

# Enforcement

February 12, 2015  
Local Program Workshop

By  
John Payne

## To Enforce or Not to Enforce ?



Important things to consider...

- 1) Is there offsite sedimentation damage?
- 2) What is the extent of the damage?
- 3) Prior knowledge of the law?
- 4) Is the violation willful?
- 5) Is this a battle worth investing in?

## Types of Enforcement

SPCA

- Injunctions
- Civil Penalties
- Stop Work Orders
- Restoration
- Criminal Penalties

## Types of Enforcement

Local Ordinances

- Stop code inspections
- Don't issue CO
- Stop work orders

## Preparing The Enforcement Case

### ❖ Getting the Facts

Gathering and documenting the information you need to prepare a solid enforcement case.



### ❖ Telling the Story

Important information to be included in the enforcement package.



## Putting it All Together...Telling the Story

### **Pertinent information which should be included in the enforcement action documentation.**

- 1) Location of the subject property.
- 2) Size of the tract being developed.
- 3) Size and location(s) of disturbed acre(s). Give the method of measurement.
- 4) Copy of the deed showing current owner.

**Putting it All Together...Telling the Story  
Continued...**

**Pertinent information which should be included in  
the enforcement action documentation.**

- 5) The Financial Responsibility/Ownership Form (FRO).
- 6) Copy of Notice of Violation(s) (NOV), other correspondence, notes on telephone calls, inspection reports, memos to file, documentation that compliance inspection was scheduled, Plan Receipt Letter, Plan Approval or Disapproval Letter(s), etc.

**Putting it All Together...Telling the Story  
Continued...**

**Pertinent information which should be  
included in the enforcement package.**

- 7) Complete Civil Penalty Assessment Guidelines.
- 8) Photographs or slides taken during compliance inspection with corresponding map showing location of pictures, direction photos were taken, and date taken.
- 10) Chronological history of events.
- 11) Keep the "Original Copy" of the enforcement case in the office file.

**Summary of Three Enforcement Pitfalls -  
According to the NC Attorney Generals  
Office**

- ❖ Not obtaining the deed before sending the NOV.
- ❖ Not noticing the landowner in addition to the Financial Responsible Party. Again NOTICE EVERYONE.
- ❖ Only noticing the husband and not the wife. If the wife's name is on the deed, both names **MUST** be included in the NOV. There is no recourse if the property is owned jointly. Must reissue the NOV.

**Civil Penalties**

## Civil Penalties

- 113A-64 Penalties
  - Maximum for a violation is \$5000.
  - May be assessed from the date of a violation
  - Each day of a continuing violation shall constitute a separate violation

## Initial One Day Civil Penalty

- 113A-61.1(c) Inspection of land-disturbing activity; notice of violation states in part as follows:
  - Any person who fails to comply within the time specified is subject to additional civil and criminal penalties...

## Who assess a Civil Penalty

- 113 A-64(2) states that the Secretary or a local government that administers an e&sc program shall determine the amount of the civil penalty
  - The civil penalty is normally assessed by an individual with the delegated program that has been designated to do the assessment. Usually is not the inspector.

## 113A-64. Civil Penalties Criteria

- ❖ Degree and extent of harm caused by violation
- ❖ Cost to rectify damage
- ❖ Money saved by noncompliance
- ❖ Whether the violation was committed willfully
- ❖ Prior compliance record of violator

## 15A NCAC 04C .0106 Criteria for Civil Penalty Assessment

- ❖ Severity of the violation
- ❖ Degree and extent of harm
- ❖ Type of violation
- ❖ Duration
- ❖ Cause
- ❖ Extent of any resulting off-site damage
- ❖ Effectiveness of action taken by violator
- ❖ Adherence to plan submitted by violator
- ❖ Effectiveness of plan submitted by violator
- ❖ Cost to rectify damage
- ❖ Violator's prior compliance record
- ❖ Estimated cost of installing and/or maintaining corrective measures
- ❖ Staff investigative costs

