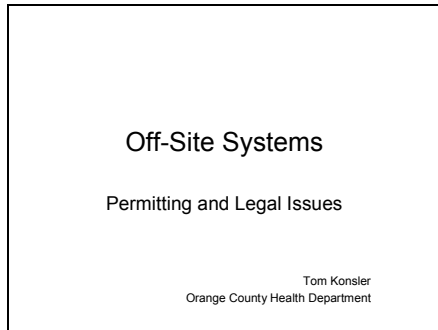
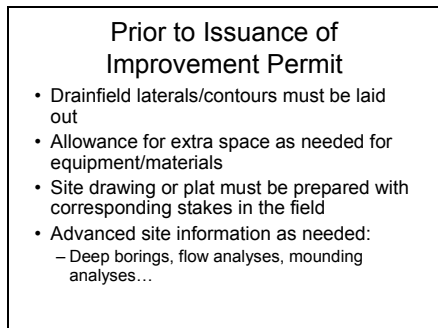


**Permitting, Responsibilities, and Legal Issues**  
Tom Konsler, Orange County Health Department



The following presentation will be part of the issues discussed and proposed during the development of the *Remote System Guidance Manual*.

They may not reflect what every county currently does, but is rather a presentation of the best management practices that were developed during the process of developing the guidance manual.



In addition to the normal things that are needed prior to the issuance of an improvement permit, there are a few other elements that should apply to remote systems due to the nature of the beast. Because lots or easement areas are often cut around the minimum area required for a system. Thinking ahead to system installation and repair, there must be a staging area and room to maneuver.

Generally, surveying will be needed in conjunction with the evaluation.

If systems are located collectively with a density of \_\_\_ per acre,

### Authorization to Construct

- All components must be installed by a Registered Contractor
- Must have an Authorization and inspection for every system component
- Limited Authorization to Construct

Some important points to consider regarding the Construction Authorizations

Contrary to some current practices, all of the system components must be installed by or under the authority of a registered septic contractor. This includes supply lines that extend from the lots to the drainfield areas. In some cases, counties have allowed utility contractors or grading contractors to install these components. All system components must be under the purview of a CA and must be inspected and approved prior to backfilling.

Our BMPs, and the regulations would require that these components be installed by registered contractors only, under the coverage of a Construction Authorization.

Sleeves or culverts under the road may be an exception. These could be installed by a grading contractor or a road constructor provided the materials, depths, etc can be verified by the LHD or validated by an engineer.

(Leads into Limited Cas)

**Limited  
Authorization to Construct**

- Allows installation of individual system components:
  - Force mains
  - Drainfields
  - Tanks, pump, and controls
- Operation Permit is held until all system components are in

Limited Construction Authorizations are something that is allowed within the current permitting scheme.

In a typical scenario, a system may require 3 limited construction authorizations. Each one addresses its corresponding system components.

1<sup>st</sup>- to install the force mains when the subdivision, roads and utilities are first built. The pipe is stubbed out and labeled at each lot and at each drainfield area.,

2<sup>nd</sup> -to install the drainfields

3rd, to construct the STEP system and tap into the stub out.

Does it have to be done all by the same contractor? Not necessary, but it would be nice. When there are different contractors, there is a very likely potential that one will blame the other for system faults. If one deals with different contractors, and even if they don't – each of the 3 components needs to be fully tested at the time of installation. i.e., the force main must be pressure tested before signing off on that portion of the installation, The drainfield landscaping and cover needs to be verified before signing off on that portion of the system, etc.

**Prior to Issuance of  
Authorization to Construct**

- All easements must be executed and recorded
- Easement and property lines must be surveyed/permanently marked in field
- Encroachment agreements must be obtained
- Draft Tri-party agreement must be submitted to the local health department

In addition to all of the other normal conditions to be met before a CA is issued, the following elements need to be included if applicable.

We will take Easements, Encroachments, and Tri-Party agreements individually and discuss why and when they are needed.

## Easement

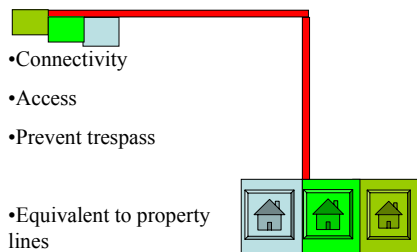
- Necessary when all of the wastewater system is not located on property owned (controlled) by the system owner.
- Allows for system construction, inspection, operation, maintenance and repair, and right-of-entry .

