#### CT Association of Conservation & Inland Wetlands Commissions



Focus on Enforcement

#### **2023 CACIWC Annual Meeting**

#### Presenter: Janet P. Brooks Attorney at Law, LLC November 11, 2023

### The Executive Branch

- Carries out / implements / executes policy + the law
- Sets policy only to the extent that the enabling legislation authorizes the agency to:
  - adopt regulations: yes
  - create a guidance document: DEEP



Image source: CT.gov

• develop general permit: DEEP

## What is your job?

"an administrative body must act strictly within its statutory authority, within constitutional limitations and in a lawful manner ..."



Photo source: wikipedia.org

### "Creature of statute"

"[The agency] cannot modify, abridge or otherwise change the statutory provisions ... under which it acquires authority unless the statutes expressly grant it that power."



Photo Credit: USACE NAO

# The ABCs of Enforcement



Access to site: can you view the alleged violation?

Burden of proof: do you have to prove the violation?

<u>Costs</u>: can you afford to enforce the law?

# Statutory authority of DEEP to inspect properties:

**Sec. 22a-6**. (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, managing agent or occupant of any such property shall permit such entry, and **no action for trespass shall lie** against the commissioner for such entry, or he may **apply** to any court having criminal jurisdiction for a warrant to inspect such **premises** to determine compliance with any statute, regulation, order or permit administered, adopted or enforced by him . . .

Your statutory authority to inspect properties:

#### Burden of proving the facts in an order

- "It is an elementary rule that whenever the existence of any fact is necessary in order that a party may make out his case or establish his defense, the burden is on such party to show the existence of such fact."
- ➢ An agency which issues an order alleging violations of the Inland Wetlands & Watercourses Act has the burden of proof on those allegations.

## Charge monitoring compliance fees

• CGS 22a-42a (e): "The inland wetlands agency may require a filing fee to be deposited with the agency... . (to) be sufficient to cover . . . The costs of . . . and monitoring compliance with permit conditions or agency orders."

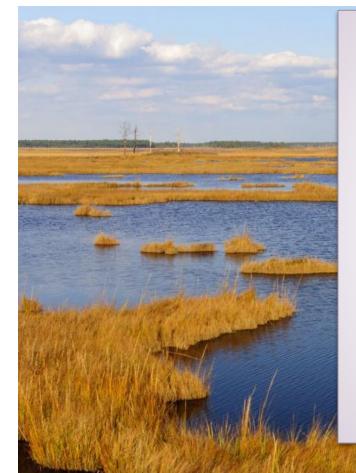
#### Adopt regulation re- compliance fees

• <u>Suggestion</u>: The agency may require a fee to be deposited with the agency sufficient to cover the costs of monitoring compliance with any order issued by the agency. Such fee may include, but not be limited to, (con't.)

#### Adopt regulation re- compliance fees

• (con't.) the cost of retaining experts to analyze, review, and report on issues requiring such experts. The Agency or the duly authorized agent shall estimate the compliance fee based on the estimates provided by such experts which fee shall be paid within 10 days of the orderee's receipt or notice of such estimate. Any portion of the fee in excess of the actual cost shall be refunded to the orderee no later than 30 days of the completion of the requirements in the order.

# "Throw, tow, row, go"



Everything I learned about wetlands enforcement I learned in the senior aquatics life-saving course I took at summer camp in the 1960s on the Delaware River.

#### Informal actions / Formal actions

THROW	TOW	ROW	GO
Staff	Alleged	Issuance of	Go to court
contact	violator	cease,	to seek
alleged	appears	desist and	"immediate"
violator:	before	restore	court order
telephone	U V	order, or	pending
/at site/in	discuss	permit	trial
office	and	suspension	
	resolve by	or	
	agreement	revocation	

# The problem with NOVs starts with the DEP Model Regulations

- "issue a notice of violation to such person .
  .. prescribing the necessary action and steps to correct the violation including, without limitation, halting work in wetlands or watercourses."
- "What's in a name? That which we call an order by any other name would smell as sweet."

# Is it an order or a permit?

- If the agency wants an activity to occur = order
- If a person wants to undertake an activity = permit
- If a permittee decides not to undertake an activity, s/he doesn't have to do the activity or the permit conditions – also, permits expire!

# How to issue an open-ended order by requiring:



A) a fee to pay for agency experts to review **B**) consultant(s) for the orderee C) Who will submit a plan with proposed steps and dates for remediation to be approved by the agency **D**) and **execute** approved plan.



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