

## "The ABCs of Enforcement by Wetlands Agencies"

In the last issue I reintroduced the Q & A format that was featured a number of years ago to spark a dialogue between readers and the writers of *The Habitat*. A number of readers pointed out that if I begin by focusing on what a wetlands agency shouldn't be doing (requiring conservation easements as permit conditions), then I should spend a column encouraging wetlands agency to act. In conjunction with that sentiment and a specific request from the editor of *The Habitat*, this column will explore enforcement actions.

The ABCs could refer literally to the enforcement provisions of the state wetlands law:

- General Statutes § 22a-44 (a): actions conducted at the agency level;
- General Statutes § 22a-44 (b): civil actions by the agency *or others* in court;
- General Statutes § 22a-44 (c): criminal actions by the state's attorney's office in court.

Or the ABCs could refer to the primary challenges in undertaking enforcement:

- Access to site: can you view the alleged violation?
- Burden of proof: do you have to prove the violation?
- Costs: can you afford to enforce the law?

We'll explore both sets of basics in the course of the column. This article is intended to summarize the existing laws. Be sure to consult your regulations and the statute to adhere to mandatory deadlines or timeframes.

### Which enforcement action to choose?

There are different enforcement tools for different problems. Sometimes more than one tool may be appropriate. In addition to the remedies provided in Section 22a-44 of the Connecticut General Statutes, I will add two others for your consideration: **suspension or revocation of a permit**, § 22a-42a (d) (1), and **issuance of a citation**, "ticket" *if* your Agency has enacted an ordinance (by the town legislative body, not a regulation by the Agency) setting up the citation procedure and mandatory hearing process. (You can access the detailed explanation of the citation process written by Attorney Michael Zizka in the summer 2002 issue of *The Habitat*, available on the CACIWC website.)

1. **Are you seeking restoration?** The Agency will have to issue an order and/or initiate a court action.
2. **Do you want someone to stop violating a wetlands permit, such as not providing specified sedimentation and erosion controls?** *If the party is actively engaged in construction activities*, then suspension or revocation of the permit is probably the best means to get the party's attention to stop. But if the construction is dormant due to the weather or because of financing or other reasons, issuing an order will probably be the better alternative.
3. **Do you want to deter wrongful conduct by charging for violations?** If your town has enacted an ordinance to issue citations, the citation

process is efficient, but only if the price is not so low that it's just the "cost of doing business." Caveat: a citation can not require corrective action. If you need restoration, you need another tool as well.

In general, it is better for the Agency to undertake action at its meetings, either by the issuance of an order or the suspension/revocation of a permit than proceeding directly to court. The Agency, which has the burden of proof (see below), has a relaxed standard for the introduction of evidence at an agency hearing in comparison with a court hearing, which works to the Agency's advantage. Also, once the Agency has determined the existence of facts, and there is a basis in the Agency's record for those facts, those facts most likely will be deferred to by the court.

The extraordinary case which may warrant going to court short of completed Agency action is catastrophic run-off or sedimentation that is severely damaging a waterbody, for instance. If the Agency has issued a cease and desist order but the party persists in the damaging activities, immediate court action may be warranted.

#### Informal vs. formal action

Informal action includes a telephone call or a letter requesting answers to questions or appearance at a meeting to discuss a situation. Formal action is action established by statute, such as the issuance of a cease and desist order or the suspension or revocation of a permit. The Agency can tailor the formality of its action to the facts in a given case. If informal action yields the results sought, voluntary cooperation or ceasing of an activity until a permit has been issued, nothing further need be done. But failure to comply with an informal act, such as not returning a telephone call or not attending a meeting to discuss a situation, does not rise to a violation of law. If the Agency wants to undertake enforceable action, it must take formal action.

#### Agency order vs. permit condition

If the Agency wants corrective action undertaken, the only way the Agency can enforce the corrective action is by issuance of an order. It may seem easier to include the corrective actions as a permit condition if the party is currently before the Agency for a permit application. However, a permit is "permission" to undertake specific acts, it is not a requirement to do so. If the permittee loses financing or interest in going forward, the Agency will not be able to enforce the permit condition requiring corrective action, if the permittee isn't conducting activities approved by the permit.

#### **Access to site**

##### Can you enter onto private property to investigate possible or known wetlands violations?

Without the consent of the property owner neither the Agency nor the town staff has legal authority to enter private property to investigate violations of the wetlands law. Wetlands agencies are not protected from claims of trespass when carrying out their duties. In contrast, the Department of Environmental Protection does have explicit protection from trespass claims, because the legislature included protective language in the DEP statutes. See General Statutes § 22a-6 (a) (5) ("(a) The commissioner may: . . . (5) in accordance with constitutional limitations,

enter at all reasonable times, without liability, upon any public or private property, except a private residence, for the purpose of inspection and investigation to ascertain possible violations of any statute, regulation, order or permit administered, adopted or issued by him and the owner . . . shall permit such entry, and no action for trespass shall lie against the commissioner for such entry . . .”).

The 2006 DEP Model Regulations now reflect this correct legal position. All references to entering property without consent have been deleted. Your agency should review its regulations and amend them, as needed. The troublesome sections were in Sections 14.1 and 14.2. The 2006 version of the Model Regulations addresses this by revising Sections 14.1, 14.2, and creating a new 14.3.

How can you do your job? View the property from the street. Ask permission of an abutter to observe the neighboring property. Did you try asking the property owner? In some instances DEP can provide the investigatory legwork for your agency. DEP’s authority to enter onto private property, however, does not include your agency accompanying DEP at the site.

