

# 2012 Municipal Inland Wetland Commissioners Training Program

## Segment 2

### Connecticut's Inland Wetlands and Watercourses: *A Legal, Administrative, and Resource Management Update*

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## ENFORCEMENT

An Inland Wetlands Agency's enforcement authority comes from the Connecticut Inland Wetlands and Watercourses Act, specifically Connecticut General Statute (CGS) section 22a-42a(d) that establishes procedures for suspending or revoking permits, section 22a-42(g) that establishes procedures for municipal fines, and section 22a-44(a) that establishes procedures for issuing orders, or obtaining injunctive relief from a court of law.

An Agency's regulations serve to implement the statutes, and frequently address the procedures to be followed when pursuing a violation or investigating a potential violation. The Agency should designate an individual or individuals as the duly authorized agent for enforcement purposes.

### A. Types of Violations

An enforcement action may be warranted when a violation occurs. A violation may arise from:

1. conducting or maintaining any regulated activity without a permit for that activity;
2. failing to comply with the terms, conditions or limitations placed on a permit - which are designed to carry out the purposes of the Inland Wetlands and Watercourses Act (CGS section 22a-42a(d)(1)) ;
3. exceeding the scope of activities described in the permit application and approved in the permit;
4. failing to comply with the construction practices or procedures described in the permit application and approved in the permit;
5. violating the municipality's inland wetlands and watercourses regulations;
6. violating an order issued pursuant to CGS section 22a-44(a).

### B. Investigation and Collection of Evidence

The Agency has the burden to prove that a violation has occurred or is occurring. Often the Agency may need to investigate and document facts in order to adequately define the scope of a violation. Once the Agency obtains sufficient documentation to confirm that a violation exists, it may request the violator to provide further information such as surveys of existing and prior conditions, and analyses by qualified consultants of the scope and impacts of the violation.

There are a variety of tools that an Agency can use to develop evidence that a violation exists, including the following:

1. Inland Wetlands Agency files:

The first step in investigating a potential violation is to search the Agency's files to determine if a permit or other form of approval was issued; to ascertain to whom it was issued; and to determine the terms, conditions or limitations placed on a permit.

Other town files, such as those of the tax assessor's office and those of the Town Clerk's office, can assist in determining the ownership of the property.

2. State and federal agencies:

When pursuing a violation, it is appropriate for the Agency to communicate its findings with other regulatory agencies (other municipal commissions and local officials, the Connecticut Department of Energy and Environmental Protection, the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, etc). State and federal agencies may have concurrent jurisdiction in certain Connecticut wetlands and watercourses.

3. Maps:

Maps may be used to determine the location and scope of the violation, and to determine the potential for environmental harm. These maps include but are not limited to: topographic maps, the town assessor's map, the USDA Natural Resources Conservation Service soil surveys, and the National Wetlands Inventory map (NWI+).

4. Aerial photographs:

Aerial photographs have no equal as a record of the landscape at a given moment in time. Aerial photographs taken before and after site alterations can be very useful in determining the scope of the violation and in determining how serious the environmental harm or potential for environmental harm is. Aerial photographs, however, are a specialized resource. The use of photographs of flyovers of the state in a legal proceeding requires expert testimony in order for a decision maker to draw conclusions about what is depicted, and where; as well as conclusions about the size and scale of what is depicted. The Agency may have file photographs in an application, permit or previous violation file. Many municipal planning departments or tax assessor's offices have aerial photography of the municipality on file. The Connecticut State Library Archives has aerial photographs available for public review dating from the 1930s to 1995. At least two statewide coverages and a few partial coverages are available on-line. The University of Connecticut's MAGIC website offers photomosaics of the 1934 and 1991 flights. These are mosaic composites which allow you to move over, or pan, across the surface of the state without interruption. In addition, Microsoft's Terraserver provides photography from the early 1990s that covers the entire nation.

5. Site plans:

Site plans submitted for municipal permits can show boundaries, such as wetland boundaries and property boundaries, and can also be useful in determining such boundaries once a violation has occurred and the site has been disturbed. Applications and site plans submitted by previous applicants for a particular property may be very useful as well. These items may exist in the files of the Agency. Approved subdivision plans and maps may be on file in the Town Clerk's office.

