

# HEARING OFFICER'S REPORT

STATE OF NORTH CAROLINA  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
**DIVISION OF ENERGY, MINERAL AND LAND RESOURCES**

## HEARING OFFICER'S REPORT

Including

REPORT OF PROCEEDINGS  
OF PUBLIC HEARING AND COMMENT PERIOD

RULES REVIEW PROCESS FOR:

**Title 15A NCAC Chapter 04: SEDIMENTATION CONTROL**

SEDIMENTATION CONTROL COMMISSION

RALEIGH, NORTH CAROLINA

NOVEMBER 4, 2019

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## I. Summary and Recommendation

### A. Background

#### Reason for Proposed Action:

Chapter 150B-21.3A requires a periodic review of all rules used by state agencies. The Division of Energy, Mineral and Land Resources and the Sedimentation Control Commission (SCC) have initiated the review of the sedimentation and erosion control rules codified in 15A NCAC 04.

### B. Summary of Proposed Rule Changes Sent to Public Hearing

#### Proposed Changes

Most of the changes are administrative in nature or to provide clarity in the presentation of the requirements and should not adversely affect the operation of the State or local sediment control programs. Although no changes are expected to have any programmatic impacts on the sedimentation control programs in this state, there are seven listed below, that deal with the substance of the rules and deserve greater attention.

- 1. In rule 04B .0107, removed “15 working days” and specified that the “90 calendar days” applied only to “permanent” ground cover.** This seems like a substantive change but in reality, very little, if any, changes in program implementation will be felt. The change in rule 04B .0107 addresses concern voiced by regulated entities that in many instances, permanent stabilization cannot be achieved within the 15 working days or 90 calendar days specified in the existing rule. Although we believe that most approving authorities have allowed extensions of time, for example, where a permanent seed will not be viable until later in a season, the proposed changes to the rules specifically allow for that extended time. The important issue is that the reference to the federal Construction General Permit in this rule, which clearly specifies 7 or 14-day temporary ground cover, provides assurance that was not previously specified.
- 2. In rule 15A NCAC 04B .0124, Design Standards in Sensitive Watersheds, the existing provisions for requiring basin sizing based on settling the “70% of the 40-micron particle” in HQW zones was replaced by specific sizing and design criteria.** Although the specifications of “70% of the 40-micron particle” had been considered for years to be an appropriately protective criterion for High Quality Waters, determining if it would be achieved in the field was practically impossible for an approving authority or the plan design technician. It was concluded by the Rules Review Workgroup that codifying the basin design criteria would provide a more reliable predictor of the treatment level that would be achieved. Having the specific criteria for how to design a sediment basin codified in the rules will not affect very many who design these basins. Almost all designers already use this design criterion which has been available in DEMLR’s Erosion and Sediment Control Planning and Design Manual for years. Designers use this criterion because it provides greater certainty for getting plan approvals and often shortens the time needed for approval.
- 3. In rule 15A NCAC 04B .0124, Design Standards in Sensitive Watersheds, removed “15 working days or 60 calendar days.”** The provisions for ground cover within “15

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working days or 60 calendar days” was removed as applied to HQW zones. The existing rule wording seems to state that these requirements were “pursuant G.S. §113A-57(3).” This is incorrect. G.S. §113A-57(3) only allows the Commission to adopt rules. Also, the statute applies to the application of final ground cover which as explained in #1 above, has also been confusing and not implemented for final ground without exception as the rule seems to specify. We do not see any fiscal impact of the rule change nor do we see any adverse environmental impact from the change. In fact, the added reference to the federal Construction General Permit in the rules, which clearly specifies 7 or 14- day temporary ground cover, within 7 or 14 days, provides assurance that was not previously specified.

4. **Rule 15A NCAC 04B .0131 was rewritten for clarity.** Most of the changes made were to make the rule more consistent with the state statutes and to clarify some areas of uncertainty. Sentences were added to provide clarity on issues such as “significant deviation” from a plan. Sentences were also added to explain that “visual verification” was allowed in some practices and measurement was required for others. These changes were made for clarity and should not have any noticeable effect on the techniques applied. Please Note: For rule the 04B .0131 rule, due to a file-naming error, an earlier version got published. The Hearing Officer’s recommendation is to include the language as approved by the Commission on 5/29/15.
5. **15A NCAC 04E .0201 FORM AND CONTENT OF PETITION** In the preparation of draft rule changes, it was determined that the Commission should modify the rule on submitting and adopting petitions for rulemaking to be compliant with the Administrative Procedure Act (APA). Rule 04E .0201 was rewritten to provide those specifics.
6. **15A NCAC 04E .0502, PROCEDURE FOR REQUESTING DECLARATORY RULINGS.** It was determined that an updated, more detailed procedure for requesting a declaratory ruling was needed. There was discussion of options for third-party interventions and public notice for requests for intervention. The version of rule 15A NCAC 04E .0502 approved by the Sediment Commission on 5/29/19 noted the possibility for third-party intervention.
7. **15A NCAC 04E .0503 DISPOSITION OF REQUEST** The version of rule 15A NCAC 04E .0503 approved by the Sedimentation Commission on 5/29/19 provided more detailed procedures for when the Commission receives a request for a declaratory ruling.

## C. Results and Recommendations from the Public Involvement Process

1. **A hearing was held on August 1, 2019.** Other than the DEMLR staff, seven persons attended, three made oral comments and the Hearing Officer received two letters, both from organizations that made comments at the hearing. See [Attachment A](#) for detailed hearing information and [Attachment F](#) for letters received.




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## 2. Actions taken as a result of the public involvement process

The only involvement during the hearing process was from three environmental organizations. Three people spoke at the hearing and two letters were received. The comments received were well-thought-out and presented many suggestions that the Hearing Officer concluded were important for the Commission to consider.

Some of the suggestions received were very valid and the Hearing Officer recommended that they be included in the recommendations for rule adoption. However, there were many excellent ideas presented that deserve some serious consideration by the Sediment Commission. Unfortunately, many of those will require a detailed evaluation of the implications to the program's implementation and fiscal impacts to the state and to those regulated. There were still other suggestions that had merit but the Hearing Officer did not recommend that they be placed for priority consideration by the Commission.

The Hearing Officer has used three "Categories of Responses" to facilitate the understanding of the decisions made regarding each comment received. The categories are as follows:

	Support making change in the rule.
	Do not recommend change in this cycle but support SCC give further evaluation.
	Do not support the recommended change.

### **The Hearing Officer recommends that these suggestions be implemented during this process:**

1. Regarding Rule 04B .0120, a recommendation was given that the rule relating to the authority for local and state government agencies to inspect sites, should not be deleted.
2. Regarding Rule 04B .0109(b), the suggestion that the Commission should not be *required* to allow alternative erosion and sediment control measures as proposed and that the language should be the Commission *may* allow alternatives measures.
3. Regarding Rules 04C .0103 and .0106, there was a suggestion about the need for clarity on the Director's authority to assess civil penalties. The Division will ensure the delegations are correct.

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**The Hearing Officer recommends that these issues and suggestions are important for consideration by the Commission but are not recommended for immediate rule changes.**

1. The issue of greater use of PAMS or polyacrylamides.
2. The issues of rain intensity and need for change in the 10 and 25 year storm criteria.
3. Need for changes in the descriptions of buffer zone protection.
4. Providing greater access to plans and maps by the public.
5. Making self-inspection data more available to the public.

**The Hearing Officer does not recommend that the Commission make modifications to the rules on these issues.**

1. Require permanent ground cover in 15 working days and not extend it to 90 days as proposed.
2. Concern over a belief that the rule changes will increase stream velocity.
3. The ground cover requirements of the NC Construction General permit (NCG01) should be adopted in the Commission's rules.
4. Require notice requests for declaratory rulings and notification of rights to intervene by this rulemaking process.
5. Add a process for noticing petitions for rulemaking
6. Change the rules regarding automatic approval of a plan after 30 days.
7. Alternative erosion and sediment control measures should only be approved if they have been approved by the Technical Advisory Committee.
8. The rules should make adjustments to the fees.
9. The rules should be revised to ensure sufficient protection should Section 404 program be restricted.
10. Plan expiration issues.

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## D. Oral Comments Received During Public Hearing and Hearing Officer's Responses

	#	ORAL COMMENTS RECEIVED	SPEAKER	HEARING OFFICER RESPONSE
Category of Response	1.	<p><b>Rules .04B .0107(b) and .0124(e)</b></p> <p>“the increase from 15 days to 90 days will allow continuous erosion and soil loss into our surface waters.” “The 15 days’ stabilization requirement has been enforced in many other states . . .”. “This rule change caters to regulated entities while overlooking impacts to our surface waters.”</p>	Emily Sutton, Haw River Assembly	<p>For context:</p> <p><u>NCG010000 Construction Stormwater Permit.</u> This is a NPDES Federal Stormwater permit, as required by the CWA, that applies to construction activities that disturb an acre or greater.</p> <ul style="list-style-type: none"> <li>- This permit includes a condition for temporary ground cover in 7-days (slopes and perimeters) and 14 days (areas flatter than 4:1).</li> </ul> <p><u>Sediment Act.</u></p> <ul style="list-style-type: none"> <li>- <b><u>Temporary Ground Cover.</u></b> The Sediment Control Act requires 21 days for temporary ground cover to be established.</li> </ul> <p><u>Commission Rules</u></p> <ul style="list-style-type: none"> <li>- <b><u>Permanent Ground Cover.</u></b> The change in this instance is to change the 15-working day requirement to establish permanent ground cover to 90-days. The issue is that permanent ground cover may not always be able to be established in 15 days under growing weather conditions common to NC. Accordingly changing the timeline 90-days is recommended with understanding that establishing temporary cover according to the NC Construction General Permit (NCG01) is a prerequisite in any event. Hearing officer recommendation is to approve the rule changes as proposed.</li> </ul>
	2.	<p><b>Rule .04B .0109(a):</b></p> <p>“The rule change to allow an increase in velocity prior to development by 10% will worsen our eroded banks downstream of development . . .”</p>	Emily Sutton, Haw River Assembly	<p>The DEMLR staff is not aware of any proposed changes that would allow any increase in velocity. The Hearing Officer does not recommend any changes to the proposed rule.</p>
<p> <span style="color: green;">■</span> Support making change in the rule.  <span style="color: blue;">■</span> Do not recommend change in this cycle but support SCC give further evaluation.  <span style="color: red;">■</span> Do not support the recommended change.                 </p>				



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3.	<p>“Another major component that has been left out of this rule revision is the requirement to treat turbid waters before being discharged with PAM.”</p>	<p>Emily Sutton, Haw River Assembly</p>	<p>The Division of Water Resources has a list of approved/recommended polymers.</p> <p>The Hearing Officer recommends that the Technical Advisory Committee consider revisiting this issue and evaluate what changes may be appropriate for the Design Manual or rules. Subsequent to this review, it is recommendation for this issue to be brought back to the Commission as an information item.</p>
4.	<p><b>Rule .04B .0107(d):</b> “Regarding the permit and timing also, I believe that the permit should reference the rule not the other way around. I think it would be a cleaner solution and provide more permanent changes.”</p>	<p>Emily Sutton, Haw River Assembly</p>	<p>The Hearing Officer’s recommendation is that the ground cover requirements of the NCG01 not be included in these rule change proposals.</p>
5.	<p><b>Rules .04B .0107(b) and .0124(e)</b> “I think we should be sticking with a temporary ground cover within seven days and things in place for permanent cover by 15 days.”</p>	<p>Forest English Tar River Keeper</p>	<p>The Hearing Officer’s recommendation is that the ground cover requirements of the NCG01 not be included in these rule change proposals.</p>
6.	<p><b>Rule .04B .0107(d):</b> “I believe that the permit should reference the rule, not the other way around.”</p>	<p>Forest English Tar River Keeper</p>	<p>The Hearing Officer’s recommendation is that the ground cover requirements of the NCG01 not be included in these rule change proposals.</p>
7.	<p><b>Rule .04B .0124</b> “I don’t see any reason not to use flocculants like PAM.”</p>	<p>Forest English Tar River Keeper</p>	<p>The Division of Water Resources has a list of approved/recommended polymers.</p> <p>The Hearing Officer recommends that the Technical Advisory Committee consider revisiting this issue and evaluate what changes may be appropriate for the Design Manual or rules. Subsequent to this review, it is recommendation for this issue to be brought back to the Commission as an information item.</p>

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Category of Response	<b>8.</b>	<p><b>Rule .04B .0129:</b>          “I just wanted to flag that the original control plans are set to expire after a three-year period, and we would certainly like to see that shortened so that those plans reflect more current site conditions at the time they are implemented.”</p>	Forest English Tar River Keeper	The Hearing Officer’s recommendation is to not modify the time periods in rule .04B .0129.
	<b>9.</b>	<p><b>Rules .04E .0501- .0504</b>          “I wanted to flag . . . the Declaratory Ruling section, I think public notice for a lot of those actions should be required in some fashion.”</p>	Forest English Tar River Keeper	The hearing officer does not recommend that the Division establish a process to notice requests for declaratory rulings and notification of rights to intervene by this rulemaking process.

- Support making change in rule.
- Do not recommend change in this cycle but support SCC give further evaluation.
- Do not support the recommended change.

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## E Major Written Comments Received and Hearing Officer's Responses (Copies of all written comments received are provided in [Attachment F.](#))

	WRITTEN COMMENTS RECEIVED	RECEIVED FROM	HEARING OFFICER RESPONSE
1.	<p><b>Rule .04B .0107(b)</b> (statements also relate to .0124(e)) “Will local governments be permitted to keep their stronger requirements? This should not give regulated entities an opportunity to shirk responsible stabilization measures. Appropriate provisions should be applied within the 15-day period.”</p> <p>“the increase from 15 days to 90 days will allow continuous erosion and soil loss into our surface waters.”</p>	Emily Sutton, Haw River Assembly	<p>Local governments can keep or add any requirements that are stronger than the statutory or rule specifications.</p> <p>For context:</p> <p><u>NCG010000 Construction Stormwater Permit.</u> This is a NPDES Federal Stormwater permit, as required by the CWA, that applies to construction activities that disturb an acre or greater. This permit includes a condition for temporary ground cover in 7-days (slopes and perimeters) and 14 days (areas flatter than 4:1).</p> <p><u>Sediment Act.</u> <b>Temporary Ground Cover.</b> The Sediment Control Act requires 21 days for temporary ground cover to be established.</p> <p><u>Commission Rules</u> <b>Permanent Ground Cover.</b> The change in this instance is to change the 15-working day requirement to establish permanent ground cover to 90-days. The issue is that permanent ground cover may not always be able to be established in 15 days under growing weather conditions common to NC. Accordingly changing the timeline 90-days is recommended with understanding that establishing temporary cover according to the NC Construction General Permit (NCG01) is a prerequisite in any event.</p> <p>The Hearing Officer does not recommend any changes to this proposed rule modification.</p>
<p> <span style="color: green;">■</span> Support making change in rule.  <span style="color: blue;">■</span> Do not recommend change in this cycle but support SCC give further evaluation.  <span style="color: red;">■</span> Do not support the recommended change.                 </p>			

Category of Response

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Category of Response	2.	<p><b>Rule 04D .0102</b></p> <p>“The model ordinance should remain in this permit to serve as a minimum guidance for new programs.”</p>	<p>Emily Sutton, Haw River Assembly</p>	<p>The model ordinance has never been in the rules and is not required by statute. Rather, the statutes specify that the purpose of the Model Ordinance is to “Assist and encourage local governments in developing erosion and sedimentation control programs.”</p> <p>The Hearing Officer does not recommend including the model ordinance in the rules.</p>
	3.	<p>“One major component that has been left out of this rule revision is the requirement to treat turbid waters before being discharged with PAM.”</p>	<p>Emily Sutton, Haw River Assembly</p>	<p>The Division of Water Resources has a list of approved/recommended polymers.</p> <p>The Hearing Officer recommends that the Technical Advisory Committee consider revisiting this issue and evaluate what changes may be appropriate for the Design Manual or rules. Subsequent to this review, it is recommendation for this issue to be brought back to the Commission as an information item.</p>
	4.	<p><b>Rule 04B .0108</b></p> <p>“The Design and Performance standard should be raised from the 10-year design storm. These measurements are outdated and inadequate . . . Under the current design standard, any potential violation would be exempt from regulatory action if more than 4.93 inches fall over a 24-hour duration. This happens regularly, leaving our waterways laden with sediment. .</p>	<p>Emily Sutton, Haw River Assembly</p>	<p>The Hearing Officer’s recommendation is for the Technical Advisory Committee to revisit the rainfall intensity issue and evaluate how best to address concerns with rainfall intensity. These findings will be presented to the Commission in an information item to determine if further action as appropriate.</p>

- Support making recommended change.
- Do not recommend change in this cycle but support SCC give further evaluation.
- Do not support the recommended change.

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5.	<p><b>Rule 04B .0109</b></p> <p>“The rule changes to allow an increase in velocity prior to development by 10% will worsen our eroded banks downstream of development. Currently, many developments causing increased stormwater velocity are not held accountable due to clustered development and an inability to isolate one development responsible. This has led to significant in-stream erosion and steep banks making the creeks inaccessible. This destroys aquatic habitat dependent on rocks, riffles, and roots.</p>	<p>Emily Sutton, Haw River Assembly</p>	<p>A review of the rules failed to reveal changes that would result in a 10% increase in velocity as noted by the commenter. The Hearing Officer does not recommend any changes to address this issue.</p>
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Category of Response

- Support making change in the rule.
- Do not recommend change in this cycle but support SCC give further evaluation.
- Do not support the recommended change.

