

## 4

## LEGAL REMEDIES\*

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.

### 4.1 Administrative Remedies

#### Permit Actions (§ 130A-23)

A permit action is the process of either suspending or revoking a person's permit. A permit may be suspended or revoked if the agency finds:

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

Permit actions must be implemented within "due process" protections. Except in the case of an Imminent Hazard, the steps in a permit action is to provide the permit holder with:

- the specific violation that the action is based upon;
- notice that a decision has been made to suspend or revoke their permit via the Intent to Suspend/Revoke form;
- an opportunity to be heard via an administrative hearing; and
- the right to appeal the decision.

#### Imminent Hazard Permit Actions (§ 130A-2)

A permit may immediately be suspended or revoked if the violations present an imminent hazard. It is not necessary to provide the permit holder with notice and opportunity to be heard prior to the suspension or revocation

going into effect. Upon suspension or revocation of the permit, the permit holder must be informed of their rights to appeal the action.

"Imminent hazard" (§ 130A-2) is defined as a situation that, if no immediate action is taken, is likely to cause:

- an immediate threat to human life,
- an immediate threat of serious physical injury,
- an immediate threat of serious adverse health effects, or
- a serious risk of irreparable damage to the environment.

#### Permit Suspensions vs. Permit Revocations

For examples of appropriate permit actions, see Appendix 1.2.

#### Non-permitted (Illegal) Food Sales

For non-permitted (illegal) food sales, use a Notice of Violation (NOV) to provide notice to the non-permitted food vendor. Appropriate strategies for enforcement will be discussed in the Civil and Criminal Action sections. An example of a NOV form can be found in Appendix 2.7.

*\*The materials were taken from documents prepared by Aimee Wall, University of North Carolina School of Government*

## 4.2 Civil Remedies

### Injunctions (§ 130A-18)

An injunction is an order of a court telling a person to stop doing something or requiring them to do something. For example, if a person is selling food without a permit, a court may issue an order telling the person to stop immediately. 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) or a permanent injunction (long-term).

If a person violates a public health statute, state regulation, or a permit condition, the state (DHHS or DENR) or a local health director may seek an injunction in superior court (§ 130A-18). State or local authorities may pursue an injunction in addition to (or instead of) other remedies (such as, criminal prosecution or permit suspension).

If a local health director (in consultation with the environmental health specialist or environmental health supervisor) believes that an injunction is necessary, he/she should contact the county attorney and/or the N.C. Department of Justice (NCDOJ). In most circumstances, the county attorney will pursue an injunction while the NCDOJ office may provide support and assistance to the county attorney. For an example of the use of an injunction see Case Study #2.

### Embargo (§ 130A-21)

Embargo is an order from a public health official requiring a person to detain or hold food or drink that the official believes is either adulterated or misbranded. Once embargoed, a public health official must seek a condemnation order from a district or superior court. Local environmental health specialists may embargo milk and shellfish in NCDENR regulated establishments. Listed below are products which could be subject to embargo:

- Food or Drink  
The NCDA&CS has the authority to embargo food and drink items that are adulterated or misbranded (§ 106-125). Food or drink

in NCDENR regulated establishments (Chapter 130A) can also be embargoed by local health directors (in consultation with a regional environmental health specialist or the DEH director) and NCDENR (regional environmental health specialist or the DEH director).

- 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. The EHS should notify the regional environmental health specialist with the Dairy Protection Branch in DEH for assistance.
- 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. The EHS should notify the regional environmental health specialist with the Shellfish Sanitation and Recreational Water Quality Section within DEH for assistance.

If the product(s) must be embargoed the process is as follows:

1. Seek voluntary disposal of the adulterated/misbranded product(s). This should always be sought first.
2. If the operator refuses to dispose of the product(s), embargo action may be appropriate.
3. An embargo tag must be affixed to the product(s).
4. There must be a warning to all persons not to remove, relocate, or dispose of the product(s) until given permission by the person who embargoed the product(s) or by the court.
5. The public health official who embargoed the items must petition a court (district or superior court) for a condemnation order. The court may order the item to be destroyed or returned to the operator.
6. If the product(s) is misbranded, the court may allow the person to fix the problem.
7. If, at any time, the operator wishes to voluntarily destroy the adulterated/

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misbranded product(s), the operator must first seek approval from the person who embargoed the product(s).

For more information on the use of embargo, see Appendix 2

### **Public Health Nuisance (§ 130A-19)**

The nuisance authority is available anytime that the state or a local health director determines

that a nuisance exists (§ 130A-19). Because the term nuisance is not clearly defined, some jurisdictions prefer to rely on more specific remedies, such as permit actions, when available.

### **Imminent Hazard (§ 130A-20)**

The imminent hazard authority is available anytime that the state or a local health director determines that an imminent hazard exists.

## 4.3 Criminal Remedies

### **Misdemeanor (§ 130A-25)**

A person may be charged with a Class 1 misdemeanor for violations of public health statutes, state regulations or conditions of a permit (§ 130A-25(a), see also § 14-3(a) which

provides that any unclassified misdemeanor is considered a Class 1 misdemeanor).

See Case Study #1 for an example and Appendix 2.1 for procedures.

