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.

The outline first addresses the remedies available to address violations of laws found in Chapter 130A of the General Statutes. Chapter 130A incorporates many of the state's public health laws, including laws governing on-site wastewater, food and lodging, childhood lead exposure, and communicable disease control. The remedies identified in Chapter 130A are also available to enforce local board of health rules, such local private drinking water well rules and on-site wastewater rules. A separate section of the outline addresses the remedies available to enforce state laws governing private drinking water wells, which are slightly different remedies because the laws are found in Chapter 87 of the General Statutes. The remedies in Chapter 87 are available only if the health department is enforcing the state drinking water rules.

Chapter 130A: Public Health

I. Permit actions (G.S. § 130A-23)

a. 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).

b. When is it available as a remedy? A permit may be suspended or revoked if the agency finds:

   i. A violation of an applicable provision of the state statutes in Chapter 130A, the state rules or a condition placed upon a permit; or
   ii. That the permit was issued based upon incorrect or inadequate information that materially affected the decision to issue the permit.

c. What is the process?

   i. 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:

      1. There has been a tentative decision to suspend or revoke the permit; and

      2. An administrative hearing may be held if requested by the permit holder, at which time the permit holder may challenge the tentative decision.

ii. 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.

1. "Imminent hazard" defined (G.S. § 130A-2): A situation that, if no immediate action is taken, is likely to cause
    a. An immediate threat to human life,
    b. An immediate threat of serious physical injury,
    c. An immediate threat of serious adverse health effects, or
    d. A serious risk of irreparable damage to the environment.

2. 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.
    a. Permits for food and lodging establishments must be immediately *revoked* for failure to maintain a minimum grade of C.
    b. A public swimming pool operation permit must be immediately *suspended* for
        i. Failure to maintain minimum water quality standards or minimum safety standards, or
        ii. Design and construction standards pertaining to the abatement of suction hazards which result in an unsafe condition.

d. When should an EHS revoke rather than suspend a permit? Both remedies are available at all times but, in most situations, EHS should consider *suspension* if the problem is one that can be fixed.

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

a. What is an administrative penalty? An administrative penalty is a monetary fine.

b. When is it available as a remedy? A person may be subject to administrative penalties if he or she violates laws related to lead certification, OSWW or smoking. DENR is responsible for imposing penalties related to violations of state statutes and rules related lead certification and OSWW. A local health director is responsible for imposing penalties related to (1) local OSWW rules and (2) state and local statutes and rules related to smoking.

    i. Lead: If a person violates the laws related to the certification for inspection, assessment and remediation of lead hazards (i.e., conducts an inspection without proper certification), DENR may impose a fine up to $1,000.00 *per day* (each day is considered a separate violation). When deciding on the amount of the fine, DENR must consider the "degree and extent of the harm caused by the violation and the cost of rectifying the damage."

ii. 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. When deciding on the amount of the fine, DENR must consider the "degree and extent of the harm caused by the violation and the cost of rectifying the damage." 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.

iii. 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. When deciding on the amount of the fine, the director must consider the "degree and extent of the harm caused by the violation and the cost of rectifying the damage." 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.

iv. Smoking: If a person who manages, operates, or controls a restaurant or bar fails to comply with the state smoking law in G.S. 130A-496, the local health director may impose an administrative penalty. The local health director also has this authority to enforce local ordinances or rules related to smoking in other public places. For the first and second violations, the health director must provide the person with a written notice of the violation. For the third and subsequent violations, the director may impose an administrative penalty of up to $200 per day.

c. What is the process? The agency or local health director is required to notify the person in writing that the penalty has been assessed. In the context of smoking enforcement, two notices are required before the penalty may be assessed.

d. May a person appeal an administrative penalty? Yes. For penalties imposed by DENR, a person may appeal to the Office of Administrative Hearings within 30 days of receiving the notice of agency action. For penalties imposed by the local health director, a person may appeal to the local board of health as provided in G.S. 130A-24(b)-(d).

e. What happens if the person refuses to pay? The state (for penalties imposed by DENR) or the county (for penalties imposed by the 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.

