

Adirondack Park Agency Policy, Procedures & Guidance System	LEGAL - 1
Topic: General Enforcement Guidelines	
<hr/> Cecil Wray, Chairman, Enforcement Committee	Effective Date: January, 2003

I. Purpose and Applicability

These General Enforcement Guidelines establish the Agency’s objectives and approach for the investigation and resolution of violations of the Adirondack Park Agency Act (APA Act), the Wild, Scenic and Recreational Rivers System Act (Rivers Act) and the Freshwater Wetlands Act (FWA). Failure to obtain necessary Agency permits under these laws, or to undertake a project pursuant to the terms and conditions of an issued permit, would constitute violations to which these guidelines apply.

These Guidelines are the first in a series of guidelines intended to address issues relating to the Agency’s enforcement program. Other specific enforcement guidelines may be adopted such as:

- a. Substantive Standards for Settlements
- b. Civil Penalty Guidelines;
- c. Environmental Benefit Project Guidelines;
- d. Permit Compliance Guidelines.

II. Statutory and Regulatory Enforcement Authority

Adirondack Park Agency Act

The APA Act establishes land use controls for the private lands within the six-million-acre Park. The purpose of the APA Act is to “insure optimum overall conservation, protection, preservation, development and use of the unique scenic, aesthetic, wildlife, recreational, open space, historic, ecological and natural resources of the Adirondack Park.”

Executive Law, Section 813(1) provides that any “person”¹ who violates the APA Act or Agency regulation or permit or order issued by the Agency is liable for a civil penalty up to \$500 per day for each day the violation continues. Penalties are recoverable in an action by the Attorney General.

The Attorney General may also institute an action to prevent, restrain, enjoin or correct any violation, and may join in the action any appropriate person or the person responsible for the violation to take such affirmative actions as are necessary to correct the violation (Executive Law, Section 813[2]).

Any civil penalty may be released or compromised by the Agency before referral to the Attorney General, or after referral, by the Attorney General with the consent of the Agency (Executive Law, Section 813[3]).

New York State Freshwater Wetlands Act

The Agency implements the FWA within the Adirondack Park (Environmental Conservation Law, Articles 24 and 71). The purpose of the FWA is to preserve, protect and conserve freshwater wetlands and their benefits, consistent with the general welfare and beneficial development (ECL Section 24-0103). Any loss of wetlands causes a loss of important wetland benefits, such as protection of surface and ground water, flood control, wildlife habitat, recreation, open space and aesthetic appreciation, and other values (ECL Section 24-0105).

Pursuant to ECL Section 71-2303, the Agency can impose penalties up to \$3,000 for each violation of the FWA after notice and opportunity for hearing, and can order remediation and restoration of wetlands by the violator after a hearing.

New York State Wild, Scenic and Recreational Rivers System Act

The Legislature has determined that certain of the State’s rivers and their environs possess outstanding natural, scenic, historic, ecological and recreational values, and enacted the Rivers Act so that the designated rivers would be preserved in their free-flowing condition for the benefit and enjoyment of present and future generations (Environmental Conservation Law, Article 15, Title 27). For private lands in the Park, the Rivers Act is implemented by the Agency.

Section 15-2723 of the Rivers Act provides that any person who violates any provision of or order issued pursuant to the Rivers Act may be compelled to comply and shall pay a civil penalty of not less than \$100 and not more than \$1,000 per day for each day of the violation.

1 “Person” includes individuals, businesses or other private entities, and municipalities, but not the State or State agency.

Agency Enforcement Regulations

Agency regulations (9 NYCRR Part 581) effective January, 2003, provide the process for implementation of the Agency's enforcement authority under the APA Act, FWA, and the Rivers Act. The regulations provide for issuance of administrative cease and desist orders, requests to redress damage to environmental resources, opportunity to resolve violations by agreement, and an administrative process to be implemented when a Notice of Apparent Violation has been issued by staff. For violations of the FWA, the Agency may impose penalties after notice and opportunity for hearing, and can order remediation and restoration of wetlands after a hearing. In all cases involving permit violations, the Agency may, after an opportunity for a hearing, revoke, suspend or modify the permit. The Agency will not process an application for a permit or variance for property involved in a violation. An unresolved case may be referred to the Attorney General for civil action.

