

# On-site Water Protection

LIABILITY, SETTLEMENTS, AND TORTS



NC DEPARTMENT OF  
**HEALTH AND  
HUMAN SERVICES**



# Settlements vs. OAH vs. Torts

## *What's the difference?*

- ▶ Settlements are generally used when a property owner has been wronged, and all parties can agree on a reasonable solution to the problem and reasonable damages.
  - ❖ Can do a settlement at almost any time (i.e., before litigation begins, before or after a contested case with OAH, before Industrial Commission hearing)
  - ❖ Our preferred method of handling a legal case where damages are owed
  - ❖ Settlements are much more commonly used

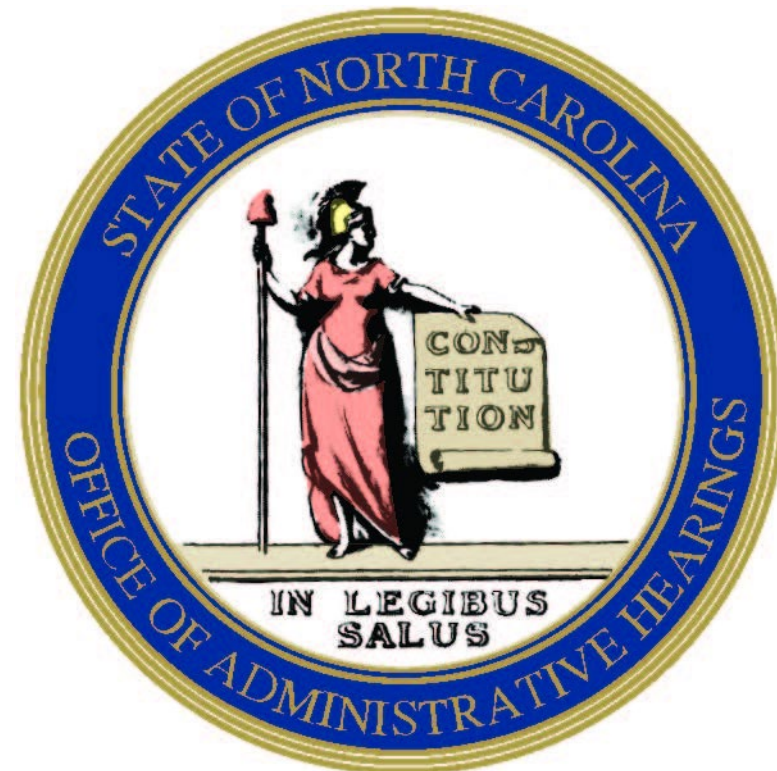




# Settlements vs. OAH vs. Torts

## *What's the difference?*

- ▶ Office of Administrative Hearings conducts fair and prompt hearings for persons affected by State agency actions.
  - ❖ The result of the proceeding is a decision to affirm, modify, or set aside the original agency decision.
  - ❖ This decision can affect the Division for future legal cases
  - ❖ Money (damages) is not typically given in OAH





# Mistakes vs. Willful Negligence

▶ Merriam-Webster defines “mistake” as:

1 : a wrong judgment :  
[misunderstanding](#)

2 : a wrong action or statement  
proceeding from faulty judgment,  
inadequate knowledge, or  
inattention

**Success does not consist  
in never making mistakes  
but in never making the  
same one a second time**

**- George Bernard Shaw**



# Mistakes vs. Willful Negligence

- ▶ “Willful negligence” is defined as:  
conduct that deliberately disregards the health, safety and welfare of another person. When it comes to liability, willful negligence is among the most heinous. Willful negligence typically involves behavior that is:

Voluntary

Intentional

Reckless



# Most Common Issues

- ▶ Poor soil calls
  - ❖ Permitted in expansive clays
  - ❖ Permitted in soil wetness conditions
- ▶ Poor installation inspections
  - ❖ Systems installed too deep
- ▶ System does not meet setbacks
  - ❖ Property lines, wells, etc.
- ▶ Not using proper BPJ
  - ❖ Reasonable expectation to function





# Real Life Example #1

- System was being installed and problems found
- Regional LSS visited site and found unsuitable structure and soil wetness that varied greatly from authorized agent's soil work
- Mobile home on property, well drilled
- No solutions on the property to date







# Real Life Example(s) #2

- We have ongoing issues in 2 counties where a former authorized agent had worked.
- We have found numerous sites that were improperly permitted, mostly in soils with expansive mineralogy and/or unsuitable soil structure, along with soil wetness conditions.
- We've only paid out on 1 case so far for \$8000 settlement.
- We have 10 more pending cases today.
- More are on the way...

# Real Life Example #3

- County improperly permitted a site and system prematurely malfunctioned.
- County went back out and permitted a repair in unsuitable soils.
- New system malfunctioned shortly thereafter.
- Property owner hired a consultant (LSS) to investigate site.
- Branch paid consultant nearly \$5000 to conduct necessary testing to determine a viable solution.
- Consultant proposed a solution that included a trench depth at 11', backfilled with sand.
- Estimates on the job are over \$60,000.
- No guarantees this will fix the problem.



