns of citizens have been addressed in the State legislature and by the Board of Health and King County. It is clear there are constitutional questions that must be first addressed in WAC 246-272A-0015 and until the legislature addresses them, the county should not use this WAC as the guiding document for their proposal. It is my understanding that administrative law does not include the authority to create taxes or to created new sources of funding for an agency or department, only the legislature can do this. The fact that the WAC has selected 12 counties for more restrictive regulation than other counties raises additional questions that should be considered by the state legislature. King county should not embark on a new program before these questions are addressed by the legislature to do so would be costly and the county funds may be wasted on projections that are not allowed by law.

**WAC 246-272-0015 (7) In order to implement the plan described in subsections (1) and (5) of this section, the local health officer may require the owner of the OSS to: (b) Provide dedicated easements for inspections, maintenance, and potential future expansion of the OSS;** thisgives the local health officer the *discretion* to require the owner of an OSS to provide dedicated easements for inspections, maintenance and potential future expansion of the OSS. The WAC is not specific, or clear enough as to persuade a reasonable person to determine if this rule is justified. It also may impose a more stringent performance requirement on private entities than on public entities.

One fundamental attribute of property ownership is the right to exclude others from the property. Discretionary powers must be carefully and selectively used on a case by case basis. Arguably, the Board proposal could be used to expand its inspection authority over private property uses that are unrelated to OSS maintenance, e.g., cattle grazing areas on rural property, or to mandate dedicated easements as a condition of granting OSS permits. The Board must avoid attempts to expand its authority in a way that would violate OSS owner's Constitutional due process and equal protection rights. The problem with a mandate for a dedicated easement in return for an OSS permit is that it might not be restricted to a single use by government officials. A regulation that requires a private property owner to formally dedicate land to some public use or that extracts an easement should be carefully reviewed. The dedication or easement that is required from the landowner must be reasonable, specific, and proportional to an identifiable problem.

King County should not chose to burden private property rights in order to protect streams, lakes, and the Puget sound from unproven potential impacts. Retroactive regulations such as dedicated easements for OSS systems do not contribute to the health of bodies of water. This is an example of the misuse of the concept of the precautionary principle which leads to conflict with property owners’ fundamental rights. Essential nexus is a required facet in determining the reasonableness of a public policy. The County and the Board of Health must recognize the need to establish causal connections as a precondition to regulation.

In fact, only 6% of developed properties use OSS systems. By far, a majority of those systems function properly and are not a source of pollution. The *potential* to pollute waters is miniscule when compared to the actual major sources of water pollution in Seattle/King County which beg to be addressed:

Over a four year period, King County annually discharged approximately 900 million gallons of raw sewage from its sewer system.

Municipal Storm and Sewer systems are leaking and failing, and municipal Sewer System retention ponds do not always function properly.

Run off from roadways entering un-maintained storm water conveyances contribute to water degradation. Many municipal storm water conveyances are not mapped, monitored, or maintained.

Storm water retention facilities attract wildlife and are not properly maintained contributing to the degradation of nearby streams.

King County has allowed OSS systems to be permitted as “temporary until sewer” systems which are claimed by the BOH to have been in use longer than they were meant to and are *probable* contributors to groundwater contamination.

Spraying applications of biosolids for sylviculture has the potential to create contaminated run-off to enter the ephemeral streams located near these applications.

Vegetative buffers are not or are improperly maintained, inundated with run off from roadways and wildlife defecation.

**WAC 242-272-0015 (h) Describe the capacity of the local health jurisdiction to adequately fund the local OSS plan, including the ability to find failing and unknown systems;** It is important to point out this portion of the WAC only requires the local health jurisdiction to *describe their capacity* to fund its local OSS plan. It *does not require* a local health entity to impose a fee or tax on individual OSS system owners.

In conclusion, it is important for the Seattle/King County board of health to realize and act upon the concerns addressed in this comment:

Is the BOH carefully and appropriately interpreting legislative intent in its application of WAC 246-272A-0015 to its resolution?

Is the BOH carefully considering the responsibility to apply a causal connection to the intended regulation? Is the BOH carefully and reasonably considering a property owner’s fundamental property rights?

Does the BOH resolution for a proposed regulation adequately address the core causes of the stated problems it attempts to address? Specifically: A RESOLUTION supporting ongoing collaboration for the purpose of improving the health and well-being of King County residents by ensuring safe drinking and surface water in King County. Does this resolution address all possible methods for that purpose or is it singling out a particular segment of the population to bear the burden of the well-being of King County residents?

The proposed resolution is a serious threat to property owner’s fundamental rights and we believe this is an unnecessary burden on a landowner that has not been required in the past. The means to enforce the proposal are cost prohibitive and would require an unconstitutional regulatory path. Current law does not provide for the implementation of Resolution 16.03 please see: RCW 70.05.190, section 3 and RCW70.05.060(7); Title 13.04.020B and Title 13.04.020C. King County should carefully consider the responsibility to apply a causal connection to the intended regulation regulatory takings require a proportional essential nexus and Resolution 16.03 does not address that constitutional necessity.

Respectfully,

Cindy Alia, Citizens’ Alliance for Property Rights (CAPR)