

**Overview of Remedies
Available to Enforce Public Health Laws**

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Public health officials in North Carolina have a wide range of legal tools available to assist them with enforcement of state and local laws. In most situations, public health officials will have a choice of one or more possible remedies. It is important to understand all of the options available so the best possible remedy may be chosen for each particular situation. The remedies discussed below are divided into three categories: administrative, civil and criminal.

I. Administrative

a. Permit actions (G.S. § 130A-23)

- i. What is a permit action? A permit action is the process of either suspending or revoking a person's permit (e.g., OSWW, food and lodging, swimming pools).
- ii. When is it available as a remedy? A permit may be suspended or revoked if the agency finds:
 1. A violation of an applicable provision of the state statutes in Chapter 130A, the state rules or a condition placed upon a permit;
or
 2. That the permit was issued based upon incorrect or inadequate information that materially affected the decision to issue the permit.
- iii. What is the process?
 1. Due process protections: Except as provided in section I.a.iii.2. below, the first step in a permit action is to provide the permit holder with notice and an opportunity to be heard. Specifically, the permit holder must be sent a notice ("intent to suspend/revoke" letter) explaining that:

- a. There has been a tentative decision to suspend or revoke the permit; and
 - b. An administrative hearing may be held if requested by the permit holder, at which time the permit holder may challenge the tentative decision.
- 2. Imminent hazard permit actions: A permit may *immediately* be suspended or revoked if the violation presents an imminent hazard. EH need not provide the permit holder with notice and opportunity to be heard. Upon suspending or revoking the permit, EH must inform the permit holder of their rights to appeal the action.
 - a. “Imminent hazard” defined (G.S. § 130A-2): A situation that, if no immediate action is taken, is likely to cause
 - i. An immediate threat to human life,
 - ii. An immediate threat of serious physical injury,
 - iii. An immediate threat of serious adverse health effects, or
 - iv. A serious risk of irreparable damage to the environment.
 - b. Specific types of imminent hazards: The statute identifies two specific types of imminent hazards, but this list should *not* be considered exclusive. EH professionals may conclude that other situations rise to the level of an imminent hazard.
 - i. Permits for food and lodging establishments must be immediately *revoked* for failure to maintain a minimum grade of C.
 - ii. A public swimming pool operation permit must be immediately *suspended* for
 - 1. Failure to maintain minimum water quality standards or minimum safety standards, or
 - 2. Design and construction standards pertaining to the abatement of suction hazards which result in an unsafe condition.
- iv. When should a permit be revoked rather than suspended? Both remedies are available at all times but, in most situations, a health department should consider *suspension* if the problem is one that can be fixed.

b. Administrative penalties (G.S. § 130A-22)

- i. What is an administrative penalty? An administrative penalty is a monetary fine.
- ii. When is it available as a remedy? A person may be subject to administrative penalties if he or she violates environmental health laws related to lead certification or OSWW. When deciding on the amount of the fine, DENR (or, in the case of local OSWW rule, the local health director) must consider the “degree and extent of the harm caused by the violation and the cost of rectifying the damage.” The penalties that may apply in the context of EH enforcement include:
 1. Lead: If a person violates the laws related to the certification for inspection, assessment and remediation of lead hazards, DENR may impose a fine up to \$1,000.00 *per day* (each day is considered a separate violation).
 2. OSWW under *state* rules: If a person willfully violates the state laws related to on-site wastewater or violates a condition placed on a permit issued pursuant to those laws, DENR may impose a graduated fine. DENR may *not* impose a fine if the person establishes that it is impossible to comply with the laws by either improving the site or system or installing a new system. If the system is designed to support a daily flow < 480 gallons or if it serves a single one-family dwelling, the fine may be up to \$50.00 per day. For other systems, the fine may be up to \$300.00 per day.
 3. OSWW under *local* rules: If a person willfully violates local rules related to on-site wastewater or violates a condition placed on a permit issued under those rules, a local health director may impose an administrative penalty. The director may *not* impose a fine if the person establishes that it is impossible to comply with the state statutes (not necessarily the local rules) by either improving the site or system or installing a new system. If the system is designed to support a daily flow < 480 gallons or if it serves a single one-family dwelling, the fine may be up to \$50.00 per day. For other systems, the fine may be up to \$300.00 per day.
- iii. What is the process? The agency (or, in the case of local OSWW rules, the local health director) is required to notify the person about the penalty but is not required to go through any other particular administrative or judicial process. If a health department believes penalties should be assessed, it should contact DENR (or local health director if enforcing local rules).