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Category of Response	6.	<p>(Paragraph II, page 4) The commenter stated that the rules must continue to include requirements for temporary ground cover within 15 days. “Under the proposed changes, the requirement for temporary ground cover would be deleted . . . “</p> <p>“The Act requires short-term and long-term measures . . .”</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environmental Law Center</p>	<p>For context:</p> <p><u>NCG010000 Construction Stormwater Permit</u>. This is an NPDES Federal Stormwater permit, as required by the CWA, that applies to construction activities that disturb an acre or greater.</p> <ul style="list-style-type: none"> <li>- This permit includes a condition for temporary ground cover in 7-days (slopes and perimeters) and 14 days (areas flatter than 4:1).</li> </ul> <p><u>Sediment Act</u>.</p> <ul style="list-style-type: none"> <li>- <b>Temporary Ground Cover</b>. The Sediment Control Act requires 21 days for temporary ground cover to be established.</li> </ul> <p><u>Commission Rules</u></p> <ul style="list-style-type: none"> <li>- <b>Permanent Ground Cover</b>. The change in this instance is to change the 15-working day requirement to establish permanent ground cover to 90-days. The issue is that permanent ground cover may not always be able to be established in 15 days under growing weather conditions common to NC. Accordingly changing the timeline 90-days is recommended with understanding that establishing temporary cover according to the NC Construction General Permit (NCG01) is a prerequisite in any event.</li> </ul> <p>Hearing officer recommendation is to approve the rule changes as proposed.</p>
	7.	<p>Paragraph III, page 5</p> <p>“An erosion and sediment control plan should only be approved if it is complete” and contends that the rules allow approval in conflict with the statutes.</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environment al Law Center</p>	<p>The commenter noted that rule 04B .0118(a) allowed a plan to be automatically approved if the oversight agency fails to act within 30 days and that is inconsistent with the Act which requires a “completed” plan. The staff noted that the statute in §113A-54.1 provides for “deemed approval of a plan” if the reviewing agency fails to act within 30 days of receipt. Therefore, changing the rule to disallow this would be inconsistent with the Act. The Hearing Officer recommends that the rule not be modified as requested.</p>

	Support making change in the rule.
	Do not recommend change in this cycle but support SCC give further evaluation.
	Do not support the recommended change.

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Category of Response	8.	<p>Paragraph IV, page 6          “The rule revisions must require protection against runoff from higher intensity storms, which occur far more frequently in the current climate.”          “protection from rain events that historically occurred every 25 years is insufficient to prevent the sedimentation of our waterways.”          “We urge the Agencies to require that the Design Standards for Sensitive Watersheds incorporate measures designed to provide protection from runoff from a 100-year storm. We also urge the Agencies to require design standards for other watersheds and stormwater discharge outlets that provide protection from the runoff from 25-year storms.”</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environmental Law Center</p>	<p>The Hearing Officer’s recommendation is for the Technical Advisory Committee to revisit the rainfall intensity issue and evaluate how best to address concerns with rainfall intensity.</p> <p>It is the recommendation of the hearing officer that these findings be presented to the Commission to determine further action, as appropriate.</p>
	9.	<p>Paragraph V, page 7          For rule 04B .0120, the SELC suggested that paragraphs (b) and (c), relating to the authority for local and state government agencies to inspect sites, should not be deleted as is proposed.</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environmental Law Center (SELC)</p>	<p>The Hearing Officer recommends that paragraphs (b) and (c) not be deleted and the rule be recommended for adoption as shown in the proposed rules.</p>

- Support making change in the rule.
- Do not recommend change in this cycle but support SCC give further evaluation.
- Do not support the recommended change.

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Category of Response	10.	<p>Paragraph VI., page 7 For rule 04B .0125</p> <p>”all buffer zones under the Act should be measured from the top of the stream bank.”</p>	<p>Tirrill Mooreth Kelly Moser</p> <p>Southern Environmental Law Center</p>	<p>The Hearing Officer recommends that this not be initiated at this time but that the issue be given to the Technical Advisory Committee to review and report to the Commission.</p>
	11.	<p>Paragraph VII, page 8 In rule 04B .0129, “The rules should provide a clear expiration period for all . . . plans . . . and plans should expire more quickly [than the present three years] where no land-disturbing activity has occurred.”</p> <p>-----</p> <p>“Additionally, where a plan has been approved, but no land-disturbing activity has begun, the rules should provide that the plan expires one year after approval.”</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environmental Law Center</p>	<p>The Hearing Officer’s recommendation is to not modify the time periods in rule .04B .0129.</p> <p>It should be pointed out that the approving authority has the authority to modify plan requirements when needed to protect the state’s water resources.</p> <p>-----</p> <p>The Hearing Officer recommends that this suggested rule change not be included in these proposed rule revisions.</p>
	12.	<p><i>Paragraph VIII, page 8 04B .0131(1)</i></p> <p>“Self-inspection should be required during and after each of the phases listed . . . “ in the rule.”</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environmental Law Center</p>	<p>The Hearing Officer recommends that rule 04B .0131 be adopted as set forth in this Report but also recommends that the Technical Advisory Committee consider how improvements can be made, especially given the differences in size, complexity and risks associated with the projects across the state.</p>
<p> <span style="color: green;">■</span> Support making change in the rule.  <span style="color: blue;">■</span> Do not recommend change in this cycle but support SCC give further evaluation.  <span style="color: red;">■</span> Do not support the recommended change.         </p>				



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Category of Response	<b>13.</b>	<p>Paragraph IX(a), page 9 04E .0502</p> <p>“The public should be adequately notified of their right to intervene in a request for a declaratory ruling.” ,</p> <p>“The rules should provide that the public receive adequate timely notice of any request for declaratory ruling.”</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environmental Law Center</p>	<p>The hearing officer does not recommend that the Division establish a process to notice requests for declaratory rulings and notification of rights to intervene by this rulemaking process.</p>
	<b>14.</b>	<p>Paragraph IX(b), page 9 04E .0201 The rule should contain a provision that “the public should be notified when any petitions for rulemaking are initiated . . .”</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environmental Law Center</p>	<p>The addition of a process for noticing petitions for rulemaking is not recommended by the hearing officer as a part of this rule re-adoption procedure.</p>
	<b>15.</b>	<p>Paragraph IX(c), page 10</p> <p>Projects that receive approval for erosion and sediment control plans should be mapped and the project maps and other details should be accessible to the public.</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environmental Law Center</p>	<p>Considerable resources have been applied to making data available to the public. A significant amount of searchable information on active construction projects is available at...”</p> <p><a href="https://edocs.deq.nc.gov/WaterResources/Browse.aspx?dbid=0&amp;startid=579758">https://edocs.deq.nc.gov/WaterResources/Browse.aspx?dbid=0&amp;startid=579758</a></p>
	<b>16</b>	<p>Paragraph IX(d), page 10</p> <p>“The public should have greater access to erosion and sediment control plans, notices of violations, applications, and approvals.” “There is no easy way for the public to access</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environmental Law Center</p>	<p>Making this information available on-line would be an extremely, resource-intensive effort that would be unachievable without substantial, additional funding.</p>

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	<p>erosion and sediment control plans, notices of violations, applications, or approvals.”</p> <p>“The Agencies should require any erosion and sediment control plan submitted be made publicly available by the approval authority within 5 days of receipt.”</p>		<p>All plans are available for public review at any stage of review in the offices of the NC DEMLR or the local approving agency.</p> <p>The public can easily access plans, NOVs, applications and/or approvals are available through file review at all Regional Offices.</p>
17.	<p>Paragraph IX(e), page 11</p> <p>“Self-inspection should require greater public notice and reporting requirements.”</p> <p>“Under both the previous rules and the revised rules, self-inspections are only required to be made available at the site location. The Agencies should require that self- inspection reports be submitted to the Agencies, so that they are available to the public through Public Records Act requests. Even better, the Agencies should make self-inspection reports accessible to the public on the oversight agencies’ website.”</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environmental Law Center</p>	<p>The Hearing Officer suggests that the staff address this issue from an IT capacity standpoint and to bring this back to the Commission as an information item for their consideration.</p> <p>The Hearing Officer does not recommend a change at this time.</p>

- Support making change in the rule.
- Do not recommend change in this cycle but support SCC give further evaluation.
- Do not support the recommended change.

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Category of Response	<b>18.</b>	<p>Paragraph X, page 11 The commenter asked that the stabilization requirements of NCG01 be included in rules.</p> <p>“Redundancies in the NCG01 permit and the Sedimentation Pollution Control Act are necessary to ensure that protective provisions remain in force even if the scope of the federal Clean Water Act is restricted.” “The Agencies should reinstate all rule revisions made on this basis given the ongoing federal efforts to weaken federal Clean Water Act protections and redefine the definition of “waters of the United States.”</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environmental Law Center</p>	<p>The Hearing Officer’s recommendation is that the ground cover requirements of the NCG01 not be included in these rule change proposals.</p> <p>As to the request that concerns about changes in the implementation of the federal Clean Water Act “Waters” definition should cause the Commission to modify its rules, the Hearing Officer does not believe that these rules are the appropriate venue to address those issues.</p>
	<b>19.</b>	<p>Paragraph XI. page 12 04B .0109(b) and .0124 “The Commission should not be <i>required</i> to allow alternative erosion and sediment control measures as proposed . . The language should be the Commission <i>may</i> allow alternatives measures . . .”</p> <p>Alternative erosion and sediment control measures should only be approved if they have been approved by the Technical Advisory Committee.</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environmental Law Center</p>	<p>The hearing officer agrees that the term “may” should be used and provides this as the recommendation of the Hearing Officer.</p> <p>The alternative erosion control measures could be the same traditional measures applied with additional protective measures or they could be new devices. However, The Hearing Officer believes that the wording in the proposed rule that requires any alternative to provide “an equal or more effective level of erosion and sedimentation control” is sufficient and the recommendation is not to change the proposed language.</p>

# HEARING OFFICER'S REPORT

Category of Response	20.	<p>Paragraph XII, page 12 04B .0124.</p> <p>“Non-toxic flocculants should be required in sensitive waters and recommended in other waters”</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environmental Law Center</p>	<p>The Division of Water Resources has a list of approved/recommended polymers.</p> <p>The Hearing Officer recommends that the Technical Advisory Committee consider revisiting this issue and evaluate what changes may be appropriate for the Design Manual or rules. Subsequent to this review, it is recommendation for this issue to be brought back to the Commission as an information item.</p>
	21.	<p>Paragraph XIII, page 13 04C .0103 and .0106</p> <p>“The Director should have the authority to assess civil penalties.” Also, the delegations from the Secretary should be up-to-date before the rule adoption is finalized.</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environmental Law Center</p>	<p>The existing rule has the Commission delegating authority to assess civil penalties to the Director of DEMLR. However, it was pointed out to the staff that the statute actually gives the authority to the Secretary of DEQ, not to the Commission. The commenter explained that the Director should have the authority to assess civil penalties. The Hearing Officer agrees. However, this is accomplished through delegation from the Secretary.</p>
	22.	<p>Paragraph XIV, page 13 04D .0102</p> <p>“The rules should maintain the model ordinance so that local programs are more likely to adopt their own protective ordinances.”</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environmental Law Center</p>	<p>The model ordinance has never been in the rules and is not required by statute. Rather, the statutes specify that the purpose of the Model Ordinance is to “Assist and encourage local governments in developing erosion and sedimentation control programs.”</p> <p>The Hearing Officer does not recommend including the model ordinance in the rules.</p>

	Support making recommended change.
	Do not recommend change in this cycle but support SCC give further evaluation.
	Do not support the recommended change.

# HEARING OFFICER'S REPORT

Category of Response

<b>23.</b>	<p>Paragraph XV, page 14 “Fees should be set at a level sufficient to sustain . . . the program.” “fees cover less than 50% of the program’s expenditures.”</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environmental Law Center</p>	<p>The fees are set in statute and cannot be increased by the Commission.</p>
<b>24.</b>	<p>Paragraph XVI, page 14 04B.0112</p> <p>The “Operations in Lakes and Natural Watercourses” provision should be revised to “ensure the revised rules provide sufficient protection should Section 404 program be restricted.”</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environmental Law Center</p>	<p>The commenter stated that “the federal government is currently attempting to redefine the term “waters of the United States” in order to reduce federal jurisdiction under the Clean Water Act” and urged the Commission to add the following: “<i>The disruption shall only be permitted if no practicable alternative exists that would have less adverse impact on the aquatic ecosystem and the water quality of downstream waters will not be degraded.</i>”</p> <p>The Hearing Officer does not recommend addressing the complex issue of federal implementation of Section 404 waters in these rule proposals.</p>
<b>25.</b>	<p>Paragraph XVII “Conclusion”</p> <p>The commenter noted that continued development and intensifying rainfall will increase the state’s sedimentation pollution issues and “unless these issues are adequately addressed, the state’s valuable water resources will suffer . . . and the state and its municipalities will be forced to spend public funds for dredging and water treatment.”</p> <p>“We respectfully request that the agencies fully incorporate our requested changes.</p>	<p>Tirrill Moore, Kelly Moser</p> <p>Southern Environmental Law Center</p>	<p>The Hearing Officer’s recommendation is for the Technical Advisory Committee to revisit the rainfall intensity issue and evaluate whether the Sediment Control Design Manual or the rules should be updated to better address concerns with rainfall intensity. This would first be presented to the Commission as an information item.</p>

- Support making recommended change.
- Do not recommend change in this cycle but support SCC give further
- Do not support the recommended change.

# HEARING OFFICER'S REPORT

The Hearing Officer recommends that the proposed revisions to Title 15A NCAC, CHAPTER 04 Sedimentation Controls as published in the North Carolina Register and sent to public hearing on August 1, 2019, be adopted by the Commission with the changes shown in Section I.F. of the following pages of this report.

## GUIDANCE FOR REVIEWING RULE CHANGES

- Anything that is highlighted is a **change** from what was published in the register on 7/15/19.
  - Highlighted language that is struck through is now being deleted. (i.e. ~~now being deleted~~)
  - Highlighted language that is struck through and in brackets *was new language* in the register and is now being deleted. (i.e. ~~[was new but now being deleted]~~)
  - Highlighted language that is underlined is new. (i.e. new)
  - Language that is only highlighted is now being kept and not deleted (i.e. **now keeping not deleting**)

# HEARING OFFICER'S REPORT

## F. Hearing Officer's Recommendations on Final Rules: Combined Rules

1 15A NCAC 04A .0101 is proposed for amendment as follows:

2

### 3 **15A NCAC 04A .0101 OFFICES OF THE SEDIMENTATION CONTROL COMMISSION**

4 Persons may ~~write or visit~~ contact the North Carolina Sedimentation Control Commission offices at the Archdale  
5 Building, 512 N. Salisbury Street, P.O. Box 27687, Raleigh, North Carolina 27611. Persons may ~~write or visit~~ contact  
6 regional offices of the Commission's staff in the Division of Energy, Mineral, and Land Resources at the following  
7 locations:

8 (1) ~~Interchange Building~~  
9 ~~59 Woodfin Place~~  
10 ~~P.O. Box 370~~  
11 ~~Asheville, N.C. 28801~~  
12 Asheville Regional Office  
13 2090 U.S. 70 Hwy.  
14 Swannanoa, NC 28778-8211  
15

16 (2) ~~585 Waughtown Street~~  
17 Winston-Salem Regional Office  
18 450 W. Hanes Mill Rd., Suite 300  
19 Winston-Salem, N.C. 27107 27105  
20

21 (3) ~~919 North Main Street~~  
22  Mooresville Regional Office  
23 610 E. Center Avenue, Suite 301  
24 ~~P.O. Box 950~~  
25 Mooresville, N.C. 28115-28115-2578  
26

27 (4) Raleigh Regional Office  
28 3800 Barrett Drive  
29 ~~P.O. Box 27687~~  
30 Raleigh, N.C. 27611 27609-7222  
31

32 (5) ~~Wachovia Building~~  
33 ~~Suite 714~~  
34 Fayetteville, N.C. 28301 28301-5095  
35

36 (6) ~~1424 Carolina Avenue~~  
37 Washington Regional Office  
38 1424 Carolina Ave.  
~~P.O. Box 2188~~ Washington, N.C. 27889 27889-3314

# HEARING OFFICER'S REPORT

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(7) Wilmington Regional Office  
127 Cardinal Dr., Ext.  
Wilmington, N.C. 28405-3845

*History Note: Authority G.S. 143B-298;113A-54*  
*Eff. February 1, 1976;*  
*Amended Eff. August 1, 2012 (see S.L. 2012-143, s.1.(f)); October 1, 1995; February 1, 1992; May*  
*1, 1990; December 1, 1988;*  
*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2,*  
*2016.*  
*Amended Eff. XX, 1, 20XX*

- Anything that is **highlighted** is a **change** from what was published in the register on 7/15/19.
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  - Highlighted language that is struck through and in brackets *was new language* in the register and is now being deleted. (i.e. **[was new but now being deleted]**)
  - Highlighted language that is underlined is new. (i.e. **new**)
  - Language that is only highlighted is now being kept and not deleted (i.e. **now keeping not deleting**)