## 6. Field inspections:

The Agency should contact the landowner, permittee, or his or her agent to request permission to inspect the property and to explain the problem and the reasons for the inspection.

*It is important to remember that there are legal limitations on entry of private property. Absent permission from the landowner, a municipal official does not have authority to conduct an inspection on the landowner's property.* In some instances, a violation can be viewed from an adjacent property. If the owner of the adjacent property cooperates and grants permission to be on his land, such a remote viewing may be acceptable for gathering necessary information.

When making field inspections, it is important to keep a field book for future reference. Field notes should be recorded at the time of the inspection and should include:

- a. the time and date of the inspection;
- b. the location of the violation;
- c. the reasons for the inspection;
- d. who was met at the site;
- e. summary of conversations at the site;
- f. what was seen (description of site conditions, problems, size of violation, an assessment of observed or potential impacts, etc.);
- g. weather conditions - present and past several days;
- h. names and phone numbers of any contractors working on the site;
- i. a record of the number of photographs taken, the location and compass direction in which they were taken, and a short description of what they depict;
- j. a diagram or drawing showing approximate location of areas of interest and/or problem areas (including reference points, distances, area estimates and specific vantage points of photographs taken).

## 7. Site photographs:

Photographs are an important component of field inspections. Once the photographs are printed, certain essential information should be written on the back of each photograph. This information should include at least the following:

- a. the time and date when the photograph was taken;
- b. the town name and street location;
- c. the property owner's or the violator's name;
- d. inland wetland agency's file reference;
- e. the compass direction in which the photograph was taken (location should be noted on site diagram in field book);
- f. what the photograph shows (notes should be taken in field book and referred to in order to ensure proper descriptions and information);
- g. who took the photograph and recorded the information.

## 8. Personal knowledge:

An Agency may accept personal knowledge to help it determine if a violation exists. Such information may be provided through sworn testimony at the show cause hearing for an order, even if it is the personal knowledge of an Agency member.

## 9. Expert knowledge:

An Agency may need to obtain an expert to assist in proving a violation has occurred. The expert may be an individual within the Agency, such as an Agency member or a municipal employee that is a soil scientist. The Agency may also contract with an individual specifically for their expert assessment of a set of facts and circumstances central to the enforcement case.

## C. Investigation Follow-up

Upon completion of the investigation, an investigation report should be prepared. If the Agency or investigating official determines that no violation has occurred, then the file can be closed.

If the Agency or investigating official determines that a violation has occurred or is occurring, the report should include the information noted under section "B" above, as well as:

1. the name(s) of the inspector(s);
2. the exact name and address of the property owner;
3. the name and address of any contractor(s) involved in the violation;
4. the assessor's map reference for the property;
5. the most current deed to the property.

A property owner can be identified through the town's land records. The tax assessor's office can usually provide the last known owner's name and address, although this may not be the current owner. The municipality's daybook should be consulted to obtain the name of any new property owner not yet recorded on the town's tax records. (Consult the Town Clerk's Office for the location of the daybook.) The tax assessor's office can also provide the map number, block number, and lot number of the property involved with the violation.

It is important to obtain the most current deed to the property. The tax assessor's office can provide the volume and page number of the land records where the deed is located for the listed owner. The Town Clerk's Office has on file all recorded deeds of properties located in the municipality. Property deeds, and accompanying plans and maps, provide a history of transactions and actions affecting the property (sale, subdivision, easements, liens, etc.).

If a corporation or limited liability company owns the property, or is responsible for the violation, the Office of the Secretary of State (860-509-6003) can provide information on the agent for service and the corporation's business address.

The municipal Inland Wetlands Agency should also notify the Department of Energy and Environmental Protection, Inland Water Resources Division (860-424-3019), if a violation involves a diversion of water, or work upon or close to a dam.

## D. Evaluation

Upon determining the existence of a violation, the Agency should evaluate:

1. the seriousness of the violation;
2. the seriousness of the environmental harm or potential for environmental harm;
3. the best method to address the harm to the environmental resources subject to the jurisdiction of the Inland Wetlands Agency.

It is important to remember that:

1. each violation is a separate and distinct offense.
2. each day's continuance of a violation is a separate and distinct offense.

