

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
  - develop general permit: DEEP



*Image source: CT.gov*

# *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?
- **Costs**: 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*

- Suggestion: 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 orderer's receipt or notice of such estimate. Any portion of the fee in excess of the actual cost shall be refunded to the orderer 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*

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



## *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 order

**C) Who will submit a plan** with proposed steps and dates for remediation **to be approved** by the **agency**

**D) and execute** approved plan.





# **Janet P. Brooks**

Attorney at Law, LLC

P. O. Box 365

East Berlin, CT 06023-0365

[www.attorneyjanetbrooks.com](http://www.attorneyjanetbrooks.com)

[www.ctwetlandslaw.com](http://www.ctwetlandslaw.com)

[jb@attorneyjanetbrooks.com](mailto:jb@attorneyjanetbrooks.com)