# HEARING OFFICER'S REPORT

1 15A NCAC 04A .0105 is proposed for readoption with substantive changes as follows:

## 3 15A NCAC 04A .0105 DEFINITIONS

4 In addition to the terms defined in G.S. 113A-52, As used in this Chapter, the following terms definitions shall apply  
5 in this Chapter and have these meanings:

- 6 (1) "Accelerated Erosion" means any increase over the rate of natural erosion, as a result of  
7 land-disturbing activities.
- 8 (2) "Act" means the Sedimentation Pollution Control Act of 1973 in G.S. 113A-50 et seq.
- 9 (3) ~~(2)~~ "Adequate Erosion Control Measures, Structure, or Device Devices or Structures" means one ~~which~~  
10 that controls the soil material within the land area under responsible control of the person conducting  
11 the land-disturbing activity.
- 12 (4) "Approving Authority" means the Division or other state or a local government agency that has been  
13 delegated erosion and sedimentation plan review responsibilities in accordance with the provisions  
14 of the Act.
- 15 (5) ~~(14)~~ "Being Conducted" means a land-disturbing activity has been initiated and ~~permanent stabilization~~  
16 ~~of the site has not been completed.~~ not deemed complete.
- 17 (6) ~~(3)~~ "Borrow" means fill material ~~which~~ that is required for on-site construction ~~and~~ that is obtained  
18 from other locations.
- 19 (7) ~~(4)~~ "Buffer Zone" means the strip of land adjacent to a lake or natural watercourse.
- 20 (8) ~~(27)~~ "Coastal counties Counties" means the following counties: Beaufort, Bertie, Brunswick, Camden,  
21 Carteret, Chowan, Craven, Currituck, Dare, Gates, Hertford, Hyde, New Hanover, Onslow, Pamlico,  
22 Pasquotank, Pender, Perquimans, ~~Tyrrell~~ Tyrrell, and Washington.
- 23 (9) ~~(23)~~ "Completion of Construction or Development" means that no further land-disturbing activity is  
24 required on a phase of a project except that which is necessary for establishing a permanent ground  
25 cover.
- 26 (10) ~~(26)~~ "Director" means the Director of the Division of Energy, Mineral, and Land Resources of the  
27 Department of ~~Environment, Health, and Natural Resources.~~ Environmental Quality.
- 28 (11) ~~(22)~~ "Discharge ~~Point~~" Point or Point of Discharge" means that point where runoff leaves a tract of ~~land.~~  
29 land where a land-disturbing activity has occurred or enters a lake or natural watercourse.
- 30 (12) "Division" or "DEMLR" means the Division of Energy, Mineral, and Land Resources of the  
31 Department of Environmental Quality.
- 32 (13) ~~(18)~~ "Energy Dissipator" means a structure or a shaped channel section with mechanical armoring placed  
33 at the outlet of pipes or conduits to receive and break down the energy from high velocity flow.
- 34 (14) ~~(5)~~ "Ground Cover" means any natural vegetative growth or other material ~~which~~ that renders the soil  
35 surface stable against accelerated erosion.
- 36 (15) ~~(24)~~ "High Quality Waters" means those ~~classified as such~~ described in 15A NCAC 02B .0101(e)(5) –  
37 General Procedures, which is incorporated herein by reference to include further amendments. 02B

# HEARING OFFICER'S REPORT

1 .0224 which is herein incorporated by reference including subsequent amendments and editions,  
2 and may be accessed at no cost at <http://reports.oah.state.nc.us/pdf>.

3 (16) "High Quality Water (HQW) Zones" means areas in the Coastal Counties that are within 575 feet of  
4 High Quality Waters and for the remainder of the ~~state~~ State areas that are within one mile of and  
5 drain to HQWs.

6 (17) "Lake or Natural Watercourse" means any stream, river, brook, swamp, sound, bay, creek, run,  
7 branch, canal, waterway, estuary, and any reservoir, lake lake, or pond pond, natural or impounded,  
8 in which sediment may be moved or carried in suspension, and which could be damaged by  
9 accumulation of sediment.

10 (18)(7) "Natural Erosion" means ~~erosion~~ "erosion" as defined in G.S. 113A-52(5) under natural  
11 environmental conditions undisturbed by man.

12 (19)(9) "Person Conducting the ~~Land Disturbing~~ Land-disturbing Activity" means any person who may be  
13 held responsible for a violation unless ~~expressly~~ expressly provided otherwise by ~~the~~ the Sedimentation Pollution  
14 Control Act of 1973, G.S. 113A 50 to 66, the North Carolina Administrative Code, Title 15A Chapter  
15 4 the Act, the Rules of this Chapter, or any order or local ordinance adopted pursuant to ~~the these~~  
16 Rules or the Act, Sedimentation Pollution Control Act of 1973, G.S. 113A 50 to 69.

17 (8) ~~—"Person Who Violates" as used in G.S. 113A 64, means:~~

18 (a) ~~— the developer or other person who has or holds himself or herself out as having financial~~  
19 ~~or operational control over the land disturbing activity; or~~

20 (b) ~~— the landowner or person in possession or control of the land when he has directly or~~  
21 ~~indirectly allowed the land disturbing activity or has directly benefitted from it or he has~~  
22 ~~failed to comply with any provision of the Sedimentation Pollution Control Act of 1973,~~  
23 ~~G.S. 113A 50 to 66, the North Carolina Administrative Code, Title 15A, Chapter 4, or any~~  
24 ~~order or local ordinance adopted pursuant to the Sedimentation Pollution Control Act of~~  
25 ~~1973, G.S. 113A 50 to 66, as imposes a duty upon him.~~

26 (20) "Person Who Violates", or "Violator", as used in G.S. 113A-64, means: any landowner or other  
27 person who has financial or operational control over the land-disturbing activity; or who has directly  
28 or indirectly allowed the activity, and who has failed to comply with any provision of the Act, the  
29 Rules of this Chapter, or any order or local ordinance adopted pursuant to the Act, as it imposes a  
30 duty upon that person

31 (10) ~~—"Phase of Grading" means one of two types of grading, rough or fine.~~

32 (21)(11) "Plan" means an erosion and sedimentation control plan.

33 (22)(12) "Sedimentation" means the process by which sediment resulting from accelerated erosion has been  
34 or is being transported off the site of the land-disturbing activity or into a lake or natural watercourse.

35 (23) "Storm Drainage Facilities" means the system of inlets, conduits, channels, ditches and  
36 appurtenances that serve to collect and convey stormwater through and from a given drainage area.



# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0105 is proposed for re adoption with substantive changes as follows:

2

3 **15A NCAC 04B .0105 PROTECTION OF PROPERTY**

4 Persons conducting land-disturbing activity shall ~~take all reasonable~~ follow the measures specified in this Chapter and  
5 the Act to protect all public and private property from sedimentation and erosion damage caused by ~~such~~ the land-  
6 disturbing activities.

7

8 *History Note: Authority G.S. ~~113A-54(b)~~; 113A-54(d)(2);*

9

*Eff. February 1, 1976;*

10

*Amended Eff. August 1, 1988; November 1, 1984.*

11

*Readopted Eff. XX, 1, 20XX*

12

13

[Return to Table of Contents](#)

# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0106 is proposed for readoption with substantive changes as follows:

2  
3 **15A NCAC 04B .0106 BASIC EROSION AND SEDIMENTATION CONTROL PLAN OBJECTIVES**

4 ~~(a)~~ An erosion and sedimentation control plan developed pursuant to Chapter 04 of these rules shall ~~may be~~  
5 ~~disapproved pursuant to 15A NCAC 4B .0118 if the plan fails~~ be designed to address the following: ~~following control~~  
6 ~~objectives:~~

- 7 (1) Identify Critical ~~Areas:~~ Areas. Identify site areas subject to ~~severe~~ accelerated erosion, and off-site  
8 areas ~~especially~~ vulnerable to damage from erosion and sedimentation.
- 9 (2) Limit Exposed Areas. Limit the size of the area exposed at any one time.
- 10 (3) Limit Time of Exposure. Limit exposure to the shortest ~~feasible time~~: time specified in G.S. 113A-  
11 57, the Rules of this Chapter, or as directed by the approving authority.
- 12 (4) Control Surface Water. Control surface water ~~run-off~~ originating upgrate of exposed areas in order  
13 to reduce erosion and sediment loss during exposure.
- 14 (5) Control Sedimentation. All land-disturbing activity ~~is to~~ shall be planned ~~and conducted so as to~~  
15 prevent off-site sedimentation damage.
- 16 (6) Manage ~~Storm Water~~ Stormwater Runoff. ~~When the increased~~ Plans shall be designed so that any  
17 increase in velocity of ~~storm-water~~ stormwater runoff resulting from a land-disturbing activity  
18 causes will not result in accelerated erosion of the receiving ~~waterecourse~~, stormwater conveyance  
19 [within the project boundary,] or at the point of discharge. ~~plans~~ Plans shall include measures to  
20 control the velocity prevent accelerated erosion within the project boundary and at ~~to~~ the point of  
21 discharge.

22 ~~(b) When deemed necessary by the approving authority a preconstruction conference may be required.~~

23  
24 *History Note: Authority G.S. 113A-54(d)(4); 113A-54.1;*

25 *Eff. February 1, 1976;*

26 *Amended Eff. July 1, 2000; February 1, 1992; May 1, 1990; November 1, 1984; March 14, 1980.*

27 *Readopted Eff. XX, 1, 20XX*  
28  
29

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# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0107 is proposed for readoption with substantive changes as follows:

2

3 **15A NCAC 04B .0107 MANDATORY STANDARDS FOR LAND-DISTURBING ACTIVITY**

4 (a) No land-disturbing activity subject to these Rules shall be undertaken except in accordance with ~~the G.S. 113A-~~  
5 ~~57, 113A-57~~ and the standards established in these Rules.

6 (b) Pursuant to G.S. 113A-57(3), Unless where otherwise specified in the Act or the rules of this Chapter, provisions  
7 for [for a] permanent ground cover sufficient to restrain erosion ~~must shall~~ be accomplished within ~~15 working days~~  
8 ~~or 90 calendar days following completion of construction or development, development, whichever period is shorter,~~  
9 ~~except as provided in 15A NCAC 4B .0124(e).~~

10 (c) Pursuant to G.S. 113A-57(4) and 113A-54(d)(4), an erosion and sedimentation control plan ~~must shall~~ be ~~both~~  
11 filed and approved by the ~~agency having jurisdiction, approving authority.~~

12 (d) All individuals that obtain a State or locally-approved erosion and sedimentation control plan, that disturb one acre  
13 or more of land, are required by the U.S. Environmental Protection Agency to obtain coverage under the N.C.  
14 Department of Environmental Quality Construction General Permit No. NCG010000 (NCG01). The requirements in  
15 NCG01 for temporary or permanent ground cover may differ from the ground cover, or stabilization, requirements in  
16 this Chapter. It is the responsibility of the person conducting the land-disturbing activity to ensure compliance with  
17 the NCG01.

18

19 *History Note: Authority G.S. 113A-54(d)(4); 113A-57; 113A-57(3)(4);*

20 *Eff. February 1, 1976;*

21 *Amended Eff. July 1, 2000; May 1, 1990; August 1, 1988; November 1, 1984; March 14, 1980.*

22 *Readopted Eff. XX, 1, 20XX*

23

24

# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0108 is proposed for reoption with substantive changes as follows:

2  
3 **15A NCAC 04B .0108 DESIGN AND PERFORMANCE STANDARD**

4 Except where otherwise specified in this Chapter, erosion ~~Erosion~~ and sedimentation control measures, structures, and  
5 devices shall be ~~se~~ planned, designed, and constructed to provide protection from the ~~run off~~ runoff of that a ~~10-year~~  
6 10-year storm that [which] produces the maximum peak rate of ~~run off~~ runoff as calculated according to procedures  
7 in the United States Department of ~~Agriculture~~ Agriculture, Soil ~~Natural Resources~~ Conservation Service's "National  
8 Engineering Field ~~Manual~~ Handbook 630 (Handbook 630)" This document is herein incorporated by reference  
9 including subsequent amendments and editions, and may be accessed at no cost at  
10 <https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/water/manage/hydrology/?cid=stelprdb1043063> ~~or~~  
11 according to procedures adopted by any other agency of this state or the United States or any generally recognized  
12 organization or association. Other methodologies can be used if based on generally accepted engineering standards  
13 that are shown to be equivalent to or improved over the procedures in Handbook 630. The approving authority shall  
14 determine acceptability of an alternative methodology based upon a showing that the runoff model used was based on  
15 observed data in agreement with the predictive model.

16  
17 *History Note: Authority G.S. 113A-54;*  
18 *Eff. February 1, 1976;*  
19 *Amended Eff. November 1, 1984; July 1, 1978.*  
20 *Readopted Eff. XX, 1, 20XX*  
21  
22

# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0109 is proposed for readoption with substantive changes as follows:

2

3 **15A NCAC 04B .0109 ~~STORM—WATER~~ STORMWATER **OUTLET** **DISCHARGE POINT****  
 4 **PROTECTION**

5 (a) Persons shall ~~conduct~~ provide a design for the land disturbing **land-disturbing** activity so that the ~~post construction~~  
 6 post-construction velocity of the ~~ten-year~~ ten-year storm ~~run-off~~ **runoff** in the receiving ~~waterecourse~~  
 7 stormwater conveyance ~~to to, and including,~~ the discharge ~~point~~ point, does not exceed the greater of:

- 8 (1) the velocity established by the table in Paragraph (d) of this Rule; or
- 9 (2) the projected velocity of the ~~ten-year~~ ten-year storm ~~run-off~~ runoff in the receiving ~~waterecourse~~  
 10 stormwater conveyance prior to development.

11 If projected conditions in Subparagraphs (1) or (2) of this Paragraph cannot be met, then the receiving ~~waterecourse~~  
 12 stormwater conveyance ~~to to, and including~~ and including, the discharge point shall be designed and constructed to  
 13 withstand the expected velocity anywhere the velocity exceeds the "~~prior to development~~" velocity prior to  
 14 development by ten percent.

15 (b) ~~Acceptable Management Measures. The commission recognizes that management of storm water run-off to~~  
 16 ~~control downstream erosion constitutes a developing technology and consequently invites the use of innovative~~  
 17 ~~techniques shown to produce successful results. Alternatives include:~~ The Commission shall may allow  
 18 alternative measures to control downstream erosion, including:

- 19 (1) ~~Compensate~~ compensation for increased ~~run-off~~ runoff from areas rendered impervious by designing  
 20 measures to promote ~~infiltration.~~ Infiltration; or
- 21 (2) ~~Avoid~~ avoiding increases in ~~storm water~~ stormwater discharge velocities by using vegetated or  
 22 roughened swales and waterways in place of closed drains and paved ~~sections.~~ sections; or
- 23 (3) ~~Provide~~ providing energy dissipators at storm drainage outlets to reduce flow velocities to the  
 24 discharge ~~points.~~ points; or
- 25 (4) ~~Protect~~ protecting ~~waterecourses~~ stormwater conveyances subject to accelerated erosion by  
 26 improving cross sections ~~and/or~~ or providing erosion-resistant lining.

27 (c) ~~Exceptions.~~ This Rule shall not apply when ~~storm water~~ stormwater discharge velocities will not ~~create an erosion~~  
 28 ~~problem result~~ in accelerated erosion in the receiving ~~waterecourse.~~ stormwater conveyance or discharge point.

29 (d) The following table sets maximum permissible velocity for storm water discharges:

30

Material	Maximum Permissible	
	Velocities <del>For</del> in feet and Meters Per Second*	
	F.P.S.	M.P.S.
35 Fine Sand (noncolloidal)	2.5	.8
36 Sandy Loam (noncolloidal)	2.5	.8
37 Silt Loam (noncolloidal)	3.0	.9
38 Ordinary Firm Loam	3.5	1.1
39 Fine Gravel	5.0	1.5
40 Stiff Clay (very colloidal)	5.0	1.5
41 Graded, Loam to Cobbles (noncolloidal)	5.0	1.5



# HEARING OFFICER'S REPORT

1	Graded, Silt to Cobbles (colloidal)	5.5	1.7
2	Alluvial Silts (noncolloidal)	3.5	1.1
3	Alluvial Silts (colloidal)	5.0	1.5
4	Coarse Gravel (noncolloidal)	6.0	1.8
5	Cobbles and Shingles	5.5	1.7
6	Shales and Hard Pans	6.0	1.8

7  
8 ~~Source: Adapted from recommendations by Special Committee on Irrigation Research, American Society of Civil~~  
9 ~~Engineers, 1926, for channels with straight alignment. For sinuous channels multiply allowable velocity by 0.95 for~~  
10 ~~slightly sinuous, by 0.9 for moderately sinuous channels, and by 0.8 for highly sinuous channels.~~

11  
12 \*For sinuous channels, multiply allowable velocity by 0.95 for slightly sinuous, by 0.9 for moderately sinuous  
13 channels, and by 0.8 for highly sinuous channels. Source: Adapted from recommendations by Special Committee on  
14 Irrigation Research, American Society of Civil Engineers, 1926, for channels with straight alignment.

