

WETLANDS DEMYSTIFIED
Enforcement, Part II
By Paul Hennen

In our January 7, 2006 *Wetlands Demystified* I began this series of articles to demonstrate why enforcement to protect our wetlands and watercourses is important and why violations must be corrected promptly. I discussed the Cease and Desist Order process and emphasized that as a Wetlands Agency we may file a certificate of the order on Pomfret's land records if action is not taken to resolve a violation in a reasonable amount of time. We also may appoint agent(s) to represent us with the authority to inspect private property, except a private residence, whenever a violation is reported or suspected. In addition, the Agency (members and alternate members) and our staff, which may include hired consultants, may make regular inspections of all regulated activities for which wetlands permits are pending or have been issued. This becomes especially important where conditions of permit approval have been imposed. For example, regular inspections must be conducted to ensure that erosion and sedimentation (E & S) control measures are in place before any construction begins, or that a required conservation easement's boundaries are marked before issuance of a wetlands permit. I should mention here that we frequently approve a permit before all appropriate permit conditions have been met, but, with few exceptions, such permits are not issued until all fees and required deposits have been paid or a security cash bond established when required. Another important reason for site monitoring by the Agency and its staff is to insure that all conditions of permit approval are being met as the project proceeds. An example of this would be site monitoring to ensure that the project is adhering to all requirements of the approved site plan. Should we find that is not the case we could halt the project by issuing the permittee a Cease and Desist order, a Notice of Violation (if the infraction is judged by the Agency to be minor), or both. If it is found that an activity is inconsistent with an approved wetlands permit or that any person (with or without a permit) is conducting an activity in a regulated area that may damage a wetlands or watercourse, he or she may be simply directed to stop what they are doing and to correct the matter. This frequently occurs when we find E & S control measures in disarray or piles of debris (bulky waste) resulting from a project that is too close to a wetland or watercourse. We may require the person responsible to appear before the Agency at our next regularly scheduled meeting to discuss the matter. Remedial action may include fixing the E & S fence or removing the debris from the area. If the violation occurs in an area in which a wetlands permit was required, the violator could be required to file an application for a wetlands permit to remediate any damage to a wetland or watercourse before any further activity is conducted or to modify a previously approved permit if appropriate. Failure of the person responsible to respond to our request could result in the formal issuance of a Cease and Desist order or Notice of Violation, or both if the project is on going, or other enforcement proceeding as provided by the Connecticut Wetlands Act. I will briefly address those legal remedies later in this article.

The Agency may also suspend or revoke a wetlands permit if it is found that the permittee has not complied with the terms of his/her permit or that the Agency relied on information provided by the applicant that later is found to be false, deceptive, inaccurate or incomplete. However, prior to a permit revocation or suspension action we must attempt to notify the permittee by certified mail explaining the facts that warrant the intended action. The Agency must then hold a hearing to allow the permittee concerned an opportunity to show that he/she is in compliance with his or her permit. We are required then to notify the permittee by certified mail within fifteen (15) days of our decision. We must also publish our decision in a local newspaper. The Act allows any person aggrieved by that decision to appeal to a Superior Court, including an abutting property owner or person owning land within ninety feet of the wetland or watercourse involved.

In most cases the landowner resolves violations found in a regulated area concerned by applying for a wetlands permit to allow the completion of the project in a manner that avoids any potential damage to a wetlands or watercourse and that is agreeable to the Agency. In other cases the violator agreeing to stop what she/he was doing may solve the problem. If a Cease and Desist Order was issued under such circumstances, we will usually leave the order in place until the matter is resolved. However, what if, in spite of all our efforts to get a violator's attention, we fail and the violation continues? What recourse do we have then? Our first action is to document the facts for review by our staff attorney. Under our current Regulations, that review will be at the alleged violator's expense if a Cease and Desist order or Notice of Violation had been issued. We will also direct our staff to contact the appropriate authorities in the Connecticut DEP and Army Corps of Engineers (if appropriate) to determine their interest in the alleged violation. If the DEP or Army Corps wished to exercise their authority under state or federal law, we as an Agency would take no further action unless directed to do so. If, however, the DEP and the Army Corps choose not to become involved, the Agency will have no option but to seek a Superior Court ordered remedy. The first step through our attorney will be to request a court injunction to halt any further activity by the alleged violator. The Wetlands Act is very specific in stating its enforcement intent.

“Any person who commits, takes part in, or assists in any violation of any provision of sections 22a-36 to 22a-45, inclusive, [Wetlands Act] including regulations adopted by the Commissioner [DEP] and ordinances and regulations [Wetlands Agency] promulgated by municipalities or districts pursuant to the grant of authority herein contained, shall be assessed a civil penalty of not more than one thousand dollars for each offense. Each violation of said sections shall be a separate and distinct offense, and, in the case of a continuing violation, each day's continuance thereof shall be deemed to be a separate violation and distinct offence”.

The Act goes on to state that all costs, fees and expenses to include attorney's fees shall be assessed against the violator. For a first offense the violator may be fined up to one thousand dollars per violation per day or imprisoned for not more than six months or both. For subsequent violations the fine and imprisonment may be doubled. The statute

goes on, but at this point I believe enough said. The Wetlands Act is very comprehensive, and case law [court rulings] has made it even more so. Connecticut law grants significant authority to municipal wetlands agencies to protect a town's wetlands and watercourses. Nonetheless, while such enforcement options are available to us as an Agency, we prefer to work with violators. It is our intent to protect wetlands and watercourses and to fix problems when they occur. That is and will continue to be our position when violations occur. The bottom line is one of attitude and a willingness to recognize and admit mistakes, to fix those mistakes by whatever means necessary and to avoid a repetition of similar mistakes in the future.

My next article will appear in the April issue of the *Pomfret Times*. Spring will be approaching. Perhaps, it would be appropriate to think again of the creatures and plants that depend on wetlands and watercourses for their very existence and, in particular, those exceptional animals that live in upland land areas for most of the year. Do you know the sound of a wood frog? What about a spotted salamander? What kind of sound do they make? The answer is salamanders go about their return to the place that gave them birth, like turtles, without making any sound at all. We do not hear them and they do not hear us as we wiz down out Town roads and highways. However, the sound of peepers is a familiar one and means to many people, like me, the end of winter. Unless we continue to protect our wetlands and watercourses this annual heralding of spring will no longer be heard. I hope you will stay tuned, and do not forget our web site at www.pomfretct.org. We continue to update the site with new information concerning wetlands issues. Be informed!

Again my thanks to Katarina Rutkowski, for her encouragement and review of this article.