



Critical Area Enforcement Training

MAY 26, 2022

Agenda

- ▶ Importance of Critical Area Enforcement
- ▶ Enforcement Provisions in Critical Area Law
- ▶ The Enforcement Process
- ▶ In-Depth Topics
- ▶ CAC & OAG Assistance



Importance of Critical Area Enforcement

Why is it Important to Enforce Critical Area Law?

- ▶ Critical Area is valuable, fragile & sensitive
- ▶ Human activity can cause immediate & adverse environmental impacts
- ▶ Statutory goal within Critical Area law: provide for habitat conservation & water quality benefits
- ▶ Commission's oversight role is to ensure that Critical Area programs are effectively enforced
- ▶ Local jurisdictions have primary responsibility to implement the program
- ▶ Public perception
- ▶ Level playing field
- ▶ Fairness
- ▶ Equal application of laws
- ▶ Prevent reoccurring problems



Enforcement Provisions in the Critical Area Law

NR 8-1808, NR 8-1815, NR 8-1815.1

Minimum Elements of Critical Area Programs (NR 8-1808)

- ▶ Local CA programs **MUST** include “provisions relating to enforcement”
- ▶ Specifically:
 - ▶ Penalty provisions establishing that violators subject to fine not exceeding \$10,000
 - ▶ Considerations for penalty amount
 - ▶ Administrative enforcement procedures
 - ▶ After-the-fact variance process

What if A Local Enforcement Program is Different Than Critical Area Law?

- ▶ A local jurisdiction's enforcement provisions can be different than those provisions under the Critical Area Statute
- ▶ BUT ...
- ▶ A local jurisdiction's enforcement provisions **MUST** be (1) at least as effective as the enforcement requirements under the Critical Area statute AND (2) approved by the full Critical Area Commission (NR 8-1808(c)(3))

What if a Local Program Lacks Certain Enforcement Provisions?

- ▶ “Notwithstanding any provision in a local law or ordinance, or the lack of a provision in a local law or ordinance, all of the requirements of this subtitle shall apply to, and be applied by, a local jurisdiction as minimum standards for a program sufficient to meet the goals of the Critical Area Program.”
(NR 8-1808(c)(1)(i))

Critical Area Enforcement Procedures (NR 8-1815)

- ▶ Local jurisdiction **SHALL** take enforcement action when it identifies a Critical Area violation
- ▶ Local jurisdiction **SHALL** require restoration and mitigation to offset adverse impacts resulting from the violation
- ▶ Local jurisdiction **SHALL** collect a bond when:
 - ▶ Restoration or mitigation exceeds 1,000 square feet or
 - ▶ Restoration or mitigation involves expenses that exceed \$1,000

Critical Area Enforcement Procedures – Authority of Local Jurisdiction (NR 8-1815)

- ▶ A local jurisdiction may:
 - ▶ Bring an action
 - ▶ Circuit Court or District Court
 - ▶ Criminal case (misdemeanor); upon conviction fine not to exceed \$10,000 or imprisonment not to exceed 90 days or both, plus costs imposed by court discretion
 - ▶ Request assistance from the Commission in an enforcement action
 - ▶ Request that the CAC Chairman refer an enforcement action to the Attorney General

Critical Area Enforcement Procedures -- Access (NR 8-1815)

- ▶ If a local jurisdiction believes that Critical Area violation has occurred, is occurring, or may occur, it may obtain access to a property to:
 - ▶ Identify or verify a suspected violation;
 - ▶ Restrain a development activity; or
 - ▶ Issue a citation.
- ▶ The local jurisdiction shall make a reasonable effort to contact the property owner before obtaining access to the property.
- ▶ If access is denied, the local jurisdiction may seek an injunction to enter the property and pursue the enforcement action.

Critical Area Enforcement Procedures – Tree Cutting & Clearing (NR 8-1815.1)

- ▶ For a tree cutting or tree clearing violation within the Critical Area, the local jurisdiction may bring an action:
 - ▶ To require the violator to replant trees where the cutting or clearing occurred and under a plan prepared by the State Forester, a registered professional forester, or a registered landscape architect;
 - ▶ To stop a planned violation; or
 - ▶ For damages:
 - ▶ To be assessed by a circuit court in an amount equal to the estimated cost of replanting trees; and
 - ▶ To be paid by the violator.