15  
16 *History Note: Authority G.S. 113A-54(b)(c);*

17 *Eff. February 1, 1976;*

18 *Amended Eff. February 1, 1992; May 1, 1990; November 1, 1984; July 1, 1978.*

19 *Readopted Eff. XX, 1, 20XX*  
20  
21

# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0110 is proposed for reoption as follows:

2

3 **15A NCAC 04B .0110 BORROW AND WASTE AREAS**

4 If the same person conducts the ~~land-disturbing~~ land-disturbing activity and any related borrow or waste activity, the  
5 related borrow or waste activity shall constitute part of the ~~land-disturbing~~ land-disturbing activity, unless the  
6 borrow or waste activity is regulated under the Mining Act of 1971, G.S. 74, Article 7, or is a landfill regulated by the  
7 Division of ~~Solid~~ Waste Management. If the ~~land-disturbing~~ land-disturbing activity and any related borrow or waste  
8 activity are not conducted by the same person, they shall be considered separate land-disturbing activities.

9

10 *History Note: Authority G.S. 74-67; 113A-54(b); 130A-166.21;*

11 *Eff. February 1, 1976;*

12 *Amended Eff. May 1, 1990; November 1, 1984.*

13 *Readopted Eff. XX, 1, 20XX*

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# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0111 is proposed for readoption as follows:

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3 **15A NCAC 04B .0111 ACCESS AND HAUL ROADS**

4 ~~Except for public roads, temporary~~ Temporary access and haul roads ~~roads, other than public roads,~~ constructed  
5 or used in connection with any land-disturbing activity shall be considered a part of such activity.

6

7 History Note: Authority G.S. 113A-54;

8 Eff. February 1, 1976

9 Readopted Eff. XX, 1, 20XX

# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0112 is proposed for readoption as follows:

2

3 **15A NCAC 04B .0112 OPERATIONS IN LAKES OR NATURAL WATERCOURSES**

4 ~~Land-disturbing~~ Land-disturbing activity in connection with construction in, on, over, or under a lake or natural  
5 watercourse shall minimize the extent and duration of disruption of the stream channel. Where relocation of a stream  
6 forms an essential part of the proposed activity, the relocation shall minimize unnecessary changes in the stream flow  
7 characteristics.

8

9 *History Note: Authority G.S. 113A-54;*

10 *Eff. February 1, 1976;*

11 *Amended Eff. November 1, 1984.*

12 Readopted Eff. XX, 1, 20XX

13

# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0113 is proposed for readoption as follows:

2

3 **15A NCAC 04B .0113 RESPONSIBILITY FOR MAINTENANCE**

4 During the development of a site, the person conducting the land-disturbing activity shall install and maintain  
5 all temporary and permanent erosion and sedimentation control measures as required by the approved plan or  
6 any provision of the Act, these Rules of this Chapter, or any order or local ordinance adopted pursuant to the  
7 Act. After site development, the land owner or person in possession or control of the land shall install ~~and/or~~  
8 and maintain all ~~necessary~~ permanent erosion and sediment control measures, except those measures installed  
9 within a road or street right of way or ~~easement~~ easement, accepted for maintenance by a governmental agency.

10

11 *History Note: Authority G.S. 113A-54;*

12 *Eff. February 1, 1976;*

13 *Amended Eff. November 1, 1984; July 1, 1978.*

14 *Readopted Eff. XX, 1, 20XX*

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# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0115 is proposed for re adoption with substantive changes as follows:

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3 **15A NCAC 04B .0115 ADDITIONAL MEASURES**

4 Whenever the ~~commission~~ Commission or a local government determines that ~~significant~~ accelerated erosion and  
5 sedimentation continues despite the installation of protective practices, the person conducting the ~~land disturbing land-~~  
6 disturbing activity ~~will be required to and~~ shall take additional protective action. ——— action necessary to achieve  
7 compliance with the conditions specified in the Act or the Rules of this Chapter.

8

9 *History Note: Authority G.S. 113A-54(b); G.S. 113A-54.1(b);*

10 *Eff. February 1, 1976;*

11 *Amended Eff. November 1, 1984.*

12 Readopted Eff. XX, 1, 20XX

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# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0118 is proposed for readoption with substantive changes as follows:

## 3 15A NCAC 04B .0118 APPROVAL OF PLANS

4 (a) Persons conducting land-disturbing activity on a tract ~~which~~ that covers one or more acres shall file ~~three copies~~  
5 ~~of~~ the erosion and sedimentation control plan with the local government having jurisdiction or with the Commission  
6 if no local government has ~~jurisdiction~~, jurisdiction. The approving agency shall act on the plan at least 30 days prior  
7 ~~to beginning such activity and within 30 days of receipt of the plan or the plan shall be deemed approved.~~ shall keep  
8 ~~another~~ A paper copy of the approved plan shall be kept on file at the job site. After approving a plan, if the  
9 Commission or local government determines, either upon review of such plan or ~~on~~ upon inspection of the job site,  
10 that ~~a significant risk of accelerated erosion or off site sedimentation exists,~~ the plan is inadequate to meet the  
11 requirements of the Act and of this Chapter, the Commission or local government shall require a revised plan. Pending  
12 the preparation of the revised plan, work shall cease or shall continue under conditions outlined by the appropriate  
13 authority.

### 14 (b) Commission Approval:

15 (1) The Commission shall review plans for all land-disturbing activity over which the Commission has  
16 exclusive jurisdiction ~~by statute pursuant to G.S. 113A-56,~~ and all other land-disturbing activity ~~if~~  
17 where no local government has jurisdiction.

18 (2) The Commission shall complete its review of any completed plan within 30 days of receipt and shall  
19 notify the person submitting the plan in writing that it has been:

20 (A) ~~approved,~~ approved;

21 (B) ~~approved with modification,~~ modification; or,

22 (C) ~~approved with performance reservations, or~~

23 (C) ~~(D)~~ disapproved.

24 (3) The Commission's ~~disapproval,~~ approval with modification, or ~~performance reservations~~  
25 disapproval of any proposed ~~plan,~~ plan shall entitle the person submitting the plan to an  
26 administrative hearing in accordance with the provisions of G.S. 150B-23. ~~(This Section does not~~  
27 modify any other rights to a contested case hearing which may arise under G.S. 150B-23).

28 (4) ~~Subparagraph (b)(3) of this Rule shall not apply to the approval or modification of plans reviewed~~  
29 ~~by the Commission~~ Appeals of local government decisions shall be conducted pursuant to G.S.  
30 113A-61(c).

31 (5) Any plan submitted for a land-disturbing activity for which an environmental document is required  
32 by the North Carolina Environmental Policy Act as set forth in Article 1 [or] of G.S. 113 and the  
33 rules of this Department as set forth in 15ANCAC 01C shall be deemed incomplete until ~~a complete~~  
34 an environmental document is available for review. The Commission shall ~~promptly~~ notify the  
35 person submitting the plan that the ~~30-day~~ 30-day time limit for review of the plan pursuant to  
36 Subparagraph ~~(b)(2)~~ (2) of this Rule Paragraph shall not begin until ~~a complete~~ the environmental  
37 document is available for review.

# HEARING OFFICER'S REPORT

1 (c) ~~Erosion~~ An erosion and sedimentation control ~~plans may plan shall~~ also be disapproved unless ~~they include the~~  
2 application includes an authorized statement of financial responsibility and documentation of property ownership.  
3 This statement shall be signed by the person financially responsible for the land-disturbing activity or his or her  
4 attorney in fact. The statement shall include the mailing and street addresses of the principal place of business of the  
5 person financially responsible and of the owner of the land or their registered agents.

6 (d) Local Government Approval:

7 (1) Local Governments administering erosion and sedimentation control programs shall develop and  
8 publish procedures for approval of plans. ~~Such~~ The procedures shall ~~respect~~ follow applicable laws,  
9 ordinances, and rules, and shall contain procedures for appeal consistent with the local government's  
10 organization and operations.

11 (2) The ~~secretary~~ Secretary shall appoint ~~such employee(s)~~ employees of the Department as he or she  
12 deems necessary to consider appeals from the local government's final disapproval or modification  
13 of a plan. Within 30 days following receipt of notification of the appeal, such departmental  
14 employee shall complete the review and shall notify the local government and the person appealing  
15 the local government's decision that the plan should be approved, approved with modifications,  
16 ~~approved with performance reservations~~, or disapproved.

17 (3) If either the local government or the person submitting the plan disagrees with the decision reached  
18 by ~~an employee of the Department~~ a Departmental employee, ~~then~~ he or she may appeal the decision  
19 to the Commission by filing notice within 15 days with the Director of the Division of Energy,  
20 Mineral, and Land Resources. The ~~director~~ Director shall make the proposed erosion control plan  
21 and the records relating to the local government's and ~~departmental employees'~~ Departmental  
22 employee's review, available to an ~~appeals review~~ erosion and sedimentation control plan review  
23 committee consisting of three members of the Commission appointed by the chairman. Within 10  
24 days following receipt of the notification of appeal, the ~~appeals~~ erosion and sedimentation control  
25 plan review committee shall notify the local government and the person submitting the plan of a  
26 place and time for a hearing for consideration of the ~~appeal~~, appeal, ~~and shall afford both~~ Both  
27 parties shall be given at least 15 days' notice of the hearing and an opportunity to present written or  
28 oral arguments. The ~~appeals~~ erosion and sedimentation plan review committee shall notify both  
29 parties of its decision concerning the approval, disapproval, or modification of the proposed plan  
30 within 30 days following ~~such~~ the hearing.

31 (e) The applicant's right under G.S. 113A-54.1(d) to appeal the Director's disapproval of an erosion control plan under  
32 G.S. 113A-54.1(c) gives rise to a right to ~~a contested case under G.S. 150B, Article 3.~~ an appeal to the Commission.  
33 An applicant desiring to appeal the ~~Director's~~ Commission's disapproval of an erosion control plan shall file with the  
34 Office of Administrative Hearings a contested case petition under G.S. 150B, Article 3. ~~The general time limitation~~  
35 ~~for filing a petition, and the commencement of the time limitation, shall be as set out in G.S. 150B-23(f).~~ Contested  
36 cases shall be conducted under the procedures of G.S. 150B, Article 3 and applicable rules of the Office of  
37 Administrative Hearings. ~~The Commission shall make the final decision on any contested case under G.S. 150B-36.~~



# HEARING OFFICER'S REPORT

1  
2 *History Note: Filed as a Temporary Amendment Eff. January 14, 1992 for a period of 180 days to expire*  
3 *on July 11, 1992;*  
4 *Statutory Authority G.S. 113A-2; 113A-54; 113A-54.1; 113A-57; 113A-60(a); 113A-61(b);*  
5 *113A-61(c);*  
6 *150B, Article 3; ~~150B-23~~;*  
7 *Eff. February 1, 1976;*  
8 *Amended Eff. August 1, 2012 (see S.L. 2012-143, s.1.(f)); June 1, 1995; February 1, 1992; May 1,*  
9 *1990; August 1, 1988.*  
10 *Readopted Eff. XX, 1, 20XX*  
11

# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0120 is proposed for readoption with substantive changes as follows:

2

3 **15A NCAC 04B .0120** **INSPECTIONS AND INVESTIGATIONS**

4 (a) The Commission, Department of ~~Environment, Health, and Natural Resources~~ Environmental Quality or local  
5 government may require written ~~statements~~, statements related to items including but not limited to NOV's or Stop-  
6 Work orders or the filing of reports under oath, such as self-inspection or engineering/design reports, concerning ~~land~~  
7 ~~disturbing~~ land-disturbing activity.

8

9 (b) ~~Inspection of sites shall be carried out by the staff of Department of Environment, Health, and Natural Resources~~  
10 Environmental Quality or other qualified persons authorized by the Commission or Department of  
11 ~~Environment, Health, and Natural Resources~~ Environmental Quality as necessary to carry out its duties under the  
12 Act.

13 (c) No person shall refuse entry or access to any representative of the Commission or any representative of a local  
14 government who requests entry for purposes of inspection.

15 ~~(b)~~(d) When a preconstruction conference is proposed pursuant to G.S. 113A-51, it shall be specified on the plans.

16

17

*History Note: Authority G.S. 113A-51; 113A-54(b); 113A-58; 113A-61.1;  
Eff. February 1, 1976;  
Amended Eff. October 1, 1995; May 1, 1990; November 1, 1984.  
Readopted Eff. XX, 1, 20XX*

# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0124 is proposed for readoption with substantive changes as follows:

## 3 **15A NCAC 04B .0124 DESIGN STANDARDS IN SENSITIVE WATERSHEDS**

4 (a) Uncovered areas in HQW zones shall be limited ~~at any time~~ to a maximum total area of 20 acres within the  
5 boundaries of the tract ~~of 20 acres~~. Only ~~the portion~~ of the land-disturbing activity within a HQW zone shall be  
6 governed by this Rule. Larger areas may be uncovered within the boundaries of the tract with the written approval of  
7 the ~~Director~~. Director upon providing engineering justification with a construction sequence that considers phasing,  
8 limiting exposure, weekly submitted self-inspection reports and more-conservative design than the 25-year storm.  
9 The Director may also include other conditions as necessary based on specific site conditions.

10 (b) Erosion and sedimentation control measures, structures, and devices within HQW zones shall be ~~so~~ planned,  
11 ~~designed~~ designed, and constructed to provide protection from the runoff of the ~~25-year~~ 25-year storm ~~which that~~  
12 produces the maximum peak rate of runoff as calculated according to procedures in the United States Department of  
13 ~~Agricultural Soil Conservation~~ Agriculture, Natural Resources Conservation Service's "National Engineering Field  
14 ~~Manual Handbook 630~~ for Conservation Practices" Practices. ~~or according to procedures adopted by any other~~  
15 ~~agency of this state or the United States or any generally recognized organization or association.~~ Other methodologies  
16 can be used if based on generally accepted engineering standards that are shown to be equivalent to or improved over  
17 the procedures in Handbook 630. The Division shall determine acceptability of an alternative methodology based  
18 upon a showing that the runoff model used was based on observed data in agreement with the predictive model.

19 ~~(e) Sediment basins within HQW zones shall be designed and constructed such that the basin will have a settling~~  
20 ~~efficiency of at least 70 percent for the 40 micron (0.04mm) size soil particle transported into the basin by the runoff~~  
21 ~~of that two-year storm which produces the maximum peak rate of runoff as calculated according to procedures in the~~  
22 ~~United States Department of Agriculture Soil Conservation Services "National Engineering Field Manual for~~  
23 ~~Conservation Practices" or according to procedures adopted by any other agency of this state or the United States or~~  
24 ~~any generally recognized organization or association.~~

25 (c) In order to provide for water quality protection in HQW Zones, sediment basins that discharge to those areas shall  
26 be designed and constructed to meet the following criteria:

- 27 (1) use a surface withdrawal mechanism, except when the basin drainage area is less than 1.0 acre;
- 28 (2) have a minimum of 1800 cubic feet of storage area per acre of disturbed area;
- 29 (3) have a minimum surface area of 325 square feet per cfs of [~~Q<sub>25</sub> peak~~] **Q25 peak** inflow;
- 30 (4) have a minimum dewatering time of 48 hours and,
- 31 (5) incorporate 3 baffles, unless the basin is less than 20 feet in length, in which case 2 baffles are  
32 sufficient.

33 (d) Upon a written request of the applicant, the Director may allow alternative design or control measures in lieu of  
34 meeting the conditions required in Subparagraphs (c)(2) through (c)(5) of this Rule if the applicant demonstrates that  
35 meeting all of those conditions will result in design or operational hardships and that the alternative measures will  
36 provide an equal or more effective level of erosion and sedimentation control on the site. Alternative measures may

# HEARING OFFICER'S REPORT

1 include, but are not limited to, quicker application of ground cover, use of sediment flocculants and use of enhanced  
2 ground cover practices.

3 ~~(c)(4)~~ Newly constructed open channels in HQW zones shall be designed and constructed with side slopes no steeper  
4 than two horizontal to one vertical if a vegetative cover is used for ~~stabilization~~ stabilization, unless soil conditions  
5 permit a steeper slope or where the slopes are stabilized by using mechanical devices, structural ~~devices~~ devices, or  
6 other forms of acceptable ditch liners. liners proven effective and acceptable to the Division. In any event, the The  
7 angle for side slopes shall be sufficient to restrain accelerated erosion.

8 ~~(e) Pursuant to G.S. 113A-57(3) provisions for a ground cover sufficient to restrain erosion must be provided for any~~  
9 ~~portion of a land-disturbing activity in a HQW zone within 15 working days or 60 calendar days following completion~~  
10 ~~of construction or development, whichever period is shorter.~~

11  
12 *History Note: Authority G.S. 113A-54(b); 113A-54(c)(1);*

13 *Eff. May 1, 1990.*

14 *Readopted Eff. XX, 1, 20XX*

15

# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0125 is proposed for readoption with substantive changes as follows:

2  
3 **15A NCAC 04B .0125 BUFFER ZONE REQUIREMENTS**

4 (a) ~~Unless otherwise provided, the~~ The width of a buffer zone is shall be measured from the edge of the water to the  
5 nearest edge of the disturbed area, with the 25 percent of the strip nearer the land-disturbing activity containing natural  
6 or artificial means of confining visible siltation.

7 (b) ~~The 25-foot~~ A 25-foot minimum width width, ~~for an~~ undisturbed buffer ~~zone~~ shall be protected adjacent to  
8 ~~designated~~ trout waters designated by the Environmental Management Commission. The 25-foot width buffer zone  
9 shall be measured horizontally from the top of the bank. bank [To] to the nearest area of disturbance.