## **Burden of proof**

Whenever the Agency takes any enforcement action, the Agency has the burden of proof. That means the Agency must go first and establish the violation, both factually and within its regulations. The Agency can not pass this duty off on the alleged violator. Even if the Agency writes in its cease and desist order that the party must “show cause” why the cease and desist order should not be upheld, in fact, it is the Agency *and only the Agency* that must establish that a violation has occurred.

This is a reversal of the roles for the Agency. In processing permit applications, the burden of proof is on the applicant to establish it meets the criteria for issuing a permit. Similarly, a person seeking acknowledgement from the Agency that an activity is exempt bears the burden of establishing his/her entitlement to the exemption. All of the expectations that you have of applicants or those seeking to prove their activities are exempt are on your shoulders when undertaking enforcement.

### 1. Gather and retain evidence

Reduce all observations to paper – whether handwritten, computer-generated or photographic. No specific format is required. What is clear on the 1<sup>st</sup> site visit after a rainstorm may become blurred or totally lost after the 4<sup>th</sup> or 14<sup>th</sup> visit. At the very least, include the date, weather, time of day of the observations and who was present. If there was dialogue with anyone, including the potential wrongdoer, provide a written summary.

For photographs, the back of the photo should be marked with the date and approximate location or angle of the photo. The person who took the photo need not be available to authenticate the photo, but someone will have to be able to testify that the photo is accurate.

How do you apply this? The Agency must have evidence in hand before issuing a cease and desist order. The Agency must be able to prove the person or entity receiving the order has

violated the wetlands law by undertaking a regulated activity without a permit or has violated a permit. The Agency may NOT use the mandatory hearing on the order to gather evidence from the orderee to support issuance of the original cease and desist order. If the potential violation involves wetlands, the Agency will have to be able to establish that the land involved is one of the soil types defined as inland wetlands. That duty cannot be shifted to the orderee. The gathering of photos, reports, field notes and other similar evidence should predate the issuance of a cease and desist order, though it may continue through the hearing and beyond.

## 2. Present the evidence

At the mandatory hearing on the order the Agency must present evidence first. The Agency is allowed to accept written and photographic documentation of the violations alleged in a cease and desist order. However, if the orderee appears and disputes the accuracy of the information and there is no live witness for the Agency to inquire, the Agency's documentation may become less credible. Note the brief period to hold and conclude a hearing on a cease and desist order.

## 3. Consider the rebuttal evidence

The person who received the order must be allowed to rebut the Agency's presentation of the evidence, but is not required to do so. For instance, if the Agency issues a cease and desist order and then fails to enter any evidence into the record of the hearing to substantiate the alleged violations, the Agency can not uphold the order. The orderee is under no obligation to prove the Agency's case. The orderee's silence can not legally be interpreted as a sufficient basis to uphold the original order.

Within ten days after the hearing the Agency is required to determine whether the original order shall remain in effect, be revised or be revoked. That determination must be based on evidence submitted into the record. The evidence will be primarily from the Agency. If the evidence is of a technical nature, the witness must have expertise in that area. (For instance, a certified soil scientist is necessary to establish the existence of wetlands soils.)

These same concepts apply to the Agency when suspending or revoking a permit. If through the hearing process the Agency determines there are different reasons from those cited in the notice to the permittee, which could form a basis to suspend or revoke the permit, the Agency must begin again by formally providing written notice of the specific facts which give rise to the Agency considering suspension or revocation and holding a hearing based on the new notice.

Your Agency also needs to prepare the background for the issuance of a citation. A hearing can be invoked by the "ticketed" party. Your Agency will have to substantiate the charges with proof.

The same burden of proof applies when in court. If your Agency is enforcing an order, you will need proof that order was properly issued; that the hearing was properly held; that notice of the final order was sent by certified mail. You will also need proof that the orderee did not comply with order. Did the order have specific enough requirements (acts, deadlines) so that compliance/non-compliance is clear? Do you have evidence, probably expert evidence, that the

orderee did not comply? Do you have a witness, probably an expert, to characterize the nature of the harm from the violation of the order?

Why go to court? If the person or entity does not stop the actions or does not initiate the restoration, that relief can be provided by a court, after trial. The court can impose penalties, for each day of violation and can award all costs, fees and expenses, such as for experts as well as attorney's fees.

There may be extraordinary instances when it will be advisable to go directly to court prior to the Agency undertaking or completing a cease and desist order process or a suspension/revocation of a permit. That will have to be determined on a case-by-case basis with your town counsel. Most often going to court is the least desirable option. There will be no underlying agency action that can be deferred to and everything will have to be proved in accordance with the formal rules of evidence. It will require a very substantial commitment of time and resources. Moreover, none of it will occur in the evening hours or on days scheduled around the Agency's convenience.

### Cost of enforcement

Your Agency has a duty to enforce the wetlands laws. Do you hear the following? "But we don't have a budget to hire experts." Or: "The town won't let us consult with the town attorney, it's too expensive." I urge you to undertake everything within your limits to enforce the law until you have exhausted your resources. Maybe your Agency can establish permit or other violations with the expertise of commission members. Take steps to suspend or revoke the permit or issue an order. Create a strong administrative record, even if you are not given access to legal counsel to continue enforcing the permit suspension in court. Express your willingness to work with individuals or groups who would take up enforcement in court. "*Any person,*" states Section 22a-44 (b) of the General Statutes, not just the Agency can bring a court action to enforce violations of the wetlands laws. The political winds may change in your town. The residents may eventually decide funding enforcement makes sense for the wise growth of the town.

And what if others go to court before you have started enforcement? Investigate and determine whether you want to join them or assist them. The courts are very interested in hearing from government agencies charged with enforcing the law. Enforcement is not an all-or-nothing proposition. Along the spectrum are informal and formal actions where your Agency can be the lead player as often as it chooses or work in concert with others to enforce the laws.

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