## E. Enforcement Approaches

When pursuing a violation, there are several options that the Agency can follow. They range in increasing degrees of formality from a warning letter to court action. *The Agency should tailor its enforcement approach to the magnitude of the violation.* It is important to note that a person can seek a permit for a regulated activity that is under an enforcement action. The violator/applicant has the right to apply for a permit.

The following are examples of enforcement approaches that may be taken:

1. A telephone call or personal contact by the duly authorized agent.
2. A warning letter.
3. Issuance of a Notice of Violation (NOV):

The NOV informs the violator that he or she is maintaining a condition that, unless addressed, may be treated formally by the Agency as a violation of the Inland Wetlands and Watercourses Act, the Agency's regulations, or a permit issued by the Agency. *A NOV is not an administrative order; it is an informal enforcement device, like the warning letter.* The NOV provides the alleged violator with direction respecting how to come into compliance, and may further direct the alleged violator to certify correction of the alleged violation within a reasonable period of time. The issuance of a NOV requires follow-up by the Agency in order to be a meaningful enforcement device.

4. Citation and municipal fine for violation of the municipal inland wetlands regulations (CGS section 22a-42g):

A citation and municipal fine requires the passage of a town ordinance, a schedule of fines, and a citation hearing procedure in accordance with the CGS section 7-152c. Fines cannot exceed \$1,000 and may not be imposed upon the State. Any fine collected is to be deposited into the General Fund of the municipality or any special fund designated by the municipality. A police officer or other person authorized by the chief executive officer can issue citations. *This process can operate separately from action by the Inland Wetlands Agency.*

5. Permit revocation or suspension (CGS section 22a-42a(d)(1)):

An Agency may undertake to revoke or suspend a permit for a project if the permittee has not complied with permit conditions or limitations, or has exceeded the scope of the work described in the application and permitted by the Agency. The Agency is required to provide (written) notice to the permittee of the facts or conduct which warrant suspension or revocation. The Agency is also required to conduct a hearing at which the permittee is given an opportunity to show compliance with the requirements for retention of the permit. The Agency must publish its decision, and the decision is subject to appeal under CGS section 22a-43(a).

6. Cease and Correct Order / Cease and Desist Order (CGS section 22a-44(a)):

A cease and correct order, or cease and desist order, is one of the Agency's strongest tools short of court action. An order must be written and is effective upon service upon

the alleged violator. The order should be issued in the case of a major or significant violation, even if the alleged violator intends to correct the violation. A cease and correct order may either order the activity that is in violation of the Agency's regulations to cease immediately, or the order may contain a description of a required remedial or corrective action that the Agency wants the alleged violator to undertake. The Agency shall conduct a hearing within ten days of issuing the order, and, within ten days of completing the hearing, the Agency must notify the alleged violator of its decision. The decision may be to affirm, modify or dissolve the order. The details of the procedure involved with the issuance of a cease and correct or cease and desist order must be carefully attended to by the Agency. As a practical matter, it may be important to clearly state and set timetables in the order that carry through to final resolution of a violation. See Section H below.

#### 7. Court action:

An Inland Wetlands Agency should consider, after due consultation with the town attorney, taking court action if administrative approaches fail to resolve a violation. Civil penalties collected due to the successful conduct of a court enforcement proceeding are to be used solely by the Commissioner of Energy and Environmental Protection for restoration of the affected, or other, wetlands and watercourses; for an inventory or index of wetlands and watercourses of the State; or for conducting the training of Agency members. The town may be able to recoup fees and expenses, in addition to injunctive relief awarded by the court ordering correction or removal of the violation. Court actions may take the following paths:

- a. court proceeding to enforce cease and correct order or cease and desist order (CGS section 22a-44(b)) -- the court may order injunctive relief and penalties, and the court may award attorneys' fees.
- b. court proceeding to stop illegal activity and/or correct a condition or facility without the Agency first issuing a cease and correct order or cease and desist order (CGS section 22a-44(b)) -- impact of a violation is so severe that the Agency determines that an order is not sufficient. A court may order injunctive relief and penalties, and the court may also award attorneys' fees.
- c. criminal enforcement action (CGS section 22a-44(c)) -- requires willful and knowing violation. (Such actions are not initiated by the Agency; they require consultation with the town's attorney and formal action by the Office of the State's Attorney after referral.)