10 (c) Where a temporary and minimal disturbance is permitted as an exception by G.S. 113A-57(1), land-disturbing  
11 activities in the buffer zone adjacent to designated trout waters shall be limited to a maximum of ten percent of the  
12 total length of the buffer zone within the tract ~~to be~~ and distributed such that there is not more than 100 linear feet of  
13 disturbance in each 1000 linear feet of buffer zone. ~~Larger areas may be disturbed with the written approval of the~~  
14 ~~Director.~~

15 (d) If, upon a written request of the applicant, the Director may allow a larger area of disturbance than provided in  
16 Paragraph (c) of this Rule if the applicant demonstrates that additional measures will be utilized that will achieve an  
17 equally effective or more effective level of erosion and sedimentation control than would be achieved had the  
18 specifications prescribed in Paragraph (c) of this Rule been followed.

19  
20 ~~(d)(c)~~ No land-disturbing activity shall be undertaken within a buffer zone adjacent to ~~designated~~ trout waters that is  
21 predicted by the plan approving authority to will cause adverse stream temperature fluctuations, violations in these  
22 waters as set forth in 15A NCAC 2B 02B .0211 "Fresh Surface Water Quality Classification and Standards", Standards  
23 in these for Class C waters. Waters", which is hereby incorporated by reference including subsequent amendments  
24 and editions. Copies of 15A NCAC 02B .0211 are available at <https://www.oah.state.nc.us/> at no cost.

25  
26 *History Note: Authority G.S. 113A-54(b); 113A-54(c)(1); 113A-57(1);*

27 *Eff. May 1, 1990;*

28 *Amended Eff. February 1, 1992.*

29 *Readopted Eff. XX, 1, 20XX*

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# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0126 is proposed for readoption with substantive changes as follows:

2

3 **15A NCAC 04B .0126 PLAN REVIEW APPLICATION FEE**

4 (a) ~~A~~ The nonrefundable plan review processing application fee, in the amount ~~stated in Paragraph (e) of this Rule,~~  
5 provided in [G.S. 113A-54.2] G.S. 113A-54.2, shall be paid when an erosion and sedimentation control plan is filed  
6 in accordance with ~~15A NCAC 04B .0118. Rule .0118 of this Section.~~

7 (b) Each plan shall be deemed incomplete until the plan review processing application fee is paid.

8 ~~(c) The plan review processing fee shall be based on the number of acres, or any part of an acre, of disturbed land~~  
9 ~~shown on the plan.~~

10 ~~(c)(d)~~ No plan review processing application fee shall be charged for review of a revised plan unless the revised plan  
11 contains an increase in the number of acres to be disturbed. If the revised plan contains an increase in the number of  
12 acres to be disturbed, the plan review processing fee to be charged shall be the amount ~~stated in Paragraph (e) of the~~  
13 ~~Rule specified in G.S. 113A-54.2~~ for each additional acre (or any part thereof) disturbed.

14 ~~(e) The nonrefundable plan review processing fee shall be fifty dollars (\$50.00) for each acre or part of any acre of~~  
15 ~~disturbed land.~~

16 ~~(f) Payment of the plan review processing fee may be by check or money order made payable to the "N.C. Department~~  
17 ~~of Environment and Natural Resources". The payment shall refer to the erosion and sedimentation control plan.~~

18

19 *History Note: Authority G.S. 113A-54; 113A-54.2;*

20 *Filed as a Temporary Rule Eff. November 1, 1990, for a period of 180 days to expire on April 29,*  
21 *1991;*

22 *AARC Objection Lodged November 14, 1990;*

23 *AARC Objection Removed December 20, 1990;*

24 *Eff. January 1, 1991;*

25 *Amended Eff. August 1, 2002; July 1, 2000.*

26 *Readopted Eff. XX, 1, 20XX*

27

# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0127 is proposed for readoption with substantive changes as follows:

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3 **15A NCAC 04B .0127 PLAN APPROVAL CERTIFICATE**

4 ~~(a) Approval of a sedimentation and erosion control plan will be contained in a document called "Certificate of Plan~~  
5 ~~Approval" to be issued by the Commission.~~

6 ~~(b) The Certificate of Plan Approval must be posted at the primary entrance of the job site before construction begins.~~

7 (a) The Commission shall issue a "Certificate of Approval" or a similar written documentation of approval that is  
8 provided to the applicant by hard copy or electronic submittal. Before construction begins, that documentation shall  
9 be posted at the primary entrance of the job site or other location that is easily observable to the public and inspectors.

10 ~~(b)(e) No person may initiate a land-disturbing activity until notifying the agency approving authority that issued the~~  
11 ~~Plan Approval~~ of the date that the land-disturbing activity will begin.

12

13 *History Note: Filed as a Temporary Rule Eff. November 1, 1990, for a period of 180 days to expire on April 29,*  
14 *1991;*

15 *Authority G.S. 113A-54(b);*

16 *ARRC Objection Lodged November 14, 1990;*

17 *ARRC Objection Removed December 20, 1990;*

18 *Eff. January 1, 1991;*

19 *Amended Eff. July 1, 2000.*

20 *Readopted Eff. XX, 1, 20XX*

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# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0129 is proposed for readoption with substantive changes as follows:

2

3 **15A NCAC 04B .0129 EROSION CONTROL PLAN EXPIRATION DATE**

4 ~~An erosion control plan shall expire three years following the date of approval, if~~ If no land-disturbing activity has  
5 been ~~undertaken.~~ undertaken on a site, an erosion control plan shall expire three years following the date of approval.

6

7 *History Note: Authority G.S. 113A-54.1(a);*

8

*Eff. October 1, 1995.*

9

*Readopted Eff. XX, 1, 20XX*

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11



# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0130 is proposed for reoption with substantive changes as follows:

2

### 3 15A NCAC 04B .0130 EMERGENCIES

4 Any person who conducts an emergency repair essential to protect human ~~life~~, life that ~~results in~~ constitutes a  
5 land-disturbing activity within the meaning of G.S. 113A-52(6) and these ~~Rules~~ Rules shall take the following actions:

6 (1) ~~shall~~ notify the Commission Director, or his or her designee, of ~~such the~~ the repair as soon as ~~reasonably~~  
7 possible, but ~~in~~ no event later than five working days after the emergency ~~ends~~; has ended, as  
8 determined by the Division, and

9 (2) ~~shall~~ take all reasonable measures to protect all public and private property from damage caused by  
10 the ~~such~~ repair as soon as ~~reasonably~~ possible, but ~~in~~ no event later than 15 working days after the  
11 emergency ends.

12

13 *History Note: Authority G.S. 113A-52.01(4); 113A-54(b);*

14 *Eff. October 1, 1995.*

15 *Readopted Eff. XX, 1, 20XX*

16

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# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0131 is proposed for readoption with substantive changes as follows:

2  
3 **15A NCAC 04B .0131 SELF-INSPECTIONS**

4 ~~Where inspections are required by G.S. 113A-54.1(e), the following apply:~~

5 (1) ~~— The person who performs the inspection shall make a record of the site inspection by documenting~~  
6 ~~the following items:~~

7 (a) ~~— all of the erosion and sedimentation control measures, practices and devices, as called for~~  
8 ~~in a construction sequence consistent with the approved erosion and sedimentation control~~  
9 ~~plan, including but not limited to sedimentation control basins, sedimentation traps,~~  
10 ~~sedimentation ponds, rock dams, temporary diversions, temporary slope drains, rock check~~  
11 ~~dams, sediment fence or barriers, all forms of inlet protection, storm drainage facilities,~~  
12 ~~energy dissipaters, and stabilization methods of open channels, have initially been installed~~  
13 ~~and do not significantly deviate (as defined in Sub item (1)(e) of this Rule) from the~~  
14 ~~locations, dimensions and relative elevations shown on the approved erosion and~~  
15 ~~sedimentation plan. Such documentation shall be accomplished by initialing and dating~~  
16 ~~each measure or practice shown on a copy of the approved erosion and sedimentation~~  
17 ~~control plan or by completing, dating and signing an inspection report that lists each~~  
18 ~~measure, practice or device shown on the approved erosion and sedimentation control plan.~~  
19 ~~This documentation is required only upon the initial installation of the erosion and~~  
20 ~~sedimentation control measures, practices and devices as set forth by the approved erosion~~  
21 ~~and sedimentation control plan or if the measures, practices and devices are modified after~~  
22 ~~initial installation;~~

23 (b) ~~— the completion of any phase of grading for all graded slopes and fills shown on the~~  
24 ~~approved erosion and sedimentation control plan, specifically noting the location and~~  
25 ~~condition of the graded slopes and fills. Such documentation shall be accomplished by~~  
26 ~~initialing and dating a copy of the approved erosion and sedimentation control plan or by~~  
27 ~~completing, dating and signing an inspection report;~~

28 (c) ~~— the location of temporary or permanent ground cover, and that the installation of the ground~~  
29 ~~cover does not significantly deviate (as defined in Sub item (1)(e) of this Rule) from the~~  
30 ~~approved erosion and sedimentation control plan. Such documentation shall be~~  
31 ~~accomplished by initialing and dating a copy of the approved erosion and sedimentation~~  
32 ~~control plan or by completing, dating and signing an inspection report;~~

33 (d) ~~— that maintenance and repair requirements for all temporary and permanent erosion and~~  
34 ~~sedimentation control measures, practices and devices have been performed. Such~~  
35 ~~documentation shall be accomplished by completing, dating and signing an inspection~~  
36 ~~report (the general storm water permit monitoring form may be used to verify the~~  
37 ~~maintenance and repair requirements); and~~

# HEARING OFFICER'S REPORT

1 (e) — any significant deviations from the approved erosion and sedimentation control plan, —  
2 corrective actions required to correct the deviation and completion of the corrective actions.  
3 Such documentation shall be accomplished by initialing and dating a copy of the approved  
4 erosion and sedimentation control plan or by completing, dating and signing an inspection  
5 report. A significant deviation means an omission, alteration or relocation of an erosion or  
6 sedimentation control measure that prevents the measure from performing as intended.

7 (2) — The documentation, whether on a copy of the approved erosion and sedimentation control plan or  
8 an inspection report, shall include the name, address, affiliation, telephone number, and signature  
9 of the person conducting the inspection and the date of the inspection. Any relevant licenses and  
10 certifications may also be included. Any documentation of inspections that occur on a copy of the  
11 approved erosion and sedimentation control plan shall occur on a single copy of the plan and that  
12 plan shall be made available on the site. Any inspection reports shall also be made available on the  
13 site.

14 (3) — The inspection shall be performed during or after each of the following phases of a plan:

15 (a) — installation of perimeter erosion and sediment control measures;

16 (b) — clearing and grubbing of existing ground cover;

17 (c) — completion of any phase of grading of slopes or fills that requires provision of temporary  
18 or permanent ground cover pursuant to G.S. 113A-57(2);

19 (d) — completion of storm drainage facilities;

20 (e) — completion of construction or development; and

21 (f) — quarterly until the establishment of permanent ground cover sufficient to restrain erosion  
22 or until the financially responsible party has conveyed ownership or control of the tract of  
23 land for which the erosion and sedimentation control plan has been approved and the  
24 agency that approved the plan has been notified. If the financially responsible party has  
25 conveyed ownership or control of the tract of land for which the erosion and sedimentation  
26 control plan has been approved, the new owner or person in control shall conduct and  
27 document inspections quarterly until the establishment of permanent ground cover  
28 sufficient to restrain erosion.

29  
30 All land-disturbing activities required to have an approved erosion and sedimentation control plan under [G.S. 113A-  
31 54.1] G.S. 113A-54.1(e) shall conduct self-inspections for initial installation or modification of any erosion and  
32 sedimentation control devices and practices described in an approved plan. In addition, weekly and rain-event self-  
33 inspections are required by federal regulations, that are implemented through the NPDES Construction General Permit  
34 No. NCG 010000.

35 (1) For self-inspections required pursuant to [G.S. 113A-54.1,] G.S. 113A-54.1(e), the inspection shall  
36 be performed during or after [the implementation of] each of the following [components] phases of  
37 [a project:] the plan;

# HEARING OFFICER'S REPORT

- 1 (a) initial installation of [land disturbance, perimeter] erosion, and sediment control measures;  
2 (b) clearing and grubbing of existing ground cover;  
3 (c) installation completion of [temporary or permanent sediment and erosion control measures  
4 to include] any grading that requires ground [cover] cover; [pursuant to G.S. 113A-57(2)];  
5 [d] — completion of storm drainage facilities;  
6 [e](d) completion of all land-disturbing activity, construction, or development, including  
7 permanent ground cover establishment and removal of all temporary measures; and  
8 [f](c) transfer of ownership or control of the tract of land where the erosion and sedimentation  
9 control plan has been approved and work has begun. The new owner or person in control  
10 shall conduct and document inspections until the project is permanently stabilized as in  
11 [Sub-Item (c)] Sub-Item(1)(c) of this [Item.] Rule.
- 12 (2) Documentation of self-inspections performed under Item (1) of this Rule shall include:
- 13 (a) [Verification] Visual verification of [all] ground stabilization and other erosion [and]  
14 [sedimentation] control [measures,] measures and practices [and devices,] as called for in  
15 the approved [construction sequence and the erosion and sedimentation control] plan;
- 16 (b) Verification by measurement of settling basins, temporary construction entrances, energy  
17 dissipators and traps.
- 18 [b](c) The name, address, organization affiliation, telephone number, and signature of the person  
19 conducting the inspection and the date of the inspection shall be included, whether on a  
20 copy of the approved erosion and sedimentation control plan or an inspection report. A  
21 template for an example of an inspection and monitoring report is provided on the DEMLR  
22 website at: [https://deq.nc.gov/about/divisions/energy-mineral-land-resources/erosion-](https://deq.nc.gov/about/divisions/energy-mineral-land-resources/erosion-sediment-control/forms)  
23 sediment-control/forms. Any relevant licenses and certifications may also be included. Any  
24 documentation of inspections that occur on a copy of the approved erosion and  
25 sedimentation control plan shall occur on a single copy of the plan and that plan shall be  
26 made available on the site.
- 27 [e](d) A record of any "significant deviation" from any erosion or sedimentation control measure  
28 [made] from that on the approved plan. For the purpose of this Rule, a "significant  
29 deviation" means an omission, alteration or relocation of an erosion or sedimentation  
30 control measure that [may change the intended performance of the measure.] prevents it  
31 from performing as intended. The record shall include measures required to correct the  
32 deviation along with documentation of when those measures were taken. Deviations from  
33 the approved plan may also be recommended to enhance the intended performance of the  
34 sedimentation and erosion control measures.
- 35 [d] — All self inspection documentation shall be made available on the site for at least 30  
36 calendar days or maintained until permanent ground cover has been established, whichever  
37 is longest.]

# HEARING OFFICER'S REPORT

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*History Note: Authority G.S. 113A-54; 113A-54.1(e);  
Eff. October 1, 2010.  
Readopted Eff. XX, 1, 20XX*

- Anything that is highlighted is a **change** from what was published in the register on 7/15/19.
  - Highlighted language that is struck through is now being deleted. (i.e. ~~now being deleted~~)
  - Highlighted language that is struck through and in brackets *was new language* in the register and is now being deleted. (i.e. ~~was new but now being deleted~~)
  - Highlighted language that is underlined is new. (i.e. new)
  - Language that is only highlighted is now being kept and not deleted (i.e. ~~now keeping not deleting~~)

# HEARING OFFICER'S REPORT

1 15A NCAC 04B .0132 is proposed for readoption with substantive changes as follows:

2  
3 **15A NCAC 04B .0132 DESIGN STANDARDS FOR THE UPPER NEUSE RIVER BASIN (FALLS LAKE**  
4 **WATERSHED)**

5 In addition to any other requirements of State, federal, and local law, land-disturbing activity in the watershed of the  
6 drinking water supply reservoir that meets the applicability requirements of Session Law 2009-486, Section 3.(a),  
7 shall meet all of the following design standards for sedimentation and erosion control:

- 8 (1) Erosion and sedimentation control measures, structures, and devices shall be planned, designed, and  
9 constructed to provide protection from the runoff of the 25-year storm that produces the maximum  
10 peak rate of runoff as calculated according to procedures set out in the United States Department of  
11 ~~Agriculture~~ Agriculture, Natural Resources Soil Conservation Service's "National Engineering Field  
12 ~~Manual Handbook 630~~ for Conservation Practices" or according to procedures adopted by any other  
13 agency of the State or the United States.
- 14 (2) Sediment basins shall be planned, designed, and constructed so that the basin will have a settling  
15 efficiency of at least 70 percent for the 40-micron size soil particle transported into the basin by the  
16 runoff of the two-year storm that produces the maximum peak rate of runoff as calculated according  
17 to procedures in the United States Department of ~~Agriculture~~ Agriculture, Natural Resources Soil  
18 Conservation Service's "National Engineering Field ~~Manual Handbook 630~~ for Conservation  
19 Practices" or according to procedures adopted by any other agency of the State or the United States.
- 20 (3) Newly constructed open channels shall be planned, designed, and constructed with side slopes no  
21 steeper than two horizontal to one vertical if a vegetative cover is used for stabilization unless soil  
22 conditions permit steeper side slopes or where the side slopes are stabilized by using mechanical  
23 devices, structural devices, or other ditch liners sufficient to restrain accelerated erosion. The angle  
24 for side slopes shall be sufficient to restrain accelerated ~~erosion.~~ erosion, as determined by the  
25 Division, based on soil conditions.
- 26 (4) For an area of land-disturbing activity where grading activities have been completed, temporary or  
27 permanent ground cover sufficient to restrain erosion shall be provided as soon as practicable, but  
28 ~~in no case not~~ later than seven days after completion of grading. For an area of land-disturbing  
29 activity where grading activities have not been completed, temporary ground cover shall be provided  
30 as follows:
- 31 (a) For an area with no slope, temporary ground cover shall be provided for the area if it has  
32 not been disturbed for a period of 14 days.
- 33 (b) For an area of moderate slope, temporary ground cover shall be provided for the area if it  
34 has not been disturbed for a period of 10 days. For purposes of this Item, "moderate slope"  
35 means an inclined area, the inclination of which is less than or equal to three units of  
36 horizontal distance to one unit of vertical distance.