Case Name: _____ Case Number: _____ County: _____ Regional Office: _____	
<b>WORKSHEET</b> <b>CIVIL PENALTY ASSESSMENT FOR SPCA VIOLATIONS</b> (Criteria: NCGS 113A-64-(a); 15A NCAC 04C .0106)	
A. Type(s) of Violation _____	\$ _____
B. Degree and Extent of the Harm Caused by the Violation.	\$ _____
Severe        \$300 to \$5000 Moderate     \$100 to \$300 Slight         \$0 to \$100 None            \$0	
C. Adherence to Plan/Effectiveness of Plan Submitted by Violator (Effectiveness of Steps Taken to Correct Violations).	\$ _____
D. Prior Record of Violator in Complying or Failing to Comply with the Act and Rules.	\$ _____
E. Whether the Violation was Committed Willfully.	\$ _____
F. Amount of Money the Violator Saved by His Noncompliance.	\$ _____
G. Cost of Rectifying the Damage.	\$ _____
H. Staff Investigative Costs.	\$ _____
TOTAL DAILY PENALTY	\$ _____
ACTUAL DAILY PENALTY	\$ _____
Date(s) of Violation: From _____ to _____	
_____ Days at \$ _____ per Day = \$ _____ Penalty	
Date _____	_____ Chief, Land Quality Section



## Type of Violation

- Need to document the types of violation
- Usually \$10 for each type

## Degree and Extent of the Harm Caused by the Violation

1. Describe the resource affected by off-site sedimentation.
2. What was the size and extent of the resource damage?
3. a. Describe the type of erosion.  
b. Estimate the volume of sedimentation damage to a lake/natural watercourse or other property. (Check one)
  - (1) **None**
  - (2) 1-9 cubic yards
  - (3) 10-99 cubic yards
  - (4) 100-999 cubic yards
  - (5) 1000 or more cubic yards

## Degree and Extent of the Harm Caused by the Violation

4. When was the violation discovered?
5. When was the NOV received?
6. Is the site still in violation?
7. Degree of sedimentation damage. (Check one)
  - Lake/Natural Watercourse on the tract
  - Lake/Natural Watercourse off the tract
  - Other Property
  - a. Severe
  - b. Moderate
  - c. Slight
  - d. None

## Adherence to Plan / Effectiveness of Plan Submitted by Violator / Effectiveness of steps taken to correct violations

1. Was there an approved plan prior to beginning the land-disturbing activity?
2. Was the approved plan adequately implemented?
3. Was a revised plan required?
4. Was the revised plan adequately implemented?
5. Effectiveness of steps taken to correct violations: (Check one)
  - a. No steps
  - b. Basically ineffective
  - c. Mixed results
  - d. Wholly effective

## Prior Record of the Violator in Complying or Failing to Comply With The Sedimentation Act and Rules

1. Was this person previously under an NOV for this site?
2. Has this person previously received an NOV for violations at other sites? If yes, explain.
3. Has this person ever been subject to prior enforcement action?
4. To what kind of enforcement action has this person been subject? (Check all that apply)
  - a. Injunction
  - b. Civil penalty
5. Overall, does the person have a good record of compliance with SPCA and rules? Explain.

## Whether the Violation was Committed Willfully

1. Does the violator have a prior record?
2. Did the violator have knowledge of the law prior to beginning the land-disturbing activity?
3. Are there any other factors which would make this violation willful or not willful?

## Amount of Money the Violator Saved by His Noncompliance

1. What costs were saved by the violator by his noncompliance, if known?
2. Ease or difficulty of compliance based on circumstances of site. (Check one.)
  - a. Difficult
  - b. Average
  - c. Easy
  - d. Unknown

## Cost of Rectifying the Damage

1. Has the damage been corrected?
2. If so, what was the cost, if known, of correction?
3. If not, is it practical for the damage to be corrected?