- iv. May a person appeal an administrative penalty? Yes. A person may contest a fine imposed by DENR by filing a petition with the Office of Administrative Hearings within 30 days of receiving the notice of agency action. A person may contest a fine imposed by a local health director as provided in G.S. 130A-24(b)-(d) (specifying the procedure for an appeal to the local board of health).
- v. What happens if the person refuses to pay? The state (or, in the case of local OSWW rules, a local health director) may go to court to collect a fine if the person has not paid the fine within 60 days. If the person files an appeal, this 60-day window opens at the conclusion of the appeal when the final agency decision is issued.

c. Embargo

i. Milk and shellfish

- 1. What is an embargo? An embargo is a remedy that allows an official to prevent food or drink from being used or served to the public. It effectively allows the official to “detain” the food or drink until a court decides how the material should be handled.
- 2. When is it available as a remedy? DENR and local health directors have the authority to embargo milk, scallops, shellfish and crustacea in some circumstances.
 - a. Milk: If the milk is designated as Grade “A” and there is probable cause to believe that the milk is misbranded or does not satisfy the applicable milk regulations, it may be embargoed.
 - b. Scallops, shellfish and crustacean (hereinafter “shellfish”): If there is probable cause to believe that the shellfish is adulterated or misbranded, the shellfish may be embargoed.
- 3. What is the process?
 - a. First, a tag must be affixed to the item. At the same time, there must be a warning to all persons not to remove or dispose of the item until given permission by the person who embargoed the item or a court.
 - b. Second, the person who embargoed the item *must* petition a court (district or superior court) for a condemnation order.
 - i. The court may order the item to be destroyed.
 - ii. If the item is misbranded, the court may allow the person to fix the problem.

- ii. Other food and drink items: The Department of Agriculture has the authority to embargo food and drink items other than milk and shellfish. G.S. 106-125. The agency *may* delegate this authority to DENR, but it has not elected to do so. If a public health official believes that other food or drink should be embargoed (i.e., no other public health remedy is available or would be effective), it should contact the Dept. of Agriculture.

d. Remedies related to lead poisoning hazards

i. Examination and testing

1. What is examination and testing? The state has the authority to require certain children to be examined and tested.
2. When is it available as a remedy? The state may order examination and testing whenever the state has a reasonable suspicion that a child less than 6 years of age has an elevated blood lead level (10 mcg per deciliter or greater) or confirmed lead poisoning (20 mcg per deciliter or greater).¹

ii. Remediation:

1. What is remediation? In general, remediation means that a property owner or manager “fixes” any lead poisoning hazards, such as lead dust and lead paint. The law specifies remediation standards for certain types of lead poisoning hazards. For example, lead dust on floors must be reduced below 40 micrograms per square foot. See G.S. 130A-131.9C.
2. When is it available as a remedy? The state must order remediation of a child’s residence when
 - a. A child less than six years of age has a confirmed lead poisoning of 20 micrograms per deciliter or greater; and
 - b. The child resides in a unit containing lead poisoning hazards (the term “lead poisoning hazard” is defined in G.S. 130A-131.7).

The state must also require remediation of supplemental addresses of the child (such as a grandparent’s home that the child regularly visits).

¹ These thresholds for laboratory results must be based on the lower of two consecutive blood tests within a six-month period.

3. What is the process?
 - a. The state notifies the owner/manager regarding the remediation requirement and identifies possible methods of remediation. It also notifies all persons residing in, attending or regularly visiting the property. G.S. 130A-131.9B.
 - b. The owner/manager submits a remediation plan to the state within 14 days of receiving the notification. The owner/manager may not begin the remediation until he receives written approval from the state. G.S. 130A-131.9C (this statute also addresses the content of the remediation plan in more detail). If the state does not approve the plan, it may order the owner/manager to submit a modified plan. The owner/manager has 14 days to submit a modified plan. If he fails to do so, the state may order submission within 5 days.
 - c. Remediation must be completed within 60 days of the approval of the plan. An owner/manager may request an extension, which the state may grant for up to 30 days.
 - d. The state *must* conduct a visual inspection after completion of the remediation. In addition, the state has the *option* of ordering laboratory analyses of lead levels (dust and water).
4. What is the “maintenance standard” and how does it fit in?
 - a. The term “maintenance standard” is defined in G.S. 130A-131.7 to include a series of steps for maintaining property, such as repairing and repainting deteriorated paint, cleaning residential units to minimize exposure to lead dust, adjusting doors and windows to minimize friction or impact on surfaces (which can generate dust), and providing occupants with written materials regarding lead.
 - b. If an owner/manager of a property housing a lead-poisoned child follows the maintenance standard and also remedies all identified lead hazards, he will have satisfied the remediation requirement. The state is required to monitor compliance with the maintenance standard as provided in the statute. Documented compliance with the maintenance standards also shields the owner/manager from liability in some circumstances. G.S. 130A-131.9D.