# HEARING OFFICER'S REPORT

1 (c) For an area of steep slope, temporary ground cover shall be provided for the area if it has  
2 not been disturbed for a period of seven days. For purposes of this Item, "steep slope"  
3 means an inclined area, the inclination of which is greater than three units of horizontal  
4 distance to one unit of vertical distance.

5  
6 *History Note: Authority S.L. 2009-486; G.S. 113A-54(b)*  
7 *Eff. February 1, 2012.*  
8 *Readopted Eff. XX, 1, 20XX*

9  
10

# HEARING OFFICER'S REPORT

1 15A NCAC 04C .0103 is proposed for readoption with substantive changes as follows:

2

3 **15A NCAC 04C .0103 WHO MAY ASSESS**

4 The ~~director~~ Secretary may assess civil penalties against any person responsible for a violation.

5

6 *History Note: Authority G.S. 113A-55; 113A-64; 143B-10;*

7 *Eff. February 1, 1976;*

8 *Amended Eff. November 1, 1984.*

9 *Readopted Eff. XX, 1, 20XX*

10

11



# HEARING OFFICER'S REPORT

1 15A NCAC 04C .0106 is proposed for readoption with substantive changes as follows:

2

## 3 15A NCAC 04C .0106 CRITERIA

4 In determining the amount of the civil penalty assessment, the ~~director~~ Secretary shall consider the following ~~criteria:~~  
5 criteria, in addition to the factors pursuant to G.S. 113A-64(a)(3):

6 (1) severity of the ~~violation,~~ violation;

7 ~~(2) degree and extent of the harm,~~ [harm;]

8 ~~(3) (2) type of violation,~~ violation;

9 ~~(4) (3) duration,~~ duration;

10 ~~(5) (4) cause,~~ cause;

11 ~~(6) (5) extent of any off-site damage which may have resulted,~~ resulted;

12 ~~(7) (6) effectiveness of action taken by violator,~~ violation;

13 ~~(8) (7) adherence to plan submitted by violator,~~ violation;

14 ~~(9) (8) effectiveness of plan submitted by violator,~~ violation;

15 ~~(10) cost of rectifying any damage,~~ [damage;]

16 ~~(11) the violator's previous record in complying with rules [the Act, or any rule or order] of the~~  
17 ~~commission,~~ [Commission;]

18 ~~(12) (9) estimated cost of installing and/or maintaining taking corrective sediment control measures,~~ actions;  
19 ~~and~~

20 ~~(13) (10) staff investigative costs~~ costs;

21 ~~[(14) the amount of money the violator saved by noncompliance; and]~~

22 ~~[(15) whether the violation was committed willfully.]~~

23

24 *History Note: Authority G.S. 113A-54(b); 113A-55; 113A-64(a);*

25 *Eff. February 1, 1976;*

26 *Amended Eff. November 1, 1984; April 1, 1978.*

27 *Readopted Eff. XX, 1, 20XX*

28

29

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  - Highlighted language that is struck through is now being deleted. (i.e. now being deleted)
  - Highlighted language that is struck through and in brackets *was new language* in the register and is now being deleted. (i.e. [was new but now being deleted])
  - Highlighted language that is underlined is new. (i.e. new)
  - Language that is only highlighted is now being kept and not deleted (i.e. now keeping not deleting)

# HEARING OFFICER'S REPORT

1 15A NCAC 04C .0107 is proposed for readoption with substantive changes as follows:

2

### 3 15A NCAC 04C .0107 PROCEDURES: NOTICES

4 (a) The notice of violation shall describe the violation ~~with reasonable particularity~~, request that all illegal activity  
5 cease, and inform the violator that a civil penalty may be assessed pursuant to G.S. 113A-64. If particular actions  
6 need to be taken to comply with the Sedimentation Pollution Control Act, the notice shall specify the actions to be  
7 taken, shall specify a time period for compliance, and shall state that upon failure to comply within the allotted ~~time~~  
8 time, the person shall become subject to the assessment of a civil penalty for each day of the continuing violation  
9 beginning with the date of the violation.

10 (b) The ~~stop-work~~ stop-work order provided in G.S. 113A-65.1 shall serve as the notice of violation for purposes of  
11 the assessment of a civil penalty pursuant to G.S. 113A-64(a)(1). Copies of the ~~stop-work~~ stop-work order shall be  
12 served upon persons the Department has reason to believe may be responsible for the violation ~~by any means~~  
13 ~~authorized under~~ pursuant to G.S. 1A-1, Rule 4.

14

15 *History Note:* *Filed as a Temporary Amendment Eff. January 14, 1992 for a period of 180 days to expire on July*  
16 *11, 1992;*

17 *Authority G.S. 113A-54; 113A-61.1; 113A-64; 113A-65.1; ~~143B-10;~~*

18 *Eff. February 1, 1976;*

19 *Amended Eff. August 1, 2000; October 1, 1995; April 1, 1992; May 1, 1990; November 1, 1984;*

20 *Temporary Amendment Eff. August 1, 2000;*

21 *Amended Eff. April 1, 2001.*

22 *Readopted Eff. XX, 1, 20XX*

23

24

# HEARING OFFICER'S REPORT

1 15A NCAC 04C .0108 is proposed for repeal through readoption as follows:

2

3 **15A NCAC 04C .0108 REQUESTS FOR ADMINISTRATIVE HEARING**

4 ~~After receipt of notification of any assessment, the assessed person must select one of the following options within 30~~  
5 ~~days:~~

6 (1) ~~tender payment; or~~

7 (2) ~~file a petition for an administrative hearing in accordance with G.S. 150B-23.~~

8

9 *History Note: Authority G.S. 113A-64; 143B-10; 150B-23;*

10 *Eff. February 1, 1976;*

11 *Amended Eff. October 1, 1995; October 1, 1988; October 5, 1980; April 1, 1978.*

12 *Repealed Eff. XX, 1, 20XX*

13

14

# HEARING OFFICER'S REPORT

1 15A NCAC 04C .0110 is proposed for repeal as follows:

2

3 **15A NCAC 04C .0110 ADMINISTRATIVE HEARING**

4 ~~Administrative hearings shall be conducted in accordance with the procedures outlined in G.S. 150B-22 et seq. and~~  
5 ~~the contested case procedures in 15A NCAC 1B .0200.~~

6

7 *History Note: Authority G.S. 113A-55; 150B-22 et seq.;*

8 *Eff. February 1, 1976;*

9 *Amended Eff. October 1, 1995; August 1, 1988; November 1, 1984; October 5, 1980;*

10 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2,*  
11 *2016.*

12 *Repealed Eff. XX, 1, 20XX*

13

14

# HEARING OFFICER'S REPORT

1 15A NCAC 04C .0111 is proposed for repeal as follows:

2

3 **15A NCAC 04C .0111 FURTHER REMEDIES**

4 ~~No provision of this Subchapter shall be construed to restrict or impair the right of the secretary, the director, or the~~  
5 ~~Sedimentation Control Commission to pursue any other remedy provided by law for violations of the Sedimentation~~  
6 ~~Pollution Control Act.~~

7

8 *History Note: Authority G.S. 113A-54; 113A-60; 113A-64 through 113A-66;*

9

*Eff. February 1, 1976;*

10

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2,*

11

*2016.*

12

*Repealed Eff. XX, 1, 20XX*

13

14

# HEARING OFFICER'S REPORT

1 15A NCAC 04D .0102 is proposed for repeal through readoption as follows:

2

3 **15A NCAC 04D .0102 MODEL ORDINANCE**

4 ~~The commission has adopted a model ordinance. Local governmental units wishing to establish a local erosion and~~  
5 ~~sedimentation control program may obtain a copy of the model ordinance upon writing to:~~

6 ~~North Carolina Department of Environment, Health, and Natural Resources~~  
7 ~~Land Quality Section~~  
8 ~~P.O. Box 27687~~  
9 ~~Raleigh, North Carolina 27611~~

10

11 *History Note: Authority G.S. 113A-54(d); 113A-60;*

12 *Eff. February 1, 1976;*

13 *Amended Eff. March 14, 1980; February 23, 1979;*

14 *Summary Rule Filed January 26, 1982;*

15 *Amended Eff. October 1, 1995; May 1, 1990; August 1, 1988; November 1, 1984.*

16 *Repealed Eff. XX, 1, 20XX*

17

18

# HEARING OFFICER'S REPORT

1 15A NCAC 04E .0101 is proposed for repeal as follows:

2

3 **15A NCAC 04E .0101 GENERAL PURPOSE**

4 ~~Rules at 15A NCAC 1B .0100 are adopted by reference and with the rules of this Subchapter shall govern rule making~~  
5 ~~hearings conducted under the purview of the commission.~~

6

7 *History Note: Authority G.S. 113A-54; 113A-55; 150B;*

8

*Eff. March 14, 1980;*

9

*Amended Eff. November 1, 1984;*

10

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2,*

11

*2016.*

12

*Repealed Eff. XX, 1, 20XX*

13

# HEARING OFFICER'S REPORT

1 15A NCAC 04E .0102 is proposed for repeal as follows:

2

## 3 **15A NCAC 04E .0102 DEFINITIONS**

4 ~~As used in this Subchapter:~~

5 (1) ~~"Commission" means the North Carolina Sedimentation Control Commission.~~

6 (2) ~~"Director" means the Director of the Division of Energy, Mineral, and Land Resources of the~~  
7 ~~Department of Environment, Health, and Natural Resources.~~

8

9 *History Note: Authority G.S. 113A-54; 113A-55;*

10 *Eff. March 14, 1980;*

11 *Amended Eff. August 1, 2012 (see S.L. 2012-143, s.1.(f)); May 1, 1990;*

12 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2,*  
13 *2016.*

14 *Repealed Eff. XX, 1, 20XX*

15

16



# HEARING OFFICER'S REPORT

1 15A NCAC 04E .0104 is proposed for amendment as follows:

2

3 **15A NCAC 04E .0104 COPIES OF RULES: ~~INSPECTION~~ RULES**

4 (a) Anyone desiring to obtain a copy of any or all of the rules of the ~~commission~~ Commission may do so by requesting  
5 such from the ~~director~~ Director at the address of the ~~commission~~ Commission as set forth in 15A NCAC 04A .0101  
6 ~~at Rule .0001 of Subchapter A of this Chapter~~. The request ~~must~~ shall specify the rules requested, for example, 15A  
7 NCAC 4, 04, Sedimentation Control, or 15A NCAC 4E, ~~Rulemaking Procedures~~. 04B .0113, Responsibility for  
8 Maintenance. The ~~director~~ Director may charge reasonable fees to recover mailing and duplication costs for requests  
9 of more than one copy of the same rule(s).

10 (b) The rules of the ~~commission~~ Commission (15A NCAC ~~4~~NCAC 04) and other documents specified in G.S.  
11 ~~150B-11~~ are available for public inspection at the Office of the Director (P.O. Box 27687, 512 N. Salisbury Street,  
12 ~~Raleigh, N.C. 27611~~) during regular office hours. can also be found on the website of the NC Office of Administrative  
13 Hearings at: <https://www.oah.state.nc.us/>.

14

15 *History Note: Authority G.S. 113A-54; 113A-55; ~~150B-11~~;*

16 *Eff. March 14, 1980;*

17 *Amended Eff. August 1, 1988; November 1, 1984;*

18 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2,*  
19 *2016.*

20 *Amended Eff. XX, 1, 20XX*

21

22

# HEARING OFFICER'S REPORT

1  
2 15A NCAC 04E .0201 is proposed for amendment as follows:

3  
4 **15A NCAC 04E .0201 ~~PETITION FOR RULEMAKING HEARINGS~~ FORM AND CONTENT OF**  
5 **PETITION**

6 ~~Any person wishing to submit a petition requesting the adoption, amendment, or repeal of a rule by the commission~~  
7 ~~shall forward the petition to the director at the address of the commission in Rule .0001 of Subchapter A of this~~  
8 ~~Chapter. The first page of the petition should clearly bear the notation: RULEMAKING PETITION RE and then the~~  
9 ~~subject area (for example, RE PLAN REQUIREMENTS, RE PENALTIES, RE INSPECTIONS) or an indication of~~  
10 ~~any other area over which the commission may have rulemaking authority.~~

11 (a) Any person wishing to request the adoption, amendment, or repeal of a rule of the Commission shall make the  
12 request in a petition to the Commission addressed to the:

13  
14 Director  
15 Division of Energy, Mineral, and Land Resources  
16 1612 Mail Service Center  
17 Raleigh, North Carolina 27699-1612  
18

19 (b) The petition shall contain the following information:

- 20 (1) the text of the proposed rule(s) for adoption or amendment;  
21 (2) a statement of the reasons for adoption or amendment of the proposed rule(s), or the repeal of an  
22 existing rule(s);  
23 (3) a statement of the effect on existing rules or orders; and  
24 (4) the name(s) and address(es) of the petitioner(s); and petitioner(s).

25 (c) In its review of the proposed rule, the Commission shall consider whether it has authority to adopt the rule;  
26 the effect of the proposed rule on existing rules, programs, and practices; probable costs and cost factors of the  
27 proposed rule; and the impact of the rule on the public and regulated entities. The petitioner may include the following  
28 information within the request:

- 29 (1) the statutory authority for the agency to promulgate the rules(s);  
30 (2) a statement of the effect of the proposed rule(s) on existing practices in the area involved, including  
31 cost factors for persons affected by the proposed rule(s);  
32 (3) a statement explaining the computation of the cost factors;  
33 (4) a description, including the names and addresses, if known, of those most likely to be affected by the  
34 proposed rule(s); and  
35 (5) documents and data supporting the proposed rule(s).

36 (d) Petitions that do not contain the information required by Paragraph (b) of this Rule shall be returned to the  
37 petitioner by the Director on behalf of the Commission.  
38

# HEARING OFFICER'S REPORT

1 *History Note: Authority G.S. 113A-54; ~~150B-16~~; 150b-20;*  
2 *Eff. March 14, 1980;*  
3 *Amended Eff. November 1, 1984;*  
4 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2,*  
5 *2016.*  
6 *Amended Eff. XX, 1, 20XX*  
7

# HEARING OFFICER'S REPORT

1 15A NCAC 04E .0203 is proposed for repeal as follows:

2

## 3 15A NCAC 04E .0203 DISPOSITION OF PETITIONS

4 ~~(a) The director will determine whether the petition contains sufficient information for the commission to determine~~  
5 ~~whether the public interest will be served by granting the request. The director may request additional information~~  
6 ~~from the petitioner(s), he may contact interested persons or persons likely to be affected by the proposed rule and~~  
7 ~~request comments, and he may use any other appropriate method for obtaining additional information.~~

8 ~~(b) The commission will render a decision within 30 days after the petition is submitted. If the decision is to grant~~  
9 ~~the petition, the director, within 30 days of submission, will initiate a rulemaking proceeding. If the decision is to~~  
10 ~~deny the petition, the director will notify the petitioner(s) in writing, stating the reasons therefor.~~

11 ~~(c) If the commission is not scheduled to meet within 30 days of submission of a petition the director may either:~~

12 ~~(1) accept the petition and initiate a rulemaking proceeding; or~~

13 ~~(2) Ask the chairman of the commission to call a special meeting of the commission so that a decision~~  
14 ~~can be made by the commission within the 30 day time period required by 150B-16 and in~~  
15 ~~accordance with the procedures set out in (b) of this Rule.~~

16

17 *History Note: Authority G.S. 113A-54; 113A-55; 150B-16;*

18 *Eff. March 14, 1980;*

19 *Amended Eff. August 1, 1988; November 1, 1984; June 5, 1981;*

20 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2,*  
21 *2016.*

22 *Repealed Eff. XX, 1, 20XX*

23

24

# HEARING OFFICER'S REPORT

1 15A NCAC 04E .0403 is proposed for repeal as follows:

2

3 **15A NCAC 04E .0403 WRITTEN SUBMISSIONS**

4 ~~(a) Any person may file a written submission containing data, comments, or arguments after distribution or publication~~  
5 ~~of a rulemaking notice until the day of the hearing, unless a longer period has been prescribed in the notice or granted~~  
6 ~~upon request. These written comments should be sent to the director at the address of the commission.~~

7 ~~(b) The first page of any written submission shall clearly identify the rulemaking proceeding or proposed rule to~~  
8 ~~which the comments are addressed and include a statement of the position of the person making the submission (for~~  
9 ~~example, "In support of adopting proposed Rule .0000," "In opposition to adopting proposed Rule .0000").~~

