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November 24, 2021

Sender's Email: acornelius@hwpalaw.com

VIA FEDEX: 7752 9232 7123

Julie Coco, PE
State Sediment Engineer
DEMLR
512 N. Salisbury Street
Raleigh, NC 27604

Re: Request for Remission
Civil Penalty Assessment for Violations of the Sedimentation Pollution Control Act
Cabarrus County
LQS-21-006

Dear Ms. Coco:

I represent Cabarrus County and Cabarrus County Schools (technically, the Cabarrus County Board of Education) regarding the civil penalty that has been assessed against them by the North Carolina Department of Environmental Quality ("NCDEQ") as detailed in that letter of September 22, 2021 from William E. Vinson, Jr. with the Civil Penalty Assessment, bearing file number LQS-21-006, dated September 22, 2021 ("Civil Penalty"). The Civil Penalty was earliest received by my clients on September 29, 2021.

This letter is submitted on behalf of Cabarrus County ("County") and Cabarrus County Schools ("Schools") within 60 days of receipt of the Civil Penalty as a request to remit the Civil Penalty pursuant to N.C. Gen. Stat. 113A-64.2 et seq. In support of this request, enclosed are the following documents.

- a. Waiver of Right to an Administrative Hearing and Stipulation of Facts
- b. Justification for Remission Request
- c. Letter from Leitner Construction Company dated November 19, 2021 ("Leitner Letter")
- d. A disc containing all Exhibits to the Leitner Letter

At the outset, the County and Schools accept the factual findings and legal conclusions established in the Civil Penalty, and this request for remission does not seek to contest those conclusions. Rather, this request seeks to provide information and explanation as to the events that gave rise to the Civil Penalty and the efforts taken by the Schools and its general contractor

for the Project, Leitner Construction Company (“Leitner”), to mitigate and remedy the environmental issues that arose on this Project.

The County and Schools contend that their request for remission should be granted because the contractor for the Project promptly abated any environmental damage resulting from the violations, the violations were inadvertent, and the contractor for this Project has never been assessed civil penalties from any previous violation.

The Schools hired Leitner as the general contractor for the construction of the Southwest Cabarrus Elementary School aka Hickory Ridge Elementary School (“Project”). The real property is owned by the County, but the Schools contracts for construction of all schools in the county and the Schools pays for said construction. During construction of the Project, Leitner encountered a significant amount of subterranean rock that was unable to be excavated and had to be blasted and moved to the rear of the site and used as fill to meet design grade elevations. The erosion control plan originally established for the Project was not designed for the amount of rock uncovered or the type of soil on site. Ultimately, the rocky conditions and some significant weather events made it difficult for Leitner and its subcontractors to stabilize the site.

The enclosed Leitner Letter explains in more detail the issues encountered by Leitner regarding the erosion control measures for the site, and the steps taken by Leitner to address any non-compliance and violations. In particular, the documentation provided by Leitner shows that Leitner immediately sought to remedy the damage identified by NCDEQ in the Notice of Violation (which was identified as “slight” damage), and that the damage resulted, at least in part, from the removal of rock berms, which was required to comply with approved plans for the site. The removal of the rock berms was an inadvertent cause of sediment damage, which was quickly addressed.

The other violations were also inadvertent as shown by the Exhibits to the Leitner Letter. Leitner took extensive measures to address all site conditions that were violations or lead to violations, and Leitner spent over \$150,000 seeking to maintain compliance or to remedy violations. The Exhibits also show how Leitner worked with NCDEQ to address the violations.

Lastly, during this process, personnel with the Schools were regularly in contact with Leitner about the violations and the work to address and remedy the violations. It is the opinion of the Schools that Leitner made every effort to comply with the existing erosion control plans and to address and remedy all violations. In the opinion of the Schools, the violations and noncompliance were not willful, but were inadvertent and were the result of some unfortunate circumstances due to weather and unknown conditions with the site, and all parties involved did the best they could to remedy the violations and mitigate the damage.

For these reasons, the County and Schools request a remission of the Civil Penalty. If you have any questions about this request or if you require further information, please contact me, and I will be happy to respond with anything you need.