III. Agency Enforcement Objectives

The Agency regulates land use and development on private lands within the Adirondack Park through a permitting program. Effective enforcement of the Agency's laws, regulations, permits and orders is fundamental to the meaningful regulation of land use and development in the Park and to the fulfillment of the Agency's statutory mandate to protect the natural resources of the Park.

In any case where there is on-going environmental damage, the Agency will seek cessation of the on-going actions and immediate remediation of the damage.

The primary objective of the Enforcement Program is to obtain compliance with regulatory environmental requirements. The Agency will require actions to ensure that the environmental damage created by violations will be eliminated or minimized for the long term.

A further objective of the program is to deter additional violations, either by that landowner or other landowners, or the public. The consistently applied requirement that properties in violation be brought into compliance with regulatory environmental standards has a significant deterrent effect. The imposition of civil penalties in appropriate cases also creates a significant deterrent effect. Violators should not profit from the undertaking of a violation. To that end, the Agency will seek actions that eliminate the economic benefit derived from violations. Where intentional or knowing violations occur, the Agency's objective will be to make the cost of noncompliance greater than the cost of compliance would have been.

Agency enforcement efforts will be calculated to encourage prompt, voluntary cooperation resulting in the firm, but fair resolution of violations. It is the Agency's intention to generally provide an incentive to violators who voluntarily and promptly agree to a binding obligation to achieve resolution of the violation, both with respect to remediation and the payment of any civil penalties. Prompt and voluntary remediation is

far more effective to environmental protection than adjudication. Prompt resolution also contributes to the Agency's efforts to address other violations by allowing staff to use its time on other cases.

Finally, the Agency's enforcement process should be efficient, fair, and consistent, taking into account particular facts and circumstances and the need to ensure environmental protection.

IV. **Preventive Measures**

The most effective enforcement tool is the prevention of violations before they occur. Voluntary compliance by the people who live, work or recreate in the Park is the key to the future of the Park and the protection of its resources. In order for the people of the Park to both appreciate the basis for and comply with Agency regulations, relevant information must be readily available.

Therefore, the Agency will promote public awareness and understanding of the value of the Park resources and of proper design and technique in executing development projects.

The Agency will make every effort to prevent violations by continuing to provide assistance to the public in jurisdictional matters, and by ensuring that the project review process is timely and permitting requirements are clear, based on specific and accurate development plans. The Agency will continue to establish and participate in various outreach and training programs, and to enhance communications and the sharing of information between the Agency and local governments. All these actions are designed to apprise the public and local officials of the potential for Agency jurisdiction, perhaps preventing some violations.

The Agency has for thirty years been the subject of considerable public scrutiny and press coverage. Therefore, the Agency expects that landowners, developers, attorneys, purchasers, real estate agents and local government officials are aware of the potential for Agency jurisdiction. The Agency has, since its inception, maintained staff available to answer questions relating to its jurisdiction, the permit process, and other Agency matters.

Hence, the Agency anticipates that the public and professionals practicing in the Park will take advantage of the service offered and ascertain the legal status of a parcel or whether there is Agency jurisdiction over a proposed action prior to purchase or action.

V. **Enforcement Procedures**

Investigation

The Agency receives complaints about possible violations from the public and staff. Complaints will be investigated by staff and no determination of violation will be made unless and until there is sufficient proof. Investigations will be prioritized according to the potential for significant environmental damage and the need for prompt action.