10 ~~(c) Upon receipt of written comments, acknowledgment will be made with an assurance that the comments therein~~  
11 ~~will be considered fully by the commission.~~

12

13 *History Note: Authority G.S. 113A-54; 150B-12(e);*

14 *Eff. March 14, 1980;*

15 *Amended Eff. June 5, 1981;*

16 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2,*  
17 *2016.*

18 *Repealed Eff. XX, 1, 20XX*

19

20

# HEARING OFFICER'S REPORT

1 15A NCAC 04E .0405 is proposed for repeal as follows:

2

3 **15A NCAC 04E .0405 STATEMENT OF REASONS FOR DECISION**

4 ~~(a) Any interested person desiring a concise statement of the principal reasons for and against the adoption of a rule~~  
5 ~~by the commission and the factors that led to overruling the considerations urged for or against its adoption may~~  
6 ~~submit a request to the director of the address of the commission.~~

7 ~~(b) The request must be made in writing and submitted prior to adoption of the rule or within 30 days thereafter.~~

8

9 *History Note: Authority G.S. 113A-54; 150B-12(e);*

10 *Eff. March 14, 1980;*

11 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2,*

12 *2016.*

13 *Repealed Eff. XX, 1, 20XX*

14

15

# HEARING OFFICER'S REPORT

1 15A NCAC 04E .0406 is proposed for repeal as follows:

2

3 **15A NCAC 04E .0406 RECORD OF PROCEEDINGS**

4 ~~A record of all rulemaking proceedings will be maintained by the director for as long as the rule is in effect, and for~~  
5 ~~five years thereafter, following filing with the Office of Administrative Hearings. Record of rulemaking proceedings~~  
6 ~~will be available for public inspection during the hours of 8:30 AM to 5:30 PM on workdays.~~

7

8 *History Note: Authority G.S. 113A-54; 150B-11(2);*

9

*Eff. March 14, 1980;*

10

*Amended Eff. August 1, 1988; November 1, 1984;*

11

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2,*

12

*2016.*

13

*Repealed Eff. XX, 1, 20XX*

14

15

# HEARING OFFICER'S REPORT

1 15A NCAC 04E .0501 is proposed for amendment as follows:

2

3 **15A NCAC 04E .0501** ~~SUBJECTS OF DECLARATORY RULINGS~~ RULINGS: GENERALLY

4 Any person aggrieved by a statute administered or rule promulgated by the commission may request a declaratory  
5 ruling as to either the manner in which a statute or rule applies to a given factual situation, if at all, or whether a  
6 particular agency rule is valid. For purposes of this Section, an aggrieved person means a person substantially affected  
7 by a statute administered by the commission or a rule promulgated by the commission. At the request of any person  
8 aggrieved, as defined in G.S. 150B-2(6), the Sedimentation Control Commission may issue a declaratory ruling as  
9 provided in G.S. 150B-4.

10

11 *History Note: Authority G.S. 113A-54; ~~150B-17~~; 150B-4*

12 *Eff. March 14, 1980;*

13 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2,*  
14 *2016.*

15 *Amended Eff. XX, 1, 20XX*

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# HEARING OFFICER'S REPORT

1 15A NCAC 04E .0502 is proposed for amendment as follows:

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3 **15A NCAC 04E .0502**    **PROCEDURE FOR REQUESTING DECLARATORY RULINGS SUBMISSION**  
4                                    **OF REQUEST FOR RULING**

5 ~~All requests for declaratory rulings shall be written and mailed to the director at the address of the commission. The~~  
6 ~~first page of the request should bear the notation: REQUEST FOR DECLARATORY RULING. The request must~~  
7 ~~include the following information:~~

- 8            (1) ~~name and address of petitioner;~~  
9            (2) ~~statute or rule to which petition relates;~~  
10           (3) ~~concise statement of the manner in which petitioner is aggrieved by the rule or statute or its potential~~  
11                 ~~application to him;~~  
12           (4) ~~a statement of whether an oral hearing is desired and, if so, the reason therefor.~~

13  
14 (a) All requests for a declaratory ruling shall be filed with the Director, Division of Energy, Mineral and Land  
15 Resources, Department of Environmental Quality, 1612 Mail Service Center, Raleigh, NC 27699-1612.

16 (b) All requests shall include the following:

- 17            (1) name and address of petitioner(s);  
18            (2) the rule, statute or order upon which a ruling is desired;  
19            (3) a statement as to whether the request is for a ruling on the validity of a rule or on the applicability  
20                 of a rule, order or statute to a given factual situation;  
21            (4) arguments or data which demonstrate that the petitioner is aggrieved by the rule, statute or order,  
22                 or its potential application to petitioner;  
23            (5) a statement of the consequences of a failure to issue a declaratory ruling in favor of the petitioner;  
24            (6) a statement of the facts proposed for adoption by the Commission;  
25            (7) a draft of the proposed ruling; and  
26            (8) a statement of whether an oral argument is desired, and, if so, the reason(s) for requesting such an  
27                 oral argument.

28 (c) A request for a ruling on the applicability of a rule, order or statute shall include a description of the specific  
29 factual situation on which the ruling is to be based and documentation supporting those facts. A request for a  
30 ruling on the validity of a Commission rule shall state the aggrieved person's reason(s) for questioning the validity  
31 of the rule and a brief or legal memorandum supporting the aggrieved person's position. A person may ask for  
32 both types of declaratory rulings in a single request.

33 (d) In the manner provided in G.S. 150B-23(d), any other person may request to intervene in the request for  
34 declaratory ruling. The request to intervene shall be determined by the Chairman.

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36 *History Note: Authority G.S. 113A-54; ~~150B-17~~; 150B-4;*

# HEARING OFFICER'S REPORT

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*Eff. March 14, 1980;*

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2, 2016.*

*Amended Eff. XX, 1, 20XX*

# HEARING OFFICER'S REPORT

1 15A NCAC 04E .0503 is proposed for amendment as follows:

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3 **15A NCAC 04E .0503 DISPOSITION OF REQUESTS REQUEST**

4 ~~(a) Upon receiving a request, the director is authorized to initiate a declaratory ruling proceeding to receive~~  
5 ~~information concerning the request. A declaratory ruling proceeding may consist of written submissions, an oral~~  
6 ~~hearing, or other procedures as may be appropriate in the circumstances of the particular request. If the proceeding~~  
7 ~~takes the form of an oral hearing the director may direct that the proceeding take place before the commission.~~

8 ~~(b) The director will compile the information collected in the proceeding, along with other relevant information, in a~~  
9 ~~recommendation to the commission on whether to issue the ruling and what the ruling should be.~~

10 ~~(c) A decision whether to issue the ruling will be made by the commission at the next regularly scheduled meeting of~~  
11 ~~the commission within the 60 day period required by 150B-17 and after the director's recommendation is presented.~~  
12 ~~If no meeting is scheduled within that time period, the director will ask the chairman of the commission to call a~~  
13 ~~special meeting so that the commission can comply with the requirements of G.S. 150B-17.~~

14 ~~(d) If the decision of the commission is to issue the ruling, the ruling will be issued by the commission with the 60~~  
15 ~~day period required by G.S. 150B-17. If necessary, the chairman of the commission will call a special meeting so that~~  
16 ~~the commission can comply with this requirement.~~

17 ~~(e) If the decision of the commission is to deny the request, the director will notify the petitioner(s) in writing stating~~  
18 ~~the reasons therefor.~~

19 ~~(f) For purposes of this Rule, the commission will ordinarily refuse to issue a declaratory ruling:~~

20 ~~(1) unless the rule is unclear on its face;~~

21 ~~(2) unless the petitioner shows that the circumstances are so changed since the adoption of the rule that~~  
22 ~~such a ruling would be warranted;~~

23 ~~(3) unless the petitioner shows that the agency did not give to the factors specified in the request for a~~  
24 ~~declaratory ruling a full consideration at the time the rule was issued;~~

25 ~~(4) where there has been a similar controlling factual determination in a contested case or where the~~  
26 ~~factual context being raised for a declaratory ruling was specifically considered upon the adoption~~  
27 ~~of the rule or directive being questioned, as evidenced by the rulemaking record; or~~

28 ~~(5) where the subject matter of the request is involved in pending litigation in any state or federal court~~  
29 ~~in North Carolina.~~

30 (a) The Commission Chairman shall make a determination on the completeness of the request for declaratory  
31 ruling based on the requirements of this Section, and the Chairman shall make a recommendation to the  
32 Commission on whether to grant or deny a request for a declaratory ruling.

33 (b) Before deciding the merits of the request, the Commission may:

34 (1) request additional written submissions from the petitioner(s);

35 (2) request a written response from the Department, or any other person; and

36 (3) hear oral arguments from the petitioner(s) and the Department or their legal counsel.

37 (c) Whenever the Commission believes for "good cause" that the issuance of a declaratory ruling is undesirable,

# HEARING OFFICER'S REPORT

1 the Commission may refuse to issue such ruling. The Commission shall notify in writing the person requesting the  
2 ruling, stating the reason(s) for the refusal to issue a ruling on the request.

3 (d) "Good cause" as set out in Paragraph (c) of this Rule shall include:

4 (1) finding that there has been a similar determination in a previous contested case or

5 declaratory ruling;

6 (2) finding that the matter is the subject of a pending contested case hearing or

7 litigation in any North Carolina or federal court;

8 (3) finding that no genuine controversy exists as to the application of a statute, order or rule to the  
9 specific factual situation presented; or

10 (4) finding that the factual context put forward as the subject of the declaratory ruling

11 was specifically considered upon the adoption of the rule being questioned, as

12 evidenced by the rulemaking record.

13 (e) The Commission, through the Department, shall keep a record of each declaratory ruling, which shall include at a  
14 minimum the following items:

15 (1) the request for a ruling;

16 (2) any written submission by a party;

17 (3) the given state of facts on which the ruling was based;

18 (4) any transcripts of oral proceedings, or, in the absence of a transcript, a summary  
19 of all arguments;

20 (5) any other matter considered by the Commission in making the decision; and

21 (6) the declaratory ruling, or the decision to refuse to issue a declaratory ruling,  
22 together with the reasons therefore.

23 (f) For purposes of this Section, a declaratory ruling shall be deemed to be in effect until:

24 (1) the statute or rule interpreted by the declaratory ruling is repealed or the relevant  
25 provisions of the statute or rule are amended or altered;

26 (2) any court of the Appellate Division of the General Court of Justice shall construe the statute or  
27 rule which is the subject of the declaratory ruling in a manner plainly irreconcilable with the  
28 declaratory ruling;

29 (3) the Commission changes the declaratory ruling prospectively; or,

30 (4) any court sets aside the declaratory ruling in litigation between the Commission or  
31 Department of Environmental Quality and the party requesting the ruling.

32 (g) The party requesting a declaratory ruling may agree to allow the Commission to issue a ruling on the merits of  
33 the request beyond the time allowed by G.S. 150B-4.

34 (h) A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a  
35 contested case. Unless the requesting party consents to the delay, failure of the Commission to issue a ruling on the  
36 merits within the time allowed by G.S. 150B-4 shall constitute a denial of the request as well as a denial of the  
37 merits of the request and shall be subject to judicial review.

# HEARING OFFICER'S REPORT

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*History Note: Authority G.S. 113A-54; 113A-55; ~~150B-17~~; 150B-4  
Eff. March 14, 1980;  
Amended Eff. August 1, 1988; June 5, 1981;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2,  
2016.  
Amended Eff. XX, 1, 20XX*

# HEARING OFFICER'S REPORT

1 15A NCAC 04E .0504 is proposed for repeal as follows:

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3 **15A NCAC 04E .0504 RECORD OF DECISION**

4 ~~A record of all declaratory rulemaking proceedings will be maintained in the director's office for as long as the ruling~~  
5 ~~is in effect and for five years thereafter. This record will contain: the petition, the notice, all written submissions filed~~  
6 ~~in the request, whether filed by the petitioner or any other person, and a record or summary of oral presentations, if~~  
7 ~~any. Records of declaratory rulemaking proceedings will be available for public inspection during the regular office~~  
8 ~~hours of the director.~~

9

10 *History Note: Authority G.S. 113A-54; 150B-11;*

11 *Eff. March 14, 1980;*

12 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2,*  
13 *2016.*

14 *Repealed Eff. XX, 1, 20XX*

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# HEARING OFFICER'S REPORT

## II. SUPPORTING INFORMATION

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# HEARING OFFICER'S REPORT

## ATTACHMENT A

### Public Involvement Process

For this legislatively-mandated review of the Sedimentation Control Rules, the DEMLR staff went to exceptional measures to involve a variety of stakeholders in the rules re-adoption process. The process was started in 2016 with the formation of a 19-member workgroup to review, in considerable detail, each of the 39 rules that comprise the state sedimentation control rules in Chapter 04 of Title 15A of the NC Administrative Code. Over a two-year period, this group met 11 times in Raleigh to carefully consider each rule, including whether that rule should be modified, remain as it is, or repealed. They made recommendations that formed the basis for the proposed changes that were given to the Commission. The draft rule changes were presented to the Sedimentation Control Commission in August of 2017, and again, in November of 2017. The Commission members were asked to circulate the proposals to their work associates and ask them to provide comments to the DEMLR staff. With the exception of a suggestion from a Commission member, the staff did not receive any comments during that informal comment period. However, they did receive comments from the “pre-review” that the staff of the Rules Review Commission provided. Those comments were mostly administrative in nature but led to significant changes and improvements to the rule language.

At the Commission’s February 18, 2018 meeting, it was suggested that a smaller group of Commission members might want to review the proposed language before it came back to the full Commission in May. After asking for volunteers, Dr. White summarized that three members, Ms. Deck, Mr. Carson and Mr. Bivens will work with DEMLR staff in reviewing the final draft of the rule revisions and bring them back to the Commission in May.

After a public phone meeting of the three Commission members, some comments and recommendations were provided for the full Commission’s consideration. [\(See Attachment E\)](#) The DEMLR staff’s draft rules along with those comments and recommendations were presented to the Sedimentation Control Commission at their May 29, 2019, meeting. The Commission voted to publish the Notice of Text of the rules and the Regulatory Impact Analysis in the North Carolina Register, for public comment and voted to authorize the appointment of Interim Director Smith to serve as hearing officer. [*From the May 29<sup>th</sup> meeting minutes*: “A motion was made by Mr. Bivens to move to authorize the appointment of Mr. Smith, Interim Director of the DEMLR, to serve as hearing officer for any public hearing to be held at a date determined by the publication of rules, and in conformance with the required schedule for rulemaking. Dr. Havlin made a second. The motion passed. “] Because the rules had not been shown to elicit any adversarial comments, the DEMLR staff decided to hold only one public hearing, in Raleigh.

In accordance with the North Carolina General Statutes, public notice of the hearing was published in the July 15, 2019, edition of the North Carolina Register. In addition, information on the proposed rule changes were sent to approximately 400 citizens who have requested to be placed on one of two North Carolina mail lists for those interested in sediment control matters. A press release was sent to several media outlets and posted on the Department of Environmental Quality’s social media accounts.

A public hearing was held in Raleigh on August 1, 2019. A transcript of the public hearing and all comments made at the hearing are included in Attachment B.



# HEARING OFFICER'S REPORT

## ATTACHMENT B

**TRANSCRIPT OF PUBLIC HEARING**  
For  
**Proposed Revisions to Sedimentation Rules**  
August 1, 2019  
Ground Floor Hearing Room, Archdale Building

### ATTENDEES

Daniel Smith, Division Director of DEMLR,  
Commission-Designated Hearing Officer  
Boyd DeVane, DEMLR staff  
Julie Coco, DEMLR staff  
Taylor Young, DEMLR staff  
Rebecca Copa, DEMLR staff  
Christy Simmons, DEQ staff  
Sarah Bilski, DEQ staff  
Emily Sutton, Haw Riverkeeper, Haw River Assembly  
Tirril Moore, Southern Environmental Law Center  
Susan White, Water Resources Research Institute  
Forrest English, Pamlico-Tar River Keeper, Sound Rivers  
Grady McCallie,, NC Conservation Network (Call-in)  
Heather Jacobs Deck, Sound Rivers (Call-in)

### WELCOME AND INTRODUCTION BY DIRECTOR DANIEL SMITH

“Good afternoon. I would like to call this public hearing to order and for the record, it is 3:03 p.m. Please silence all mobile devices as a courtesy to the speakers and other guests. My name is Danny Smith, and I am the Director of the Division of Energy, Mineral and Land Resources, which is often referred to as DEMLR, located in the Department of Environmental Quality. I have been designated by the Sedimentation Control Commission as the hearing officer for this rulemaking hearing. Next to me is Mr. Boyd DeVane, rules re-adoption coordinator, who will be making a presentation about the proposed rules changes in a few minutes.

In accordance with the North Carolina General Statutes, public notice of this hearing was published in the July 15, 2019, edition of the North Carolina Register. In addition, information on the proposed rule changes were sent to approximately 400 citizens who have requested to be placed on one of two North Carolina mail lists for those interested in sediment control matters. A press release was sent to several media outlets and posted on our Department’s social media accounts.

For this legislatively-mandated review of the Sedimentation Control Rules, the DEMLR staff have gone to exceptional measures to involve a variety of stakeholders in the rules re-adoption process. We started in 2016 with the formation of a 19-member workgroup to review, in considerable detail, each of the 39 rules that comprise the state sedimentation control rules in Chapter 04 of Title 15A of the NC Administrative Code. If you’ll look on the slide, you will see some of the interest groups that worked with our staff to revise the existing rules. Over a two-year period, this group met 11 times here in this room to carefully consider each rule, including whether that rule should be modified,

# HEARING OFFICER'S REPORT

remain as it is, or repealed. They made recommendations that formed the basis for the proposed changes.