III. Injunctions (G.S. 130A-18)

a. What is an injunction? In general, an injunction is an order of a court directing a person to do something or 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. If a restaurant owner refuses to post the sanitation grade card, a court could order the restaurant owner to comply. 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).

b. 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).

c. What is the process? If a local health director (in consultation with the EH specialist or supervisor) believes that an injunction is necessary, the director should consult with the 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. If the person who is the subject of the order fails to comply with the order, the court may hold him or her in civil contempt (see G.S. Chapter 5A, Article 2).

IV. Embargo

a. 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.

b. When is it available as a remedy?

   i. The Department of Agriculture has the authority to embargo food and drink items that are adulterated or misbranded. G.S. 106-125.

   ii. Food or drink in regulated establishments: Local health directors (in consultation with a regional specialist or the DEH director) and DENR (regional environmental health specialists or the DEH director) have the authority to embargo adulterated or misbranded food or drink found in establishments regulated under G.S. Chapter 130A.

   iii. 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.

   iv. 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.

v. What is the process?
    1. 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.
    2. Second, the person who embargoed the item *must* petition a court (district or superior court) for a condemnation order.
        a. The court may order the item to be destroyed.
    3. If the item is misbranded, the court may allow the person to fix the problem.

V. Public health nuisance (G.S. 130A-19)

a. 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):

    i. 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.

    ii. 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.

    iii. 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.*

b. When is it available as a remedy? The nuisance authority is available anytime that the state or a local health director determines that a nuisance exists. G.S. 130A-19. Because the term nuisance is relatively vague and the enforcement process somewhat burdensome (see discussion below), some jurisdictions prefer to rely on more specific remedies, such as permit actions, when available.

c. What is the process?

    i. 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.

ii. 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:
    1. Order the owner to abate the nuisance; or
    2. 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.

VI. Imminent hazard (G.S. 130A-20)

a. What is an imminent hazard? By definition, an imminent hazard is 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.

    G.S. 130A-2(3).

b. When is it available? The state or a local health director may determine that an imminent hazard exists at any time.

c. What is the process?

    i. Issue abatement order *or* abate:
        1. 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).
        2. 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.

    ii. 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
        1. It is shown that an imminent hazard did not exist at the time of the abatement; or
        2. 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.

VII. Misdemeanor (G.S. 130A-25)

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, except for violations of the state or local smoking laws. 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 (except with respect to smoking violations).

c. What is the process?

i. Deciding whether to seek a criminal charge: If possible, discuss the facts with a county attorney or a prosecutor before seeking a criminal charge.

ii. How to initiate a criminal charge.
1. Appear before a judicial official (usually a magistrate) in the county where the violation occurred.
2. Bring a copy of the statute, rule, or ordinance allegedly violated.
3. Testify under oath before the judicial official.
   a. Reliable hearsay evidence is admissible when a judicial official determines whether there is probable cause to charge an offense. Therefore, all witnesses need not testify when a judicial official decides whether to issue a criminal charge.
   b. Other witnesses also may testify under oath.
   c. Make sure the judicial official lists all witnesses on the criminal pleading to facilitate the issuance of subpoenas.

iii. Types of criminal pleadings. (A criminal pleading is a document that charges a person with a criminal offense or infraction.)

1. Arrest warrant.
   a. May charge a felony or misdemeanor and requires the defendant's arrest.
   b. Is issued by a judicial official, usually a magistrate.
2. Criminal summons.
   a. May charge a felony, misdemeanor, or infraction and is served on the defendant, but the defendant is not arrested. Instead, the defendant is ordered to appear in court on a specific date.
   b. Is issued by a judicial official, usually a magistrate.
3. Citation.
   a. May charge a misdemeanor or an infraction.
   b. May be issued only by a law enforcement officer or other authorized person. The citation informs the defendant to appear in court on a specific date. The defendant is not arrested.
4. Magistrate's order.
   a. May charge a felony or a misdemeanor.
   b. Magistrate's order is issued by a judicial official, usually a magistrate, and only when a law enforcement officer has arrested a defendant without a warrant.