# Real Life Example #4

- Authorized agent improperly permitted a wastewater system repair for a restaurant which consequently failed 7 months later.
  - ❖ Gave improper flow reduction on restaurant based on water use readings (2840 gpd down to 420 gpd, but Branch eventually allowed 682 gpd with flow reduction)
  - ❖ Improperly sized tanks (used 1000-gal septic and grease trap, 1500-gal PT – needed 3255 ST, 2178 GT, and 3255 PT)
  - ❖ Allowed 25% reduction to drainfield
  - ❖ LTAR used was higher than the mean
  - ❖ Settlement cost \$102,833.26



# Real Life Example #5

- Authorized agent permitted a wastewater system to be installed at a trench depth of 36".
- System malfunctioned prematurely, primarily during rain events.
- Regional LSS determined that system was installed with trench depths ranging from 32"-50+".
- Appears system was allowed to be installed deeper to avoid a pump.
- Case was filed with Industrial Commission.
- Case was settled prior to hearing for \$13,903.61 which paid for a new system to be installed, along with costs associated for a soil consultant and landscaping.



# Total Cases & Costs

- Since 2019, we've paid out in settlements \$452,067 in 21 total cases (avg = \$21,527/case)
- Currently have 24 cases pending, and this number increases monthly.



# Consequences and Accountability

*What do we now?*





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Policy was created and approved by the Section in October 2020 to handle Authorization reviews, or investigations. It states, in part:

# Consequences and Accountability

## *What do we now?*

The Department shall investigate an Authorized Agent of the Department based on any of the following:

- a. A request from a local health department;
- b. Direct or indirect observation by the Environmental Health Regional Specialist (EHRS) or Regional Soil Scientist (RSS) of substandard performance that demonstrates disregard to properly apply environmental health laws, rules, and policies;
- c. Written documentation from a reputable professional in the on-site wastewater industry that demonstrates with clear and convincing evidence the Authorized Agent's disregard of environmental health laws, rules, and policies;
- d. Program review or accreditation activities that reveal disregard of environmental health laws, rules, and policies;
- e. Legal action taken against the State because of work conducted by the Authorized Agent.



# Consequences and Accountability

## *What do we now?*

- 2 authorizations in OSWW have been revoked since I've been Branch Head
- Currently investigating 2 Authorized Agents
- One other investigation found that no authorization action was needed.

# Authorization Review

## *What happens?*

- Will begin with a letter from the Branch Head letting you know that a review is coming soon
- Paperwork review by Regional SS(10 minimum)
- Field review by Regional SS(5 minimum, maximum 20)
- The Regional SS will produce a report to the Branch Head of findings



# Authorization Review

## *What happens?*

- The Branch Head will send a written recommendation, along with supporting evidence, to the Section Chief recommending one of the following:
  - No further action: review does not support any authorization action.
  - Additional review needed to make determination.
  - Conditional authorization: review does support a temporary suspension of authorization until the Authorized Agent can show competence in field of practice.
  - Intent-to-Revoke authorization: review does support a permanent revocation of authorization. The Authorized Agent may appeal this decision to OAH.

# Authorization Review

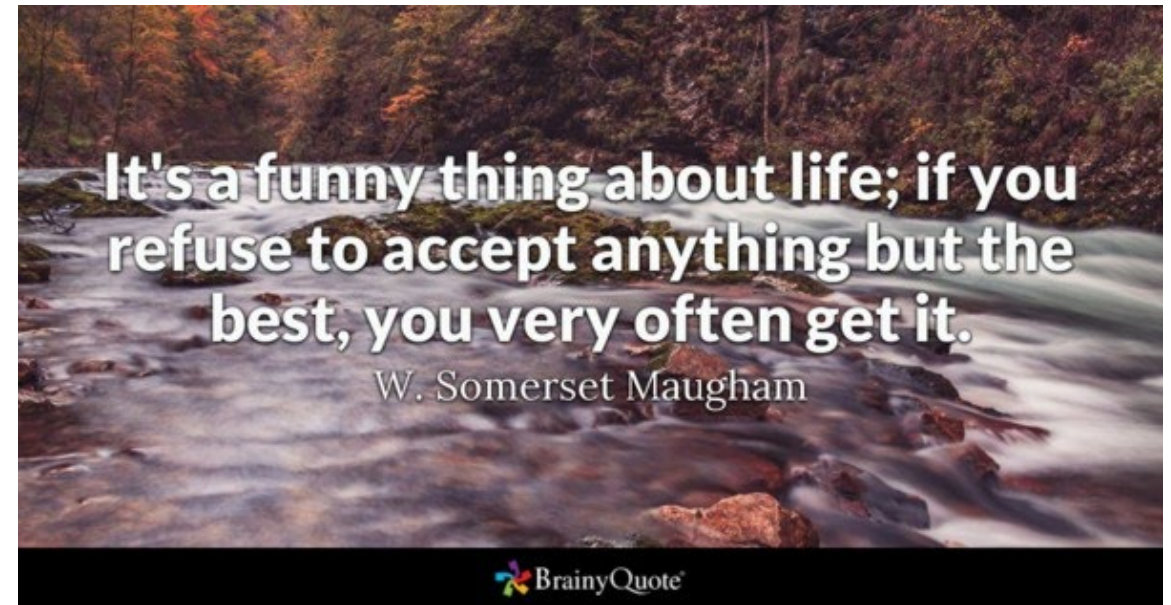
## *What happens?*

- The Section Chief makes a final decision and notifies Authorized Agent, Authorized Agent's supervisor, and Authorized Agent's health director of decision in writing
- For conditional authorization, an action plan is created that will detail steps necessary to reacquire authorization.



# Conclusion

- ▶ With the threat of privatization, we need to be more professional and accurate than ever.
- ▶ Assume that every document you create and all the work you perform will be reviewed at some point.
- ▶ Always ask yourself, “Is this professional-level work?”
- ▶ Remember that your job is to enforce all of the rules, NOT pick and choose which rules you feel should be enforced.
- ▶ Be proud of your career and your accomplishments, and never quit learning.





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**No, I did not dig up the septic tank, and frankly, I am offended at the accusation.**