## F. Who Is Potentially Subject To Enforcement Action

The Inland Wetlands and Watercourses Act provides for Agencies or their duly authorized agents to take an enforcement action against any "person" who violates the Act or local regulations. Such "person" is also subject to penalties as provided in CGS section 22a-44. A person is defined in CGS section 22a-38(2) as:

"any person, firm, partnership, association, corporation, limited liability company, organization or legal entity of any kind, including municipal corporations, governmental agencies or subdivisions thereof[.]"

This broad definition of "person" means that an enforcement action can be taken, for example, against:

1. the owner of the property;
2. a contractor(s) working on the property;

When issuing orders or seeking penalties, the Agency should consider the nature of any violation and the role that a particular contractor may have played in the violation. Naming a contractor in an order where the contractor was a prime contributor to the violation can often motivate the contractor to promptly take corrective measures.

3. a tenant or lessee in possession of the property;
4. any person who commits, takes part in, or assist in any violation of the Act (CGS section 22a-44(b)).

*Note: A municipal agency order cannot be issued against the State or an agency of the State (doctrine of sovereign immunity).*

## **G. Record Keeping**

To keep track of enforcement proceedings, an Agency should establish a record keeping system that is easy to understand and maintain. The system should allow both active and closed files to be stored and retrieved easily. Since violations are specific to location, it might be helpful to use the same file system as that used by the municipality's tax collector.

In addition to a file system, each Agency should set up a procedure to monitor current violations. A logbook, a calendar, a card file, or computer databases are suitable tools for the monitoring procedure. It is not sufficient to rely on staff memory to ensure follow-through on violations. All enforcement proceedings information should be documented. The Agency should complete and submit to the Department of Energy and Environmental Protection the Statewide Inland Wetlands and Watercourses Activity Reporting Form for each enforcement action taken.

It is important to set timetables that carry through to final resolution of a violation. To ensure success, an enforcement action must be based on a properly developed and technically adequate documentary record.

## **H. Hearing on Cease & Correct Order / Cease & Desist Order**

The burden of proof is on the Agency or presenter and NOT on the alleged violator.

If the Agency issues a cease and correct order or cease and desist order, it should hold a hearing within ten days after the issuance of the order. The purpose of this hearing is to allow the recipient of the order (respondent) to answer the order, provide whatever rebuttal evidence and testimony respecting compliance that he wishes, and challenge the facts upon which the order was based.

The property owner, contractor, and/or respondent should be notified of the hearing by certified mail.

The hearing on an order differs from the public hearing associated with a permit application. The public may attend and observe this hearing but may not speak, and no prior publication of a legal notice is required. A FOIA notice is required. Often, this hearing is referred to as a "Show Cause Hearing".

At least the following items must be entered into the record during the hearing:

1. a copy of the order or permit and permit application
2. a copy of the field book with field notes
3. a copy of the investigation report
4. copies of photographs
5. statements or receipts that prove certified mailing
6. other documents the Agency relied upon in issuing the order such as maps and deeds
7. testimony from the respondent in rebuttal to the issues raised by the Agency
8. expert testimony that challenges or supports the issuance of the order;

The Agency has the right to, and should, ask or expect that an expert may be asked for credentials including but not limited to:

- a. education;
  - b. professional experience/certifications;
  - c. publications;
  - d. teaching experience;
  - e. professional memberships;
  - f. prior expert witness experience;
  - g. data collection methods/experience
9. any evidence offered by staff, violator or witnesses (including Agency members) that responds to or rebuts issues raised by the Agency or respondent.

Evidence must be in the form of sworn testimony based on personal knowledge.

