

Overview of Public Health’s Revised Embargo Authority

Aimee Wall
UNC School of Government

I. What is embargo?

State law does not define the term “embargo.” The dictionary definition of embargo is “an order of a government forbidding foreign ships to enter, or any ships to leave, its ports” or “an official suspension of commerce or other activity.” Oxford American Dictionary (1999). The latter definition is the one most appropriate in the environmental health context. If public health officials are going to embargo food or drink, they are basically ordering a person or company *not* to sell or otherwise dispose of the food or drink until a court decides whether it should be destroyed. Another word that is typically used is “detain” or “detention.” In the context of public health’s authority with respect to food and drink, the terms are interchangeable.

In short, a public health embargo consists of an official placing a tag on a food or drink item indicating that the item is adulterated or misbranded and then petitioning district or superior court for an order of condemnation. The public health embargo authority is found in G.S. 130A-21 (as amended by S.L. 2006-80). The public health law cross-references the embargo procedure used by the N.C. Department of Agriculture and Consumer Services (DACS) found in G.S. 106-125.

II. Who may exercise embargo authority

- a. Shellfish and Grade A milk: The embargo authority related to shellfish (scallops, shellfish and crustacean) is unchanged. Therefore, environmental health specialists holding appropriate authorizations in food, lodging and institutions may still exercise embargo authority with respect to these items.
- b. Other food and drink
 - i. Who? With respect to other food and drink, the law provides that the following persons may exercise embargo authority:
 1. A Department of Environment and Natural Resources (DENR) regional environmental health specialist (REHS);
 2. The Director of DENR’s Division of Environmental Health or the director’s designee;
 3. A local health director, after consultation with an REHS or the DEH Director/designee;
 4. The Department of Agriculture and Consumer Services (DACS).

- ii. Delegation: The law includes specific language prohibiting delegation of embargo authority to individual environmental health specialists (EHS) in local health departments. Therefore, it is critical that the health director or REHS – not an EHS – is the only person actually ordering an embargo. Despite the limitations on the actual embargo authority, an EHS or EHS supervisor is likely to play an important role in the embargo process. The EHS will probably be the first person to witness the suspect food or drink item and will investigate the situation by initiating a conversation with the person in charge regarding the condition of the item and possibly suggesting voluntary disposal of the product. The EHS will probably also contact the health director and stay closely involved if the embargo process moves forward.
- iii. Consultation: The law requires that the health director consult with an REHS or the DEH Director/designee before issuing an embargo order. The form of this consultation will likely vary depending on the circumstances. It could mean a telephone conversation or a site visit. Whatever form it takes, the health director should document the consultation as part of the embargo process.
- iv. Notification: When any embargo action is taken, the law requires DENR or the local health director to notify DACS of the action taken.

III. What types of establishments and situations are subject to embargo authority?

- a. Milk and shellfish authority is unchanged. See G.S. 130A-21(b)(milk) and (c)(shellfish).
- b. Other food and drink: The embargo authority of public health officials is limited to (1) regulated establishments and (2) communicable disease investigations. If a public health official is faced with a situation where he lacks embargo authority, he should consult with representatives of DACS to determine whether it has jurisdiction.
 - i. Regulated establishments: The law authorizes embargo in establishments regulated under Chapter 130A and/or the rules of the Commission for Health Services.

1. Who is included? The following types of establishments are subject to embargo authority
 - a. Food and lodging establishments (G.S. 130A-248)
 - b. Institutions (e.g., nursing homes, hospitals, orphanages) (G.S. 130A-235)
 - c. Schools (G.S. 130A-236)
 - d. Mass gatherings (G.S. Chapter 130A, Article 8, Part 7)
 - e. Jails (G.S. 153A-226)
 - f. Child care facilities (G.S. 110-91)

2. Who is excluded?
 - a. Anyone exempt from regulation under Chapter 130A, such as private clubs (G.S. 130A-250(5)).
 - b. Areas of and products in regulated establishments that are subject to regulation by the DACS, such as packaged hot dogs in a meat market.
 - c. Establishments regulated exclusively by DACS, such as ice cream shops.

- ii. Communicable disease investigations: The law also authorizes embargo in an establishment that is the subject of an investigation pursuant to G.S. 130A-144. Note that the scope of this authority is slightly more expansive – it will apply in *any* establishment that is the subject of an investigation, whether it is regulated by DENR or not.

IV. Under what conditions may food or drink be embargoed?

- a. Adulterated: The law authorizes the use of embargo authority if food or drink is adulterated, as that term is defined in G.S. 106-129. The term essentially means that the food or drink has been mixed or altered such that it may result in human illness and/or death if consumed. Examples could include food or drink that:
 - i. Is cross contaminated with organic substances such as blood, fecal matter (animal or human) or chemicals such as petroleum products, pesticides and cleaning solutions,
 - ii. Has begun to decompose, or
 - iii. Has a foreign object in it.

- b. Misbranded: The law also authorizes the use of embargo authority if food or drink is misbranded so as to be dangerous or fraudulent, as that term is defined in G.S. 106-130. Given the complexity of the definition of misbranding and the intersection with even more complex federal regulations, public health officials should consult with DACS regarding any suspected misbranding.

V. What are some alternatives to exercising embargo authority?

- a. Voluntary disposal: When an EHS is conducting an inspection or responding to a complaint, she may educate the owner or manager about unsafe food or drink and explain that it should not be served to the public. The EHS, health director or REHS can ask the owner or manager to dispose of the food voluntarily.
- b. Permit action: If an EHS concludes that food or drink presents an imminent hazard (as defined in G.S. 130A-2), she has the authority to *immediately* suspend or revoke a permit pursuant to G.S. 130A-23(d).
- c. Imminent hazard: If an EHS concludes that food or drink presents an imminent hazard (as defined in G.S. 130A-2), she can also contact the health director or DENR and evaluate the possibility of exercising imminent hazard authority under G.S. 130A-20. Under this law, the health director or state public health official has the authority to *immediately* abate the hazard, which could include seizing the food or drink to prevent it being served to the public. It is conceivable that this authority could also be used to allow the health official to take steps to immediately destroy the food or drink if, for example, it is causing harm (e.g., emitting noxious gases).
- d. Public health nuisance: A health director or state public health official could theoretically conclude that the food or drink constituted a public health nuisance (which is not defined in state law). G.S. 130A-19. If so, he could issue an order requiring the owner or manager “abate” the nuisance, which could mean not serving it to the public. The only way to enforce such an order, however, is to go to court. Given that the process is so comparable to embargo authority, it may be more appropriate to rely on embargo than the less specific nuisance authority.
- e. Injunction: Public health officials also have the option of going to court to seek an injunction under G.S. 130A-18. An injunction has the benefit of longevity. In other words, an embargo order would effectively eliminate one lot of food or drink but an injunction could allow a court to order an owner or manager to *never* serve certain food or drink in the future. Depending on the circumstances, an injunction may be a more appropriate remedy than embargo or perhaps it could be combined with embargo.

- f. Misdemeanor: Public health officials always have the option of charging an owner or manager with a Class 1 misdemeanor under G.S. 130A-25 for violations of any provision of Chapter 130A and rules adopted by the Commission for Health Services. A criminal charge could be a useful enforcement tool if, for example, a person is operating without a permit or is repeatedly violating applicable statute or rules.