5. Statement of charges.
    a. May charge misdemeanor or infraction.
    b. Prosecutor, before arraignment in district court, may issue a statement of charges to amend the original charge, to substitute another charge for the original charge, or to add new charges with the original charge.

6. Indictment.
    a. Prepared by a prosecutor and issued by a grand jury. An indictment (or information) is required for trial in superior court for a felony charge.

iv. Proper language in charging offense: Special language for charging violations of city or county ordinance. G.S. 160A-77 through -79; G.S. 153A-50.

v. Preparing a case before a trial.
    1. If possible, discuss the case with a prosecutor before the date of trial.
    2. Prepare a one-page statement summarizing what you and other witnesses will testify about in the case.
    3. If useful, prepare a diagram.
    4. If necessary, obtain certified copies of local ordinances and rules.

vi. Trial in district court for a misdemeanor charge.

    1. Procedure.
        a. Arraignment is when a defendant enters a plea of guilty, no contest (requires consent of the prosecutor and judge), or not guilty.
            i. Before trial, remind the prosecutor to check if the offense is correctly charged if you are not sure.
        b. Trial.
            i. A criminal trial in district court is always tried before a district court judge without a jury. The judge decides whether the defendant is guilty or not guilty of the charge.
            ii. If necessary, prove local ordinances and rules by certified copies.
            iii. Judicial notice must be taken of state rules. G.S. 150B-64. However, bring a copy of the rules to court.
            iv. Hearsay evidence is generally inadmissible. Hearsay is defined as testimony by one person about the statement of another person offered to prove the truth of the matter asserted in that statement.
            v. There are many exceptions to the rule prohibiting hearsay testimony. For example, one exception makes admissible statements made by the defendant.
            vi. A defendant who is found guilty in district court has the right to appeal for a new trial in superior court (commonly referred to as “trial de novo”). The defendant must give notice of appeal within ten days of the date of the district court conviction.

2. Special sentencing provisions: For persons charged with violating G.S. 130A-144(f) or G.S. 130A-145 (compliance with communicable disease control measures and orders), the typical structured sentencing provisions in the state's criminal laws do not apply. Instead, the person must be sentenced to "a term of imprisonment of no more than two years." The person must not be released early unless the District Court determines – after consultation with the confinement facility medical personnel, the State Health Director and the local health director – that the person no longer poses a danger to the public health.

vii. Jury trial in superior court: A defendant who is tried in superior court for a felony or misdemeanor is always tried before a jury of twelve people. There is no right to waive a trial by jury, except for an infraction.

viii. Appeal to the North Carolina Court of Appeals: A defendant who is found guilty in superior court has the right to appeal to the North Carolina Court of Appeals—except for a first-degree murder conviction in which the death penalty is imposed, which goes directly to the North Carolina Supreme Court. Appellate review is generally limited to determining whether errors were committed in the superior court trial that may have deprived the defendant of a fair trial. Appellate review does not redetermine whether or not the defendant was guilty of the charge, although it may review whether there was sufficient evidence to support the defendant's conviction.

VIII. Infraction (G.S. 130A-497; 130A-498(c1))

a. What is an infraction? Technically, an infraction is not a criminal remedy, but the procedure that governs its use is comparable to criminal remedies (such as misdemeanors).

b. When is it available? If a person continues to smoke in an area where smoking is prohibited under either the state smoking law or a local smoking ordinance or rule following oral or written notice by the person in charge of the area.

c. What is the process?
   i. A sworn law enforcement officer has the authority to issue a citation (i.e., a ticket) charging the person with the infraction. Alternatively, a judicial official such as a magistrate may issue a summons for an infraction. In either case, there must be probable cause to believe that the person has committed the infraction.
   ii. Once charged, the person will have the opportunity to appear in district court to either admit or deny responsibility. Alternatively, the person may have the opportunity to waive the appearance, admit responsibility and pay the $50 fine.
   iii. If the person denies responsibility, the prosecutor must prove beyond a reasonable doubt that the person is responsible for committing the infraction. The person is not entitled to a jury trial.
   iv. If the person admits or is found responsible, he or she must pay the $50 fine but may not be assessed court costs.