Easements are a necessary evil. It wasn't all that long ago when it was allowable for a landowner to allow a neighbor to run across the property line just by a word of mouth agreement and a handshake.

As we know, properties change hands fairly often and a durable agreement must go along with property transfers.

This is not unique to remote systems  
(Move to next slide)

## Easement Lines



In this illustration, 3 houses are served by individual drainfield areas which are accessed through a common easement (red).

Connectivity – you must be able to connect each house lot with each drainfield area. Obviously a problem in the case of the yellow house. Maybe not so obvious for the orange house. Just because the lots touch at a point, does not mean you can stay on legal ground to install a 3” force main. At points there is a violation.

Access – Access is generally not much of a problem at installation. It can be much more of an issue with monitoring and repairs though. If the drainfields in this area are landlocked, and the only access to them is through the red corridor, an operator needs access from the street to the beginning of the red easement area.

### Avoid trespass

An important point to note here is that the easements must be planned from the start so that the persons and equipment carrying out the inspection repairs, maintenance must not trespass or encroach on properties to perform their duties. Force mains can not be installed against property lines. As they need to be dug up later on, a backhoe or excavator must be able to uncover the line without encroaching on P/L.

For that reason, we have stipulated that easement lines need to be treated as property lines with respect to setbacks.

### Easement

- Describes the specific area for the system (metes & bounds, plat reference).
- Granted use is perpetual and transcends ownership.
- Excludes non-compatible uses.
- Provides notification to future owners.

An easement accomplishes other things as well: The area for the system, if it is not the whole property, must have a standard legal description, and for our purposes must be referenced by a recorded plat.

The easement is non-expiring and is transferred to future property owners. There may be provisions for expiring the easement if the system is no longer required (due to sewer connections or other alternatives)

Neither grantor nor grantee can erect structures or excavate on the property other than the septic system.

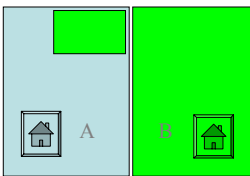
As a person arranges to buy the servient property, the notification that there is a septic system located on it will turn up on the deed search.

### Subordination Statement

- Recorded with each easement.
- Lien created by the Deed of Trust is subordinated to this document.
- Protects the system owner in case of foreclosure.

A subordination statement is considered an appendix or attachment to the easement document and is recorded at the same time. The reason this is needed is: if the property on which the system is located were to go into foreclosure, the lien holder could otherwise extinguish the easement and leave the system owner without a system. By requiring the lien holder to execute a subordination statement, they are saying that this septic easement takes precedence over their lien or mortgage.

### Subordination Statement



In this simplified example Lot B has an easement for an area on Lot A for its septic field. Should the Homeowner on lot A default on the mortgage, Mortgage company A could extinguish the terms of the easement, leaving Homeowner B without a perpetual easement. In order to guarantee that the lienholder for Lot A does not terminate the easement, they must agree to subordinate their lien to the terms of the easement.

### Encroachment

- When the easement or land for the septic system intersects another *exclusive* easement or right of way.
  - Power lines
  - Utilities
  - Roads
  - Railroads

An encroachment is a term used when another entity allows a passage across their otherwise exclusive easement or right of way. The operative term here is an **exclusive** easement or ROW.

An encroachment is not needed for instance, to cross a power line that serves just the house or facility. But if there is a utility or transportation easement that excludes other uses – an encroachment must be granted and recorded with the ROD. These encroachment areas need to be designated with a plat or metes and bounds.

### Tri-Party Agreement

- What is it?
- Why is it needed?
- Is it needed?

I will now try to cover the topic that turned out to be one of the most contentious issues with remote systems.

### Tri-Party Agreement

- An agreement executed between
  - The developer
  - The local health department
  - The special homeowners association

#### **What is it?**

These three are party to the agreement.

The Special Homeowners Association is a non-profit incorporated association made up of the parties who share in the common portions of the septic systems.

This agreement will eventually be recorded with the Register of Deeds.

Let's talk about the Special Homeowners Association...

### Special Homeowners Association

- Articles of Incorporation required
- Perpetual
- Non-profit
- Purpose
  - System construction, operation, maintenance and repair
  - Describes extent of system under joint control
  - Fee collection, assessment

Articles of Incorporation must be drawn up and recorded with the Register of deeds.

