Concerns Regarding BOH 16-B12 and BOH Resolution No. 16.03 and Staff Report

Compiled by Citizens’ Alliance for Property Rights

BOH 16.03 recites that current laws mandate Public Health-Seattle and King County to monitor and regulate septic systems (WAC 246-272A) and to implement a septic system program management plan for public health protection (RCW 70.118A).

RCW 70.05.190 authorizes local boards of health to impose reasonable fees sufficient to pay for the actual costs of administration of the on-site sewage program management plan (section 1(a)) and expressly limits the services for which fees may be charged to the actual cost of issuing or renewing licenses or permits or other services authorized by the law and the state board of health (RCW 70.05.190, section 3 and RCW70.05.060(7)).

It is likely that Title 13, the current State Board of Health Rule for On-Site Sewage, will have to be amended or replaced to accommodate "equity concerns" of the Board and expand oversight authority.

Title 13.04.020B states that "it is expressly the purpose of this title to provide for and promote the health of the general public, not to create or designate any particular class or group of persons who should be especially benefited by the terms of this title".

Title 13.04.020C states that " it is the specific intent of this title to place the obligation of complying with requirements of this title on the owner or operator of premises, and no provision is intended to impose a duty upon King County or any of its officers or employees, for whom the implementation or enforcement of this title shall be discretionary, not mandatory."

WAC 246-272-0015 (7) gives the local health officer the discretion to require the owner of the OSS to provide dedicated easements for inspections, maintenance and potential future expansion of the OSS. The Board could argue that effective OSS oversight requires mandatory easements to allow government officials to enter private property at will and without justification. It is not clear in the WAC if the word discretion is referring to all septic owners or if it refers to owners of failing systems. Citizens are concerned that the BOH 16.03 fails to address this portion of the WAC.

The BOH 16.03 report contends that EHS currently does not have the capacity to perform inspections or to educate OSS owners. However, the fact is that homeowners, not government, are obligated by law to have their onsite septic systems inspected, pumped and repaired at timely intervals. Private property OSS owners pay private sector septic tank professionals to provide these services.

The BOH briefing #16-B12 fails to address the contractual source of funds mandated by the Legislature under RCW 70.118A.080(1).

The BOH briefing #16-B12 fails to address the legislative mandates in the following RCWs
RCW 70.05.130

Expenses of state, health district, or county in enforcing health laws and rules—Payment by county. All expenses incurred by the state, health district, or county in carrying out the provisions of chapters 70.05 and 70.46 RCW or any other public health law, or the rules of the department of health enacted under such laws, shall be paid by the county and such expenses shall constitute a claim against the general fund as provided in this section.

RCW 70.08.080

Pooling of funds. The city by ordinance, and the county by appropriate legislative enactment, under this chapter may pool all or any part of their respective funds available for public health purposes, in the office of the city treasurer or the office of the county treasurer in a special pooling fund to be established in accordance with agreements between the legislative authorities of said city and county and which shall be expended for the combined health department.

RCW 70.08.090

Other cities or agencies may contract for services. Any other city in said county, other governmental agency or any charitable or health agency may by contract or by agreement with the governing bodies of the combined health department receive public health services.

RCW 34.05.570(2)(c) states a rule may only be set aside if the rule “violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious. BOH 16.03 may be in part nullified by the avoidance of the above RCWs in WAC 246-272-0015. By ignoring the WACs, the rule is calling for Counties to regulate in a way that is willful and unreasoning and taken without regard to attending facts or circumstances. This situation is aggravated by the BOH 16.03 interpretation of portions of the WAC that are poorly defined:

“(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; and” Clearly, this has not been addressed in BOH 16.03 as seen by the failure to address the above RCWs RCW 70.05.130, RCW 70.08.080, RCW 70.08.090, RCW 70.05.190.

Additionally concerning, the Legislature saw fit to limit the powers of the Board of Health in RCW 70.05.060(7), reiterating that:

“Powers and duties of local board of health. (7) Establish fee schedules for issuing or renewing licenses or permits or for such other services as are authorized by the law and the rules of the state board of health: PROVIDED, That such fees for services shall not exceed the actual cost of providing any such services.”

Citizens object to the propensity of the Seattle/King County BOH to base their proposal on WAC 246-272-0115 in an incomplete fashion. It appears to be an attempt to pick and choose which portions of the WAC are deemed to be most important to the means sought in 16.03, while ignoring entirely other sections or provisions in WAC 246-272-0015. It is most likely outside of legislative intent to propose regulations based on incomplete application of a WAC or RCW.

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. RCWs must be adhered to when an agency is considering the funding of a program. WACs must conform to RCWs. Current law does not provide for the implementation of Resolution 16.03 as proposed. BOH 16.03 is attempting an unconstitutional regulatory path and must be revised or abandoned.

Seattle/King County BOH Title 13

13.04.020 Declaration of purpose and policy.

A. In compliance with chapter 246-272A WAC, this title is enacted as an exercise of the Board of Health power of King County to protect and preserve the public health. Its provisions shall be liberally construed for the accomplishment of this purpose.

**B. It is expressly the purpose of this title to provide for and promote the health of the general public, and not to create or otherwise establish or designate any particular class or group of persons who will**

**or should be especially protected or benefited by the terms of this title.**

**C. It is the specific intent of this title to place the obligation of complying with its requirements upon the owner or operator of premises and other persons designated by this title within its scope, and no provision of or term used in this title is intended to impose any duty whatsoever upon King County or any of its officers or employees, for whom the implementation or enforcement of this title shall be discretionary and not mandatory.**

D. Nothing contained in this title is intended to be nor shall be construed to create or form the basis for any liability on the part of King County, or its officers, employees or agents, for any injury or damage resulting from the failure of the owner or operator of any premises to comply with the provisions of this title, or by reason or in consequence of any act or omission in connection with the implementation or enforcement of this title on the part of King County by its officers, employees or agents.

It is clear the Seattle King County BOH resolution being proposed is not even in keeping with their own title 13.04.020. The BOH must revise the proposal to fit current law.