## Staff Investigative Costs

- a. Below Average
- b. Average
- c. Above Average

## Where Does the case go after the Assessment

- 113A-64 Penalties Section (2) states that:
  - 1) The person who is assessed must be notified by any means under G.S.1A-1
  - 2) Notice must direct the violator to pay or contest the civil penalty
  - 3) Violator has 30 days from receipt to pay or contest the civil penalty

## Where Does the case go after the Assessment

- 4) Appeal must be filed under Article 3 of chapter 150B of the General Statutes
- 5) Local government can go to Superior Court to collect if violator doesn't pay or appeal
- 6) Collection action must be filed within 3 years of the date the assessment was due

## Where Does the case go after the Violator Appeals

- Chapter 150B-23 of the G.S. states:
  - (1) "A contested case shall be commenced by paying .... and by filing a petition with the Office of Administrative Hearings, and.... [it] shall be conducted by that office."
  - (2) Notice provided by OAH not less than 15 days
  - (3) Any person may petition to become a party

## Where Does the case go after the Violator Appeals

- A hearing is held in the Office of Administrative Hearings (OAH) in front of an Administrative Law Judge (ALJ)
  - Trial to develop a record
  - ALJ makes a recommended decision to the Final Agency Decision Maker (FADM)
- 150B-36- ~~\*\*~~(REPEALED) The FADM makes the final decision
  - Session Law 2011-398

## Where Does the case go after the Violator Appeals

- Appeal of Final Decision is to Superior Court , then Court of Appeals, and finally NC Supreme Court
  - Review is on the record developed in OAH no further testimony
  - Attorney for both sides have a brief opportunity to present their clients case- No jury (G.S. 150B-50)
  - 150B-51- Scope and Standard of Review
  - 150B-52- NC Court of Appeals- final judgment and substantial evidence test

## **Settlement Agreement**

- An agreement between the parties which does not require approval by the Court.

## **Injunctions**



## What is an Injunction?

- A writ or order from a court prohibiting a person, group or entity from carrying out a given action or ordering a given action to be done

## Basic Requirement

Show that the violation has occurred, is continuing to occur, or is threatened to occur.

## Case Law

- A judge is more familiar with the private litigant requirements: likelihood of success on the merits and either irreparable harm or the necessity to protect rights

## Reasons for an Injunction

- Need immediate action
- Imminent threat or danger to the public health or the environment
- Need to have the power of the court
- When more typical compliance efforts fail to bring the site into compliance
  - Civil penalties do not work

## Reasons for an Injunction

- The Repeat Violator
- The Procrastinating Violator
- The “Asset Challenged” Violator

Note: Any of these types of violators may also be recalcitrant in that they exhibit a stubborn resistance to authority and/or a defiance of authority or guidance.

## Results of an Injunction

- Injunction may be used to encourage violator to resolve issues as well as abate environmental impacts.
- Brings the violator to the table to discuss solutions.
- Can result in a consent judgment and settlement agreement.

## Achieving the Best Results

- Before going to court, determine what results you want
- Work with your County Attorney to organize, draft, and communicate a solution in the Complaint

## Achieving the Best Results

- Think through possible schedules and benchmarks for the solution. For example: Restoration Plan (development and approval), Monitoring, Reporting, After-the-Fact Permitting, Schedule with dates.
- If consent judgment or settlement agreement, consider penalties for not adhering to the agreement.

## Phases of Injunctive Relief

- Temporary Restraining Order
- Preliminary Injunction
- Permanent Injunction

## Temporary Restraining Order (TRO)

- Lasts for 10 days or to consent judgment is filed
- Other side need not be present, but usually need to show judge effort at notification
- Judge considers evidence presented by the Department
  - May need someone to testify

## Preliminary Injunction

- Lasts until the hearing on permanent or to consent judgment is filed
- Hearing is normally required with testimony
- Other side present
- Department staff will testify

## Permanent Injunction

- Permanent
- Hearing is normally required with testimony
- Other side present
- Department staff will testify

# Restoration

## Restoration

- Must have offsite sediment
- Restore the waters and land affected by the offsite sediment
- Need to obtain permission of affected landowner(s)
- Need to work with other Agencies
  - DWQ
  - Corp of Engineers

## Stop-work Orders

## Stop-work Orders

- Criteria for issuing a stop work order
  - Willful and knowing
  - Offsite sedimentation has eliminated or severely degraded a use of a lake or natural water course or it is imminent
  - Offsite sedimentation has caused severe damage to adjacent land or it is imminent
  - No approved plan



## Stop-work Orders

- Can Only be issued by the Secretary of DENR or the Division Director of Land Resources
- Good for five days
- AG must be in court within 2 business days
- Can stop all activity but delivery of materials

The End

Questions?