The Enforcement Process

Types of Critical Area Violations

- ▶ Structures built without permits
- ▶ Development without permits
- ▶ Forest clearing without approvals
- ▶ Exceeding clearing or lot coverage limits
- ▶ Filling wetlands without permits
- ▶ Unauthorized RCA uses
- ▶ Grading or tree removal in the Buffer
- ▶ Nonwater-dependent project without opt-in provisions
- ▶ Erosion and sediment control not performed

Who is the Violator?



- ▶ Each person who violates the provisions of the Critical Area statute or regulations or the provisions of a local Critical Area program
- ▶ Including:
 - ▶ Contractor
 - ▶ Property owner(s)
 - ▶ Or any other person who committed, assisted, authorized, or participated in the violation
- ▶ Violation stays with the property

A Generic Enforcement Process

- ▶ Receive complaint
- ▶ Start file
- ▶ Contact property owner for access
- ▶ Site visit
- ▶ Determine whether Critical Area violation
- ▶ Issue citation / NOV
- ▶ Property owner brings site into compliance

Specific Processes

- ▶ Extremely jurisdiction-dependent!!
 - ▶ Charter v. Code v. Commission
- ▶ Differences
 - ▶ District Court
 - ▶ Municipal infractions
 - ▶ Notice of Violation □ Board of Appeals
 - ▶ Circuit Court
- ▶ Compliance assistance



In-Depth Topics

Some Best Practices for NOVs

- ▶ Specific references to the local code/ordinance or State law
- ▶ OK to cite multiple people (e.g., property owner & contractor)
- ▶ Be clear about the Critical Area designation and zoning
- ▶ Be clear about the activity & extent of violation
- ▶ OK to ask for survey
- ▶ Include details on when the violation occurred (e.g., over days or over months)
- ▶ The more detail the better
- ▶ Is stabilization necessary? What does that entail? Do you need stop work order?
- ▶ Include a deadline to bring site into compliance and specifically what needs to be done to get site to pre-violation condition
- ▶ Include mitigation calculations
- ▶ Include appeal rights
- ▶ Send certified mail

Statute of Limitations

- ▶ 3 years for criminal prosecution
- ▶ 3 years for civil penalty
- ▶ Begins when local jurisdiction knew or reasonably should have known of the violation
- ▶ No specific statute of limitations on injunctive relief

(NR 8-1815(a)(2)(ii))

After-the-Fact Variances (COMAR 27.01.12.06)

- ▶ A local jurisdiction **may not accept** an application for a variance to legalize a violation of this subtitle, including an unpermitted structure or other development activity, until the local jurisdiction;
 - ▶ (1) Issues a notice of violation; and
 - ▶ (2) Assesses a penalty for the violation.
- ▶ An application for an after-the-fact variance is a waiver of the right to appeal!

After-the-Fact Variances, Cont'd (COMAR 27.01.12.06)

- ▶ A local jurisdiction **may not issue** a permit, approval, variance, or special exception to legalize a violation of this subtitle unless an applicant has:
 - ▶ (1) Fully paid all administrative, civil, and criminal penalties;
 - ▶ (2) Prepared a restoration or mitigation plan; and
 - ▶ (3) Performed the abatement measures in the approved plan in accordance with the local Critical Area program.
- ▶ If variance is approved, 7:1 mitigation required (4:1 for violation + 3:1 for variance)

After-the-Fact Variances, Cont'd (COMAR 27.01.12.06)

- ▶ If a local jurisdiction **denies** the requested after-the-fact variance, then the local jurisdiction shall:
 - ▶ (1) Order removal or relocation of any structure; and
 - ▶ (2) Order restoration of the affected resources.
- ▶ 4:1 Mitigation Required
- ▶ Local jurisdiction should order compliance within a certain time frame and include requirement to restore affected resources

Fines/Penalties

- ▶ Each violation is a separate offense
- ▶ Each calendar day that violation continues is a separate offense
- ▶ Local jurisdiction shall impose a penalty
- ▶ Penalty cannot exceed \$10,000

(NR 8-1815(c)(1)(iii)15.)