II. Civil

a. Injunctions

- i. What is an injunction? In general, an injunction is an order of a court telling a person to *stop* doing something. For example, if a homeowner is straight-piping wastewater into a local stream, a court may issue an order telling her that she must stop. A “temporary restraining order” (TRO) is a type of injunction that allows a court to *immediately* order a person to stop doing something (or not do something at all). After issuing a TRO, the court may issue a preliminary injunction (also short-term) and a permanent injunction (long-term).
- ii. When is it available as a remedy? If a person violates a public health statute, state regulation, or local board of health rule, the state (DHHS or DENR) or a local health director may seek an *injunction* in superior court. G.S. 130A-18. State or local authorities may pursue an injunction in addition to other remedies (such as criminal prosecution or permit suspension).
- iii. What is the process? If a local health director (in consultation with the EH specialist or supervisor) believes that an injunction is necessary, he should speak with his county attorney and/or the AG’s office. In most circumstances, the county attorney will pursue an injunction and the AG’s office may provide support and assistance to the county attorney.

b. Public health nuisance

- i. What is a public health nuisance? The law does not define the term public health nuisance. The law of “nuisance” is extraordinarily inconsistent and confused. When evaluating a situation, one should consider whether it meets the following three criteria (at a minimum):
 1. Is it public? There is no general rule that dictates how many individuals must be affected before a situation would be considered “public.” Common sense would lead one to usually exclude situations that are only on private property (and have no spillover effect on neighbors or the environment), such as mold inside a residence.
 2. Does it affect health? The situation must have an impact on human health. For example, it is unlikely that a court would recognize a health director’s authority to declare an adult book store a public health nuisance based on the subject matter of the books.

3. Would it be considered a nuisance? A commonly used legal definition of the term “nuisance” outside the public health context is: substantial and unreasonable interference with the enjoyment of real property that causes injury to another. Translating this definition into the public health context, one might consider whether the situation *substantially and unreasonably interferes with the health of the public*.
- ii. When is it available as a remedy? Based on the statute alone, it appears that the nuisance authority is available anytime that the state or a local health director determines that a nuisance exists. G.S. 130A-19. As a practical matter, however, health departments should proceed with caution when asking officials to exercise this authority. If any other more specific remedy (such as an injunction or permit action) is available and would achieve the same objectives, that remedy should be pursued.
 - iii. What is the process?
 1. Issue abatement order: The state or a local health director issues an order to the owner, lessee, operator or other person in control of the property. The order will direct him or her to “take any action necessary to abate the public health nuisance.” Depending on the circumstances, the order may outline specific abatement measures. The law does not specify what it means by the term “abatement” but the term is generally defined to mean “put an end to” or “reduce in degree or intensity.” Merriam-Webster’s New World Dictionary, 11th ed. It will be up to the public health official issuing the order to determine what constitutes an appropriate “abatement” under each individual circumstance.
 2. Enforce order: If the person refuses to comply with the order, the state or local health director may bring an action in superior court to enforce the order. The court may:
 - a. Order the owner to abate the nuisance; or
 - b. Direct the state or local health director to abate the nuisance.If the government is required to abate the nuisance, it will have a lien on the property for the costs of the abatement.

c. Imminent hazard

- i. What is an imminent hazard? By definition, an imminent hazard is a situation that, if no immediate action is taken, is likely to cause:
 1. An immediate threat to human life;
 2. An immediate threat of serious physical injury;
 3. An immediate threat of serious adverse health effects; or
 4. A serious risk of irreparable damage to the environment.G.S. 130A-2(3).
- ii. When is it available? The state or a local health director may determine that an imminent hazard exists at any time. As with public health nuisance, imminent hazard authority should probably only be exercised when no other remedy is available or would be effective or timely.
- iii. What is the process?
 1. Issue abatement order *or* abate:
 - a. Order: The state or a local health director may issue an abatement order to the owner, lessee, operator or other person in control of the property (see discussion of abatement orders under “public health nuisance” above).
 - b. Abate: The state or a local health director may elect to abate the imminent hazard. Prior to entering the property and abating the hazard, the government official must provide notice to (or make a reasonable attempt to notify) the owner, lessee, operator, or other person in control of the property.
 2. Lien against property: If the government elects to abate the hazard (rather than order abatement by another), it will have a lien on the property for the cost of the abatement *except in limited circumstances*. The government’ lien may be defeated if
 - a. It is shown that an imminent hazard did not exist at the time of the abatement; or
 - b. The owner, lessee, operator, or other person in control of the property shows that he or she was not culpable (i.e., guilty) in the creation of the imminent hazard.

III. Criminal

- a. What criminal penalties are available? A person may be charged with a Class 1 *misdemeanor* for violations of public health statutes, state regulations or local board of health rules. G.S. 130A-25(a) (see also G.S. 14-3(a) which provides that any unclassified misdemeanor is considered a Class 1 misdemeanor).
- b. When is it available as a remedy? Whenever a person violates a provision of the state statutes, regulations or local rules.
- c. What is the process? See handout entitled “Prosecuting Health Law Violations in Criminal Court” by Robert Farb (May 2004).