Thanking you for your attention, we are

Sincerely yours,

HARTSELL & WILLIAMS, P. A.



Andrew T. Cornelius

ATC:lce
Enclosures

cc: Carolyn McLain, Assistant AG (via e-mail w/o exhibits)
Richard Koch, County Attorney (via e-mail w/o exhibits)
H. Jay White, Sr., Schools Attorney (via e-mail w/o exhibits)
Mike Downs, County Manager (via e-mail w/o exhibits)
Jonathan Marshall, Deputy County Manager (via e-mail w/o exhibits)
G. Tim Lowder, Schools Executive Director of Operations (via e-mail w/o exhibits)
Brian Cone, Schools Director of Construction (via e-mail w/o exhibits)
Don Terry, Leitner Attorney (via e-mail w/o exhibits)

STATE OF NORTH CAROLINA

SEDIMENTATION POLLUTION
CONTROL COMMISSION

COUNTY OF CABARRUS

IN THE MATTER OF ASSESSMENT)
OF CIVIL PENALTIES AGAINST)
CABARRUS COUNTY)
CABARRUS COUNTY SCHOOLS)

WAIVER OF RIGHT TO AN
ADMINISTRATIVE HEARING AND
STIPULATION OF FACTS

CASE NO. LQS-21-006

Having been assessed civil penalties totaling \$69,130 for violation(s) as set forth in the assessment document of the Division of Energy, Mineral and Land Resources dated 9/22/2021 the undersigned, desiring to seek remission of the civil penalties, does hereby waive the right to an administrative hearing in the above-stated matter and does stipulate that the facts are as alleged in the assessment document.

The undersigned further understands that all evidence presented in support of remission of this civil penalty must be submitted to the Division of Energy, Mineral and Land Resources within sixty (60) calendar days of receipt of the civil penalty assessment. No new evidence in support of a remission request will be allowed after sixty (60) calendar days from the receipt of the civil penalty assessment.

This the 23 day of November, 2021

Andrew T. Cornelius, Attorney for Cabarrus County Schools
NAME (printed)

Andrew T. Cornelius
SIGNATURE

ADDRESS

Hartsell & Willows, PA
PO BOX 368
Concord, NC 28026

TELEPHONE

704-786-5161

JUSTIFICATION FOR REMISSION REQUEST

DEMLR Case Number: LQS-21-006

County: Cabarrus

Assessed Party: Cabarrus County & Cabarrus County Schools

Project No. (If applicable): CABAR-2018-086

Amount Assessed: \$69,130.00

Please use this form when requesting remission of this civil penalty. You must also complete the "Waiver of Right to an Administrative Hearing, and Stipulation of Facts" form to request remission of this civil penalty. You should attach any documents that you believe support your request and are necessary for the Commission to consider in evaluating your request for remission. Please be aware that a request for remission is limited to consideration of the factors listed below. Requesting remission is not the proper procedure for contesting whether the violation(s) occurred or the accuracy of any of the factual statements contained in the civil penalty assessment document. Pursuant to N.C.G.S. § 113A-64.2(b), the following factors shall be considered in determining whether a civil penalty remission request will be approved. Please check each factor that you believe applies to your case and provide a detailed explanation, including copies of supporting documents, as to why the factor applies (attach additional pages as needed).

- (a) one or more of the civil penalty assessment factors in N.C.G.S. 113A-64(a)(3) were wrongfully applied to the detriment of the petitioner (please refer to the "Assessment Factors" summary attached);
- (b) the violator promptly abated continuing environmental damage resulting from the violation (i.e., explain the steps that you took to correct the violation and prevent future occurrences);
- (c) the violation was inadvertent or a result of an accident (i.e., explain why the violation was unavoidable or something you could not prevent or prepare for; proof is recommended);
- (d) the violator had not been assessed civil penalties for any previous violations;
- (e) payment of the civil penalty will prevent payment for the remaining necessary remedial actions or would otherwise create a significant financial hardship (i.e., explain how payment of the civil penalty will prevent you from performing the activities necessary to achieve compliance);
- (f) the assessed property tax valuation of the violator's property upon which the violation occurred, excluding the value of any structures located on the property.