Purpose:

To provide for system construction, maintenance, operation and repair

Describes system area and extent of system under joint control

Provides for fee collection, assessment

This is recorded at the register of deeds office

### Tri-Party Agreement Addresses

- Ownership
- Transfer of ownership
- Operation
- Maintenance
- Repairs
- Funding for operation, maintenance, and repairs

Why are we talking about the need for tri-party agreements?

In the conventional sense, they have been used for Condominiums and subdivisions where several individual owners collectively own the same wastewater system.

That is not exactly the case here – we are talking about individual systems – however they are located on that same parcel of property – usually the gang of force mains.

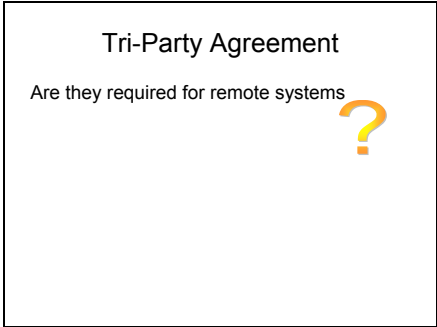
But this is the list of things that a TPA does.

### Tri-Party Agreement

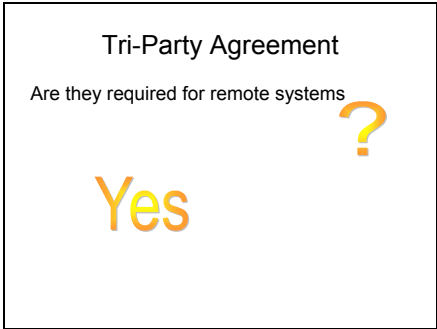
- Needed when individual system components are located on property under joint control.
- Specifically for “ganged” force mains within the force main easement.

In the context of remote systems, the common part of the system that is addressed by the TPA is the gangs of force mains, if they are located on the same parcel of land. The STEPS would not have to be included, and neither would the drainfields - if they are located on individually controlled property.

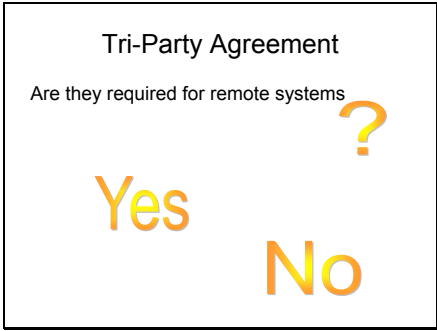
The commonly owned property containing individual system components presents a unique situation that goes beyond the conventional thinking of the rules.



After posing this question to various attorneys, other counties, and the state, I can report to you a definitive answer...



I got the answer of YES



AND I got the answer of NO

**Tri-Party Agreement**

Are they required for remote systems ?

Yes  
Maybe  
No

And I got everything in between.

**Tri-Party Agreement**

- Not required by virtue of .1937 (h)
- The facility is not a "condominium or multiple ownership development"

In most interpretations, a Tri Party is not required w/r to .1937(h) because the system is not serving a condominium nor a multiple ownership development. So we can say with some certainty that .1937(h) does not require a TPA for a remote system serving individual homes.

**Tri-Party Agreement**

However...

- Should be required as necessary
  - When components are "ganged"
  - Jointly owned property

However –  
Any situation where the system components are in close proximity (< setback distance ) and located on the same parcel of property, there is a need for a TPA

However, nothing precludes the requirement of a tri-party agreement in cases where they are deemed necessary. Our consortium of counties has deemed Tri-party agreements necessary in cases where the system components are located in close proximity and on a commonly owned parcel.

I hope to be able to make a case for this in the next example

### Who Pays to Find the Leak?



An example of why Tri-Party agreements are necessary:

After the subdivision is finished, when one of these 26 lines breaks, there is not a good way to diagnose which line is in need of repair. Almost all methods of determining which line is broken will require an expense – sometimes in the hundreds or thousands of dollars.

Even if a contractor is hired to uncover the pipes- who hires and who pays? If the line broken is not the one expected – or if several pipes are broken, is the contractor willing to continue with the repair without assurance of payment?

These are the very cases where there can be a deadlock in effecting repairs.