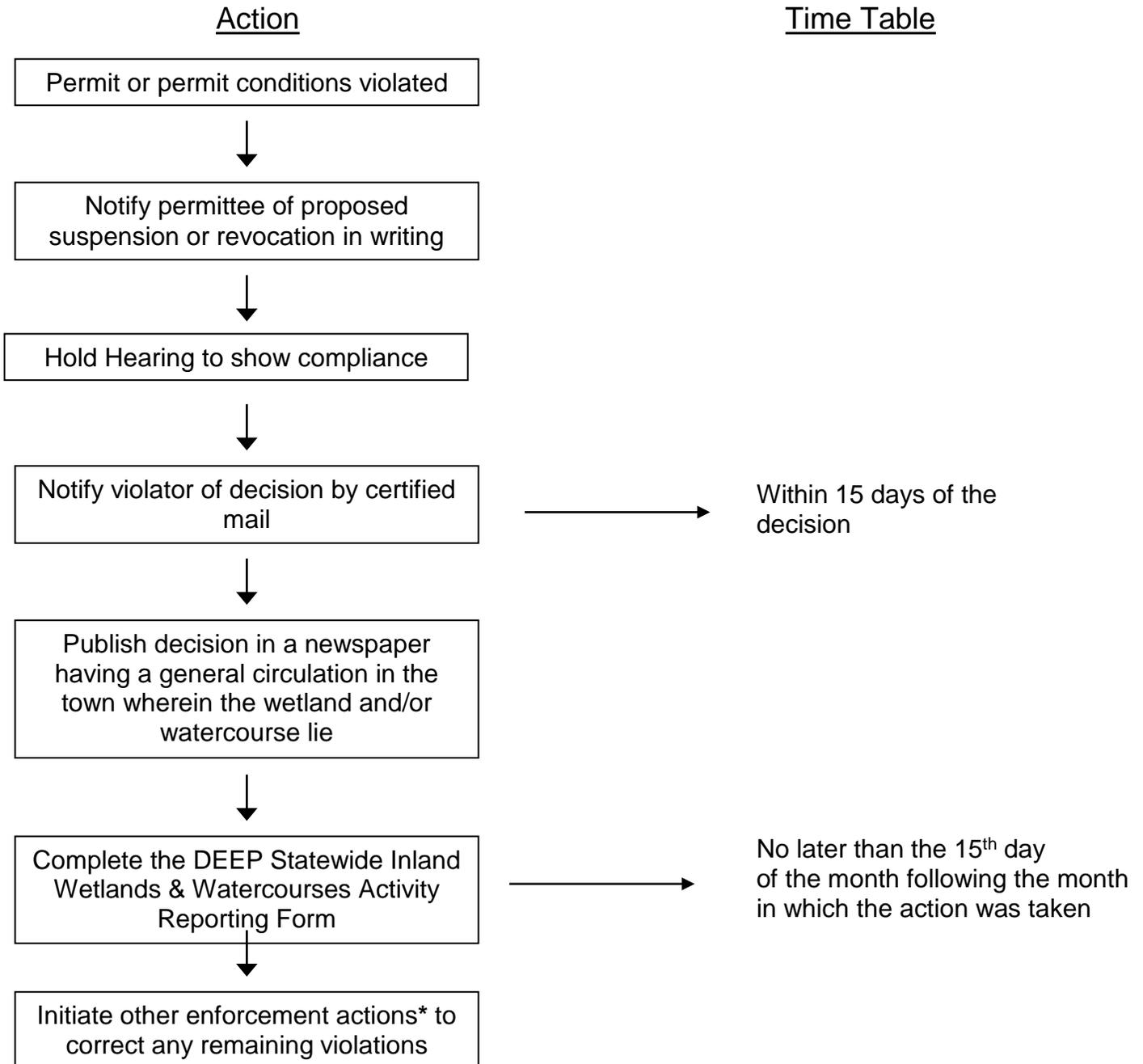
The Agency should make sure that the record demonstrates or contains adequate information regarding the Agency's authority and jurisdiction in the situation, and that the Agency followed statutory/ regulatory procedures in the conduct of its enforcement proceedings.

Within ten days of completion of the hearing the respondent must be notified by certified mail that the original order remains in effect, or that a revised order is in effect, or that the order has been withdrawn.