Please note that you have the burden of providing information concerning the financial impact of a civil penalty and the burden of showing any financial hardship.

EXPLANATION (attach additional pages as necessary):

LEITNER
CONSTRUCTION COMPANY

November 19, 2021

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

Julie Coco, PE
State Sediment Engineer
DEMLR
1612 Mail Service Center
Raleigh, NC 27699-1612

Re: Request for Remission
Civil Penalty Assessment for Violations
LQS-21-006

Pursuant to N.C.G.S. 113A-64.2 et seq. I am writing to request remission of the civil penalty issued to Cabarrus County and/or Cabarrus County Schools on September 22, 2021, and to provide the basis of the request for remission. The basis for this request is that Cabarrus County and Cabarrus County Schools, through Leitner Construction Company, promptly abated continuing environmental damages resulting from the violations, the violations were inadvertent, and Leitner has never been assessed a penalty for failure to comply with an erosion control plan or for environmental damage.

I. Additional Facts

Leitner understands that a request for remission requires a stipulation that no factual or legal issues are in dispute. Therefore, Leitner does not offer the following facts to dispute any fact asserted by NCDEQ, but rather as evidence that it promptly abated continuation environmental damage, that the violations were inadvertent, and that a penalty has never been assessed to Leitner.

Leitner Construction Company ("Leitner"), a general contractor, entered into a contract with Cabarrus County ("Contract") pursuant to which Leitner agreed to construct the Southwest Cabarrus Elementary School aka Hickory Ridge Elementary ("Project"). In furtherance of the Contract, Leitner entered into a subcontract with a sitework contractor, CB Honeycutt Grading, Inc. ("Honeycutt"). Leitner's subcontract with Honeycutt required Honeycutt to perform, among other things, all earthwork, erosion control, and erosion control maintenance for the Project.

The earthwork was originally designed as a balanced site. Unfortunately, during construction, approximately 13,596 cubic yards of mass rock, that was not able to be excavated, was encountered. The rock was blasted and moved to the back

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portion of the site and used as fill in order to balance the earthwork to achieve design grade elevations. The original erosion control plans were not designed for the types of soils encountered, or the amount of rock that was uncovered and used as fill.

By Fall of 2019, Honeycutt represented that much of the earthwork was complete, and visual inspection of the Project site appeared to confirm Honeycutt's representations. In late 2019, Honeycutt abandoned the Project, therefore Leitner terminated the Honeycutt subcontract, and hired a surveyor and other sitework contractors to evaluate and complete the sitework. During its investigation of the sitework, Leitner learned that Honeycutt had failed to construct portions of the earthwork to the correct elevations, and had incorrectly constructed portions of the Project, thereby requiring Leitner and its new subcontractors to perform significantly more work to complete the Project than originally anticipated.¹

After terminating Honeycutt's subcontract, Leitner oversaw erosion control and erosion control maintenance for the Project, but such work was primarily performed by contractors who regularly perform such work.

During the summer of 2020 Leitner attempted to stabilize the site, but its efforts were made extremely difficult by the rocky conditions. Despite the difficult conditions, the site was nearly stabilized by the end of June 2020. (See Exhibit B - Photos taken on June 12th of 2020).

On December 1, 2020, the North Carolina Department of Environmental Quality ("NCDEQ") issued a notice of violation. The December notice identified multiple areas where the site failed to comply with the approved plan, and also identified sediment damage. The inspection report included with the violation identifies the damage as "Slight." Cabarrus County received the notice on December 3, 2020, and Leitner promptly took efforts to abate continuing damage on December 4, 2020, only one day later. The immediate action by Leitner promptly abated the potential for continuing environmental damage. The damage that was identified in the December notice was inadvertent, and was caused at least in part by compliance with the approved plans which required removal of rock berms that were previously slowing the flow of water. Unfortunately, when the berms were removed, it was not known that significant rain events would occur or that the flow of water would impact the site to the extent that removal of the berms caused. The removal of the berms, lead to the "Slight" environmental damage, and also lead to the violations. Had Leitner known the extent of the rain, or the impact of removing the berms, the damage would not have occurred.