Chapter 87: Well Construction Act

I. Notice of violation and remedial action order (G.S. 87-91)

a. What is
   i. A notice of violation? Written notice to the permit holder indicating that they are in violation of state statute or regulation.
   ii. A remedial action order? An order directing a permit holder to take a specific action to remedy a violation.

b. When is it available? Both remedies are available whenever the Environmental Management Commission (EMC) has reasonable grounds to believe that there has been a violation of a state statute or regulation.

c. What is the process?

   i. Reasonable grounds: The EHS should document the "reasonable grounds" to believe that a violation has occurred. Because the law provides that the EMC must conclude that reasonable grounds exist, an EHS may need to consult with DENR staff and others before taking action.

   ii. Issue notice/order: If reasonable grounds exist, options include the following:

      1. Issue a notice of violation: Either the EMC or DENR (which includes an authorized agent of DENR) may issue a notice of violation. The notice must identify:
         a. The facts alleged to constitute a violation, and
         b. The state statute or regulation at issue.

         The notice should also include specific information about the alleged violator's appeal rights. The notice should be served upon the alleged violator by a method recognized in Rule 4 of the rules of civil procedure (G.S. 1A-1, Rule 4), which includes, for example, delivery in person or via certified or registered mail.

      2. Issue a remedial action order: Only the EMC is authorized to issue an order requiring specific remedial action. The order must specify
         a. The action to be taken,
         b. The date by which the action must be completed,
         c. The possible consequences of failing to comply with the order, and
         d. The procedure by which the alleged violator may seek review of the order.

II. Civil penalties (G.S. 87-94)

a. What is a civil penalty? A civil penalty is a monetary fine.

b. When is it available? DENR may assess a civil penalty against any person who violates any provision of (1) the Well Construction Act, (2) a rule issued pursuant to the Act or (3) any order issued pursuant to the Act. A penalty may not be assessed against a person who did not "directly commit the violation or cause it to be committed."

c. What is the process?
    i. Determine amount of penalty: DENR determines the amount of the fine, which may be up to $1,000 for each violation. Each day of a continuing violation is considered a separate offense. In considering the amount of the penalty, DENR must consider the following factors:
        1. The degree and extent of harm to the natural resources of the State, to the public health, or to private property resulting from the violation;
        2. The duration and gravity of the violation;
        3. The effect on ground or surface water quantity or quality or on air quality;
        4. The cost of rectifying the damage;
        5. The amount of money saved by noncompliance;
        6. Whether the violation was committed willfully or intentionally;
        7. The prior record of the violator in complying or failing to comply with EMC programs; and
        8. The cost to the State of the enforcement procedures.
    ii. Issue notice of penalty: DENR must notify the alleged violator that (1) a penalty has been assessed and (2) the specific reasons for the assessment of the penalty. The notice should also include specific information about the alleged violator's appeal rights. The notice should be served upon the alleged violator by a method recognized in Rule 4 of the rules of civil procedure (G.S. 1A-1, Rule 4), which includes, for example, delivery in person or via certified or registered mail.

III. Injunction (G.S. 87-95)

a. What is an injunction? In general, an injunction is an order of a court directing a person to do something or to stop doing something.

b. When is it available? DENR may request an injunction against any person who violates any provision of (1) the Well Construction Act, (2) a rule issued pursuant to the Act or (3) any order issued pursuant to the Act.

c. What is the process? DENR must request that the Attorney General's office institute a civil action in superior court. The action should seek injunctive relief to either (a) restrain the violation, (b) require corrective action, and/or (c) other relief the court deems proper.