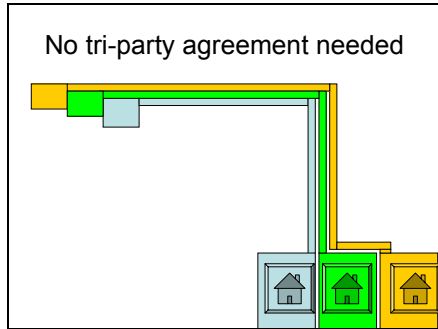
So it is pretty clear that the LHD needs to deal with one entity for this portion of the system – at least.. We have tried to effect repairs in identical situations with private ganged pipes on municipal sewer and they can be a nightmare with contractors suing to get owners to pay for work that they didn't hire out. While this could be a boon to the attorneys involved ( the same ones who say the TPA is not needed?) – it is a terrible waste of resources when things go to court.

However – if there is a TPA in place to address this, funds are available for repair and there is one contractor to repair the problem who bills the HOA, the repair is effected quickly and orderly without questioning who owns the leaking pipe.

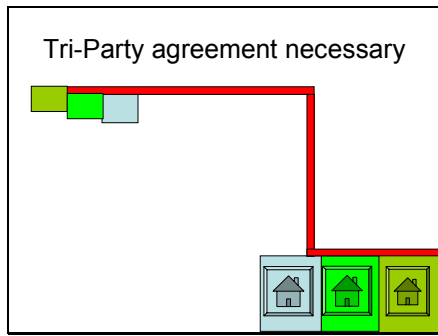
In this same scenario of ganged pipes, if a utility contractor trenches across several of the pipes, diagnosing which pipes were cut and then locating the owners would be wasted effort. This portion of the individual systems needs to be treated as a common part of the system.

There is also a concern that a contractor may inadvertently damage neighboring system components while working on an adjacent system. If there is a common ownership approach, the repairs are not a problem.

I would like to be clear that TPAs do not necessarily apply to all parts of the systems and not to individual force mains on their own easement.



Where one can tell readily where the problem is since there is 15' between each of the supply lines and one has to just measure from surveyed lines or known points to determine who pays to repair. This can be confirmed with a tracing dye if necessary. Problems can be easily identified as to owner



- Responsibilities**
- Engineer Design
    - Pretreatment components w/o prior approval
    - 3000 + GPD
    - Duplex pumps
    - Supply line networks > 1500 GPD
    - As required by the LHD

Our group tried to specify when engineer design was needed.

Most of these apply to all systems, but the operative ones are the last 2.

We felt that whenever >1500 GPD was passing through the same area on a shared supply line, that a

It should also be mentioned that when complex topography is involved, it would be wise to require an engineer to design at least the force main portions – given some parameters.

### Review of Documents

- Easements, tri-party agreements, encroachments
- Review by LHD
- Review by county attorney
- Verification after recording

There should be a process or protocol for a review of all of these documents before they get recorded or acted upon. In our county, we have a (cumbersome) process that involves LHD review, county attorney review, and verification after the documents are recorded. Without this review, I would estimate that less than 10 % of our easements would be done properly. Almost always, corrections are needed as a result of these reviews.

### Prior to Issuance of Operation Permit

- Contract with ORC
- Permanent survey markers installed
- Final tri-party agreement executed and recorded
- As-built drawings (certified)
- System start-up

As with the other permitting steps, before an OP is issued, there is a laundry list of items that need to be completed before signing on the dotted line,.

A contract with the Operator and HOA or owner as appropriate needs to be executed and submitted.

The LHD needs to verify that all markers are permanent and visible and have not been covered up by construction activities.

The TPA needs to be recorded

As built drawings must be certified and submitted

System start-up inspection needs to be completed with the required parties in attendance (Albert will cover this in more detail.

### Future Problems / Opportunities

- Building structures
- Obstacles to entry
- Maintenance of remote components
- System failure on other properties

As with all larger or more complex systems, there will be issues that arise.

If someone builds a fence or a structure over an easement area, or if a fence is erected that blocks access for the operator or LHD, these need to be dealt with. (pictures?)

We should hopefully have all the permit conditions and documents in place to fall back on when some of these issues need to be enforced or corrected.

So after the OP is issued, there will be plenty of opportunities that arise. Hopefully by getting the legal issues well planned during the permitting stage, the problems can be resolved with a minimum of hassle.