¹ Leitner made a claim against Honeycutt's performance bond. The claim was settled in September 2020.

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All of the violations that occurred on the Project were inadvertent, which is demonstrated by the extent and costs of activities that Leitner performed to attempt to put the Project site in compliance. To address site conditions that were violations or contributed to violations, Leitner added numerous erosion control measures above and beyond what was called for in the approved plan. This included, among other things, large diversion pipes, rock berms, and double row silt fence. Though the measures undertaken by Leitner generally worked, very wet weather conditions hindered Leitner's efforts, but only to the point of its trying to maintain compliance with the erosion control plan, not to the point of allowing new environmental damage. (See weather reports attached as Exhibit C). The adverse weather conditions caused the site soil conditions to deteriorate, which undermined Leitner's effort to gain compliance. Multiple times Leitner attempted to establish grass, or obtain temporary stabilization through use of mulch, but its efforts were literally washed away by rain events.

Leitner spent \$150,131.45 on efforts to maintain compliance and make repairs. (See Exhibit A). But for the weather conditions that hindered Leitner's efforts, and unexpected soil conditions, no environmental impacts would have occurred, and the Project site would have been in compliance with the approved plan and the law.

After Leitner received notice of violation, Leitner continuously worked to overcome the violation, stayed in regular contact with NCDEQ inspectors, and sought and followed the advice of NCDEQ to try to address not only the issues that caused the violations, but measures that would better the erosion control to attempt to avoid future violations. (See Exhibit D). The continuous effort and expense undertaken by Leitner to keep the Project site in compliance, and to confirm that its efforts would establish compliance, demonstrates that the violations and noncompliance were inadvertent.

While the civil penalty was assessed against Cabarrus County, the County has and will continue to assert that Leitner is responsible for paying the penalty. Therefore, when assessing whether remission of the penalty is appropriate, it is important to note that Leitner has never been assessed a penalty before, and has never been general contractor on a project where a penalty was assessed.

II. Supporting Documentation

A. Exhibit A – Leitner Repair and Erosion Control Expense

Exhibit A identifies the costs Leitner incurred to: (1) make repairs to erosion control measures, and (2) to attempt to obtain/maintain compliance with the

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erosion control plan and NCDEQ requirements. The costs identified on Exhibit A do no include the cost of Leitner's personnel's efforts to repeatedly develop plans to address compliance issues, or to communicate with NCDEQ officials.

B. Exhibit B – Germination Photos

Exhibit B identifies Leitner's efforts to establish ground cover, grass.

C. Exhibit C – Weather Reports

Exhibit D identifies weather events that occurred during the construction of the Project.

D. Exhibit D - Correspondence with NCDEQ

Exhibit D demonstrates Leitner's repeated correspondence with NCDEQ from December 2020 through July 2021. The documents included in Exhibit D demonstrate that Leitner was taking specific efforts, which it communicated in detail to the NCDEQ, and that such efforts were also demonstrated through photographs. In addition to the written communications included in Exhibit D, Leitner's personnel communicated with NCDEQ officials verbally to discuss and address outstanding issues as well as potential future issues.

While minor environmental impacts occurred, Leitner's continuous and repeated efforts drastically reduced the extent of the environmental impacts. All of the attached documentation shows the efforts that Leitner Construction made to immediately abate the existing environmental damage, prevent further environmental damage, and the attempts to bring the site back into compliance. Without Leitner's efforts, the environmental damage and impact would have increased far above the "Slight" damage that actually occurred. Similarly, the significant efforts that Leitner undertook, together with the costs of those efforts, and Leitner's repeated communications with NCDEQ about the efforts Leitner was taking, as well as seeking recommendations from NCDEQ about efforts to be taken, prove that Leitner was taking a proactive approach and that the violations were inadvertent.

Based on the information above, Leitner respectfully requests remission of the civil penalty.

Sincerely,



LEITNER
CONSTRUCTION COMPANY

Leitner Construction Company
John W. Leitner, President