Fines/Penalties, Cont'd

- ▶ In determining the penalty, local jurisdiction shall consider:
 - ▶ (1) The gravity of the violation;
 - ▶ (2) Any willfulness or negligence involved in the violation;
 - ▶ (3) The environmental impact of the violation; and
 - ▶ (4) The cost of restoration of the resource affected by the violation & mitigation for damage to that resource, including the cost to the State or local jurisdiction for performing, supervising, or rendering assistance to the restoration and mitigation

(NR 8-1815(c)(2)(i))

Restoration & Mitigation

- ▶ Restoration - purpose is to return site to pre-violation condition
- ▶ Local jurisdiction shall:
 - ▶ Require appropriate restoration
 - ▶ Ensure restoration is properly completed
 - ▶ If restoration exceeds 1,000 square feet or involves expenses exceeding \$1,000, either:
 - ▶ Collect a bond or other financial security
 - ▶ Adopt other appropriate procedures, approved by the Commission

Restoration & Mitigation, Cont'd

- ▶ Mitigation - purpose is to offset water quality and habitat impacts
- ▶ 90 days to complete mitigation, unless adverse planting conditions
- ▶ Local jurisdiction shall:
 - ▶ Require appropriate mitigation
 - ▶ Ensure mitigation is properly completed
 - ▶ If mitigation exceeds 1,000 square feet or involves expenses exceeding \$1,000, either:
 - ▶ Collect a bond or other financial security
 - ▶ Adopt other appropriate procedures, approved by the Commission

CAC & OAG Assistance

CAC Staff Assistance

- ▶ No inspectors or enforcement staff **BUT** ...
- ▶ Answer substantive and/or process questions, talk through potential options/next steps
- ▶ Forest assessment (FIDS habitat)
- ▶ When property owner appeals NOV, CAC staff has served as expert witness in BOA case
- ▶ When property owner appeals NOV, CAC staff can provide comment letter in support of County's enforcement efforts
- ▶ Other technical assistance
- ▶ Assist local jurisdiction staff and/or county attorneys with referrals to CAC
- ▶ Assist with referral to Environmental Crimes Unit
- ▶ For violations involving State projects, coordination between County staff and State agency
- ▶ Monitor significant violations, request status updates

Authority of CAC Chairman

- ▶ If local jurisdiction is failing to enforce Critical Area requirements for a specific development, CAC Chairman must first provide notice to the jurisdiction. If, within 30 days of that notice, the local jurisdiction fails to take an action to remedy or punish the violation, the Chairman may refer the matter to the Attorney General.
(NR 8-1815(b), NR 8-1815.1(c))
- ▶ CAC Chairman may request the Attorney General bring an action to restrain a violation and to compel restoration when a development in the Critical Area: (1) is proceeding in violation of approved plans; and (2) threatens to immediately and irreparably degrade the quality of tidal waters or fish, wildlife, or plant habitat.
(NR 8-1815(d))


OAG Assistance - Informal

- ▶ Talk through substantive and/or process questions on specific enforcement cases or enforcement, more generally
- ▶ Provide legal analysis and interpretation of Critical Area statute and regulations
- ▶ Provide suggestions concerning referrals to CAC or Environmental Crimes Unit
- ▶ Be a resource

OAG Authority

- ▶ On behalf of CAC Chairman, intervene in any administrative, judicial, or other proceeding or appeal concerning a project approval in the Critical Area (NR 8-1812(a))
- ▶ Upon referral of an enforcement action by CAC Chairman to Attorney General, step into the shoes of the local jurisdiction and “invoke any sanction or remedy available to local authorities” (NR 8-1815(c), NR 8-1815.1(d))
- ▶ Independent authority to compel compliance, to restrain noncompliance with approved plans, and to compel restoration to pre-violation conditions (NR 8-1815(d))
- ▶ Upon request of the CAC Chairman, may bring an action to restrain a violation and to compel restoration when a development in the Critical Area: (1) is proceeding in violation of approved plans; and (2) threatens to immediately and irreparably degrade the quality of tidal waters or fish, wildlife, or plant habitat (NR 8-1815(e))

QUESTIONS?



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