## I. Flow Charts

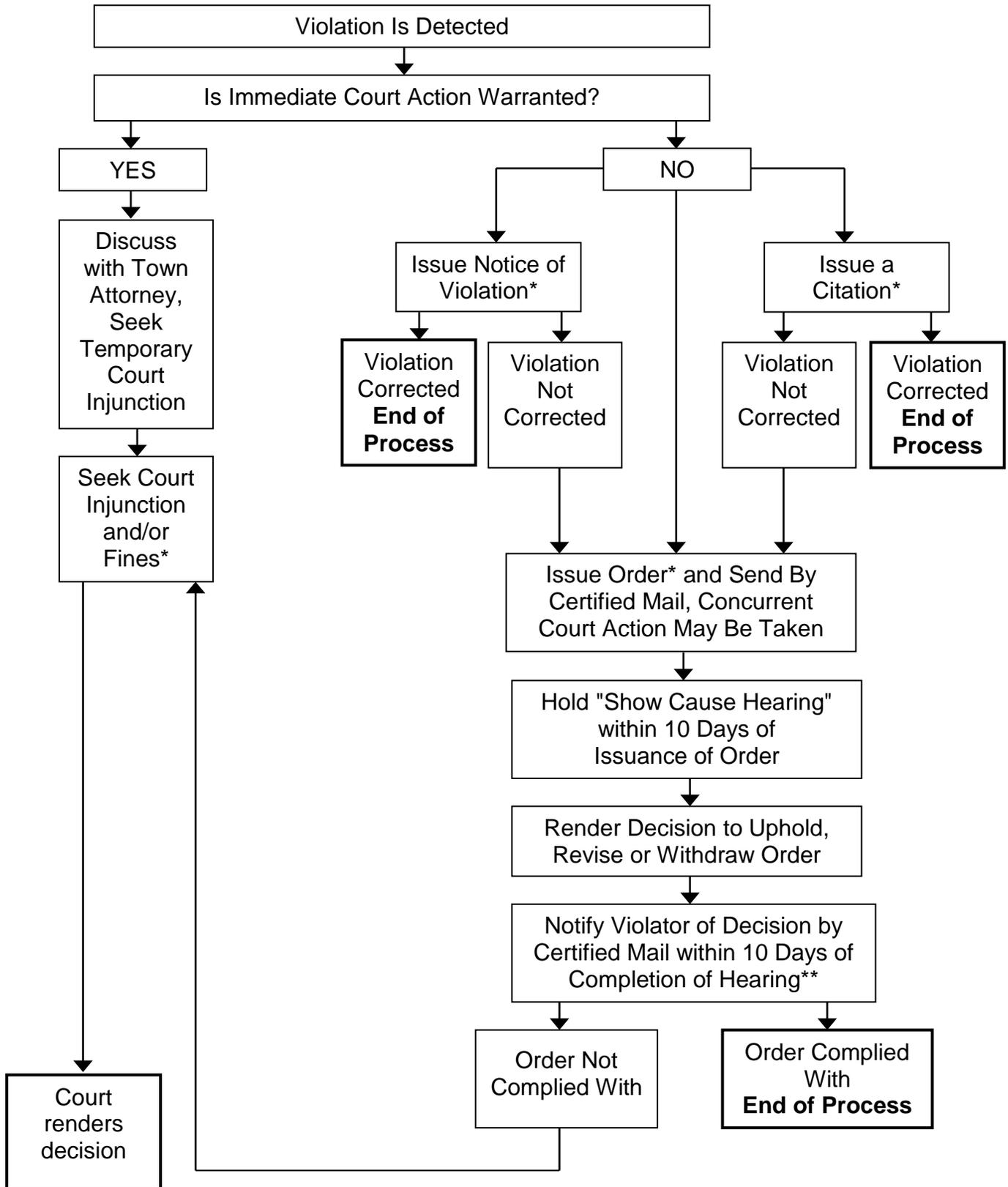
The following flow charts are provided for convenience and to guide the Agency through the enforcement process.

### PERMIT REVOCATION FLOW CHART (CGS Sec. 22a-42a(d)(1))



\* For work in and/or around wetlands and watercourses that is impacting such wetlands and watercourses and is exceeding the scope of a permit, additional enforcement action (e.g. an order, see "Enforcement Flow Chart") may be initiated concurrently.

# SAMPLE ENFORCEMENT FLOW CHART (CGS Sec. 22a-42g and 22a-44)



\* Complete the DEEP Statewide Inland Wetlands & Watercourses Activity Reporting Form and submit no later than the 15<sup>th</sup> day of the month following the month in which the action was taken.

\*\* Although not required by statute, it is good practice to publish a notice of the decision in the newspaper.