Agency enforcement officers will undertake the investigation of the alleged violations assigned to them, including obtaining information to determine the legal and factual history of the site and its use, whether a violation has in fact occurred, and options for resolution. A staff attorney is assigned to each case to ensure legal guidance. Agency project review and resource analysis staff are consulted on issues which require more expertise. Once all the necessary legal and factual information has been obtained, and if a violation has been demonstrated, the enforcement officer and assigned attorney will prepare a recommendation for resolution of the violation.

Administrative Resolution of Violations by Staff

The Executive Director or his designee will make all reasonable efforts to resolve violations with the voluntary cooperation and/or consent of the violator(s) and landowners. Almost all violations should be resolved at this level of the enforcement process to ensure the most efficient use of staff resources, and timely compliance and/or remediation of environmental damage. In developing proposed resolutions, input from appropriate executive, legal, technical, and project review staff must be obtained. Resolutions of violations should generally be consistent in similar cases, while also taking into account the specific facts and circumstances of each case. When applicable, proposed resolutions should be consistent with guidelines subsequently developed in this enforcement guideline series.

Settlement agreements entered into to resolve a violation are not permits and are not a means to bypass or circumvent the legal process and protections created by the permit system. Enforcement staff does not have the benefit of the statutory requirement that a project applicant provide all necessary information; they cannot compel production of the detailed information and plans usually required for a project to be evaluated for approval. Moreover, enforcement staff will not have the benefit of the public comment provided for in the project review process. The resolution of many violations will therefore include a requirement that the individuals involved apply for a permit for the project which has already been undertaken. However, the referral of a violation to the after-the-fact permit process will not be allowed unless or until all necessary site stabilization and restoration has occurred and the appropriate civil penalty has been paid.

When violations cannot be resolved at the staff level, they may be referred to the Enforcement Committee for resolution or, in the case of violations of the Freshwater Wetlands Act or of an Agency permit, to the Agency for a determination and order.

Administrative Resolution of Violations by the Enforcement Committee

The Enforcement Committee shall consider violations of the APA Act or the Rivers Act upon staff referral or at its request. The Agency may consider such violations instead of the Enforcement Committee upon a referral by the Committee or a request by a majority of Agency members. A determination shall be made as to whether a violation has occurred and include an appropriate disposition of the matter. Such disposition may

include a proposal to resolve the violation administratively, referral of the violation to the Attorney General, or adjournment of the matter. Where contested factual issues exist, the Enforcement Committee or the Agency may request that a fact-finding hearing be held before making its determination. The Enforcement Committee or the Agency, in reaching a determination based on the relevant facts and circumstances of the matter, will also take into account staff efforts to resolve a violation with the voluntary cooperation and/or consent of the individuals involved.

Agency Determinations in Freshwater Wetlands Act or Permit Suspension, Modification or Revocation Proceedings

The Agency may make a determination and order in matters involving violations of the FWA Act or permit violations requiring suspension, modification or revocation of an Agency permit. The Agency's decision will be based on a record after an opportunity for an adjudicatory hearing, and will also take into account any Enforcement Committee recommendation concerning the matter. Proceedings leading to a determination and order in such matters will generally only occur after staff have made a reasonable effort to resolve the violations(s) with the voluntary cooperation and/or consent of the individuals involved.

Civil Action by the Attorney General on behalf of the Agency

Where violations cannot be resolved at the administrative level, or where judicial involvement is appropriate to obtain access to property, cooperation in the investigation process, or the immediate cessation of ongoing environmental damage, the Attorney General may be asked to initiate appropriate civil action on behalf of the Agency. In such cases, all prior settlement offers and negotiations shall be inadmissible as evidence in such proceedings consistent with the Civil Procedure Law and Rules.

VI. Legal Effect

The guidance and procedures set out in this document are intended solely for the use of Agency staff. They are not intended to create any substantive or procedural rights, enforceable by any party in administrative or judicial litigation with the State of New York. The Agency reserves the right to act at variance with these guidelines and each case will be evaluated as to its particular facts and circumstances.