The purpose of today's hearing is to seek public comments on these proposed changes to the Sediment Commission rules. In a few minutes, you will be offered the opportunity to present your comments on the proposals. If you have noted a desire to speak on the sign-in sheets, and have a copy of your remarks, we would appreciate receiving a copy as you come up to speak. If you do not wish to speak, but would like to submit written comments, you may do so by sending your comments to us by September 13th.

We also would like any comments that you have on the Regulatory Impact Analysis of the environmental and economic impact of the proposed rule changes. We have copies at the back of the room. Mr. DeVane will talk more about that document in his presentation.

A written report of this hearing will be prepared that will include all relevant comments, questions and discussions. For this reason, this hearing is being recorded. Written comments received by September 13, 2019, will be included as part of the record. Based on all of the public comments received, I will make a recommendation to the Sedimentation Control Commission. The Commission will then make its decision by considering my recommendation, reviewing the written record, and taking into account any concerns of other Commission members. The Commission may adopt parts or all of my recommendations or modify them as desired. I should note that if the Commission wishes to adopt changes that differ substantially from what has been published in the North Carolina Register and proposed today, it must first publish the text of the proposed changes and accept comments on the new text.

I'd now like to recognize Dr. Susan White, who serves as Chair of the Sedimentation Control Commission. Thank you, Dr. White, for your exceptional contribution to the work of the Commission.

Mr. Boyd DeVane will now give a brief presentation on the proposed changes to the rules.”

## **PRESENTATION BY STAFF MEMBER BOYD DEVANE**

“Thank you Director Smith. Did everyone get a copy of the rules? The public notice that was published in the NC Register indicated that the Commission had asked that several specific items be brought to the public’s attention and requested that consideration be given to those issues during the public review process. The Commission added three or four additional items to the first page of the public hearing information. These items were discussed at the most recent Sediment Commission meeting and the Commission asked that they be given special consideration in the public notice. Most of the changes were administrative in nature with removals of items that were obsolete, and revision of rules to improve clarity. In the final analysis of the rule changes, the staff has concluded that the changes might have a theoretical impact but would have minor if any impact on the operation of the state or locally delegated programs. I will now go over some of the ones that are more important or more noteworthy.

In the first one in rule 04B .0107, the Commission has proposed removing the 15 day working day requirement and specified that the 90 calendar days applied only to permanent ground cover. The existing rule has not been of any benefit for the past eight years. The existing rule requires that groundcover must be applied within 15 working days after completion of construction and up to 90 days if there are unsuitable conditions for working on the site. For the 15 days, the Construction General Permit, that was modified in 2011 basically made this requirement obsolete. The staff did,

# HEARING OFFICER'S REPORT

however, decide to use the 90-day requirement for permanent stabilization, so in that rule we left in the 90 days. What we were saying is that sometimes it takes months or even an entire growing season to get permanent stabilization in place and that was okay as long as you are required to keep temporary stabilization in place during that time as has been required by the construction general permit. You see on the slide the latest construction general permit that was signed by Director Smith in April of this year. This version is basically the same as the one that we prepared in 2011. The table on this slide shows the ground stabilization requirements of the 2019 NPDES. It requires stabilization in seven calendar days on perimeter dikes in High Quality Waters and in areas with greater than three to one slope and 14 days on flat areas or areas with 3:1 or less slope. These provisions are already in place and have been in place since 2011. What the groundcover or stabilization means is that on slopes like those in this slide, groundcover must be applied within seven days from stopping of any action on that site. There is groundcover required there in seven days and on flat areas, groundcover is required within 14 days. When we talk about groundcover we are talking about the application of what is generally wheat straw. On the site on this slide, I visited about three weeks after the wheat straw and seed was applied and it was a rainy day and as you see, there was no sediment in the runoff. Down the street there was another site where they did not apply wheat straw and all that day mud was flowing into the street.

Now, another proposed change in the rules relates to calculating the size of sediment basins. What we have proposed in .04B .0124(c) is to replace the 70% of the 40-micron particle size criterion with some specific sizing and design criteria that must be used. Although the specifications of the 70% of the 40-micron particle size had been assumed for years to be an appropriately-protective criterion for High Quality Waters, determining if it was actually achieving this level and documenting it in the field was practically impossible for the regulating authority. There was also little data existing on whether the criterion was actually protecting the resource. So, it was concluded by the Rules Review Workgroup that including specific basin design criteria was a more reliable predictor of the treatment level that would be achieved.

Rule .0124(d) of the proposed changes also provides some written criteria to obtain a deviation from the specified design requirements. In some cases, especially roads in mountain areas, they just can't meet those design requirements but we have an option here that the deviations can be allowed if it can be shown that the substitute process provides equal or better protection of the affected water quality. Another proposed change in rule .0124 is in paragraph (e). The existing provisions for ground cover within 15 working days or 60 calendar days, is proposed for deletion as it applies to high quality waters zones. The addition of the seven and 14 day requirements made in the 2011 Construction General Permit made the 15-day stipulation obsolete in the rule. In rule 04B .0131, the self-inspection rule, most of the changes were made to make this rule more consistent with the state statutes and to clarify some areas of uncertainty. Sentences were added to provide clarity on issues such as significant deviation from a plan. We believe these changes will add clarity to the original intent of the rule and provide more uniformity in implementation.

In rule 04E .0201, Petitions for Rulemaking, it was determined by the Department of Environmental Quality attorney that the Commission needed to modify its rules and explain how a citizen or a regulated entity could request that the Commission add, delete, or modify a rule. Rule .0201 was rewritten to provide those specifics. The language provided is similar to the language from other agencies and carries out the requirement specified in the administrative procedure act. What happened is that our attorney noticed that the Administrative Procedure Act required the agency to adopt a specific rule providing this information. We are proposing revising rules .0501, .0502 and .0503 on Declaratory Rulings. Any person who feels that they have been adversely affected by the

# HEARING OFFICER'S REPORT

implementation of a statute or a rule may seek a ruling from the Commission on their grievance. The aggrieved party must seek a Declaratory Ruling from the sediment Commission. The Rules Review Workgroup and the staff of the Attorney General's office both decided that a major update was needed. The procedures for requesting a declaratory ruling was rewritten to more clearly describe the process. The specifics of the contents of the request are more consistent with the statutes and easier to understand. Those are the major changes and you can see all of the changes in the document that has been provided on line and is available here today.

Another thing that we are asking for public comments on is the Regulatory Impact Analysis. A few years ago a North Carolina executive order was issued that required all agencies that propose to adopt repeal or amend a rule do an analysis of the cost and impacts of the change. If there was a potential for a significant impact, then a fiscal note would be required. Therefore, for all rule change proposals the agency prepares a Regulatory Impact Analysis. If it was determined that a significant impact would be expected, then a fiscal note would be required to be prepared. We prepared a Regulatory Impact Analysis and copies of that are on the back table in this room. It was approved by the Office of State Budget and Management. The Regulatory Impact Analysis had concluded for state government that the impact would be minor, for local government as well as for the federal government. The document also concluded that any impact on regulated entities would be minor. Therefore, it was concluded that there was no substantial economic impact. We are asking the public to review the Analysis and provide the Commission with your thoughts on the document.

This concludes my presentation of the proposed rule changes and we look forward to your input both now and in written form later, up to September 13<sup>th</sup>. Now I will turn it back over to director Smith”

## **DIRECTOR SMITH REMARKS:**

“Comments will now be accepted. I will call on speakers in the order that you registered for this hearing. When your name is called, please come up to the podium, and state your name and any affiliation with an organization you may be representing. If you have them, please provide a copy of your written remarks to Mr. DeVane. I may question speakers, if necessary, to clarify or learn more about matters as they arise. After all the registered speakers have had an opportunity to comment, anyone who did not register to speak or desires additional time to speak will have the opportunity to comment. Please remember that Division staff will be available after the hearing to address any additional questions or comments that you may have.”

## **CITIZEN COMMENTS PROVIDED AT THE HEARING**

*Director Smith introduced the first speaker, Emily Sutton.*

“Hello, my name is Emily Sutton and I am the Haw River Keeper of Haw River Assembly. We represent over a thousand members in the Haw River watershed. We have serious concerns about the sediment rules revision and the tendency to cater to regulated entities rather than to meet requirements to protect our waters. By volume, sediment is the most significant pollutant of the surface waters of our state. These rules give regulatory agencies the abilities to target that pollutant and alleviate further problems as our state develops in the current rule revisions will not accomplish that goal. In regards to the rule changes, I agree that clarity is important on time requirements for groundstabilization. However, the increase from 15 days to 90 days will allow continuous erosion and soil loss into our surface waters. The 15 days' stabilization requirement has been enforced in many other states and with careful attention to slopes and stabilization, it can be done effectively. This rule change caters to regulated entities while overlooking impacts to our surface waters.

# HEARING OFFICER'S REPORT

The rule change to allow an increase in velocity prior to development by 10% will worsen our eroded banks downstream of development. Currently, many developments causing increase in the stream velocity are not held accountable for cluster development and an inability to isolate one development that is responsible. This has led to significant increase in stream erosion and steep banks, making the creeks inaccessible. This destroys aquatic habitat dependent on rocks, riffles, and roots.

Another major component that has been left out of this rule revision is the requirement to treat turbid waters before being discharged with PAM. There is no financial or technological barrier to treating construction stormwater with PAM and these compounds have had significant success in settling sediment from surface waters and preventing turbidity issues downstream. This is a major concern for us in the Haw River basin where we are seeing an increase in development. With one major development of nearly 8000 acres along the Haw River, we have already seen degraded water quality in the Haven Creek wetlands. Jordan Lake is inundated with sediment and nutrients during each rain event. Protections upstream and on all waters across the state would limit further degradation to those waters. Many of our surface waters in the state are impaired due to poor macro invertebrate life. Sampling data from our Department of Water Resources suggest that these trends are related to increase in development and sprawl. Development can be done in a way that does not jeopardize the health of our streams. Strong protections to prevent increases in turbidity and velocities through these rule revisions are critical to meet requirements under the Clean Water Act and prevent surface water degradation. Thank you.”

*Director Smith introduced Forest English.*

“Hello, I am Forest English, the Tar River keeper with Sound Rivers. We have worked to protect the Tar River watershed, as well as the Neuse. As Emily noted, turbidity increases is an ongoing problem across many places in North Carolina. While obviously, agency funding is a significant issue which we hope to address in the future, they need to be backed up by strong rules to allow the agency to do their work. So, we are going to submit more detailed comments at a later date but I have a couple of things to flag briefly now. In Rule .0107, the timeline for ground cover changes, I think we should be sticking with a temporary ground cover within seven days and things in place for permanent cover by 15 days. I think there is no particular reason to expand that. Obviously, permanent groundcover is going to take maintenance and work throughout a longer period but I think it’s totally reasonable, having done that work in the past, that those measures can be in place within 15 days and provide better protection of our waterways. Regarding the permit and timing also, I believe that the permit should reference the rule not the other way around. I think it would be a cleaner solution and provide more permanent changes. In .0124, for meeting the design standards for high quality waters, I don’t see any reason not to use flocculants like Pam which would increase assurances to actually improve water quality, reducing turbidity and sedimentation discharged to surface waters. In .0129, I just wanted to flag that the original control plans are set to expire after a three-year period. I think site conditions in neighboring properties and things like that could actually change in the three-year period, and we would certainly like to see that shortened so that those plans reflect more current site conditions at the time they are implemented. And, the last thing that I wanted to flag under .0501 through .0503, the Declaratory Ruling section, I think public notice for a lot of those actions should be required in some fashion. And, that’s all I’ve got but we will send you some more details at a later date.”

## **DIRECTOR SMITH’S CLOSING REMARKS**

“If there is anyone who did not register to speak or who has spoken and desires additional time to speak, we will be happy to have you provide those comments now. Are there any additional

# HEARING OFFICER'S REPORT

comments? (*None were offered.*) I would like to thank all of you for your attendance and interest today. The public hearing on this subject is now closed. The hearing record will remain open until September 13<sup>th</sup>, 2019. This means that any time between today and the 13<sup>th</sup> of September, anyone can submit written comments to me, in care of Mr. DeVane, and these written comments will be made part of the public record. As I mentioned earlier, after the comment period ends on September 13<sup>th</sup>, I will review those comments and make a recommendation to the Sedimentation Control Commission. At the November 4, 2019 Commission meeting, the Commission will be asked to make a decision regarding the proposed rules. If adopted, the proposed effective date for the final rules pursuant to this hearing process is January 1, 2020. Thank you for your interest in these rule changes and for coming to this hearing. This hearing is adjourned and for the record, it is 3:30p.m.”

# HEARING OFFICER'S REPORT

## ATTACHMENT C

### Regulatory Impact Analysis

for

#### Proposed Rule Revisions for 15A NCAC Chapter 04, Sedimentation Control

05/14/19 Version published in the Register

Revised on 10/20/19

(Changes made after publication in the NC Register are highlighted in yellow.)

#### A. General Information

**Agency:** Department of Environmental Quality, Division of Energy, Mineral, and Land Resources (DEMLR)

**Commission:** N.C. Sedimentation Control Commission

**Chapter Title:** Sedimentation Control

**Citation:** 15A NCAC Chapter 04 (See the latest proposed rules in the APPENDIX of the Hearing Officer Report.)

**Rulemaking Authority:** GS 113A-54; 113A-56

#### **Staff Contacts:**

Boyd DeVane, Assistant Dam Safety Engineer [Boyd.devane@ncdenr.gov](mailto:Boyd.devane@ncdenr.gov)  
(919-707-9212)

Julie Coco, State Sediment Engineer [Julie.coco@ncdenr.gov](mailto:Julie.coco@ncdenr.gov)  
(919-707-9201)

Toby Vinson, Land Quality Section Chief [Toby.vinson@ncdenr.gov](mailto:Toby.vinson@ncdenr.gov)  
(919-707-9201)

#### **Impact Summary:**

State government:	Minor
Local government:	None
Federal government:	None
Regulated entities	Minor
Substantial economic impact:	No

#### B. **Purpose of the Sedimentation Control Rules in Chapter 04**

The purpose of the Sedimentation Control Rules, codified in 15A NCAC Chapter 04, are to help implement the Sedimentation Pollution Control Act of 1973 (The Act). In the Act, the North Carolina state legislature recognized that “sedimentation of streams, lakes and other waters of this State constitutes a major pollution problem” and control of this pollution “is deemed vital to the public interest and necessary to public health and welfare.” The rules in Chapter 04 were adopted in 1976 and have been modified several times during those 43 years. The rules established a program where a state, or delegated local agency, requires erosion and sedimentation control plans be prepared for all development sites with over one acre of

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disturbed soils. These plans include measures to control erosion, like seeding areas for ground cover, and those that cause sediment to be settled, like silt fences and detention basins.

## C. Purpose of Revising the Sedimentation Control Rules in Chapter 04

S.L. 2013-413 requires a periodic review of all of the rules used by state agencies. The DEMLR staff has initiated the review of the rules of the Sedimentation Control Commission codified in Title 15A, Chapter 04 of the North Carolina Administrative Code. An ad hoc committee, the Sediment Rules Review Workgroup, met 10 times over a one-year period to review and update the rules of Chapter 04. The draft rules were sent to the staff of the Rules Review Commission for a “pre-review.” As a result of the comments provided, the DEMLR staff, with the help of the Workgroup, proposed numerous additional changes. The DEMLR staff does not believe that any of the proposed rule modifications will alter the daily operations of the sedimentation control program. There were 41 rules reviewed in Chapter 04: eleven are proposed to be deleted with many of those due to statutory changes in the NC Administrative Procedure Act (APA). A majority of the changes were administrative in nature or involved revising language to add clarity for the understanding of the rule requirements.

## D. More-Notable Rule Change Proposals

As discussed in Section C above, most of the changes are administrative in nature or to provide clarity in the presentation of the requirements and do not affect the operation of the State or local sediment control programs. A summary of the impacts of each rule change is provided in the **Table E** below. Although no changes are expected to have any programmatic impacts on the sedimentation control programs in this state, there are six listed below, that deal with the substance of a rule and deserve greater attention.

- 1. In rule 04B .0107, removed “15 working days” and specified that the “90 calendar days” applied only to “permanent” ground cover.** This seems like a substantive change but in reality, very little, if any, changes in program implementation will be felt. The change in rule 04B .0107 addresses concern voiced by regulated entities that in many instances, permanent stabilization cannot be achieved within the 15 working days or 90 calendar days specified in the existing rule. Although we believe that most approving authorities have allowed extensions of time, for example, where a permanent seed will not be viable until later in a season, the proposed changes to the rules specifically allow for that extended time. Therefore, we do not see any fiscal impact of the rule change nor do we see any adverse environmental impact from the change. In fact, the added reference to the federal Construction General Permit in this rule which clearly specifies 7 or 14-day temporary ground cover, provides assurance that was not previously specified.
- 2. In rule 15A NCAC 04B .0124, Design Standards in Sensitive Watersheds, the existing provisions for requiring basin sizing based on settling the “70% of the 40-micron particle” in HQW zones was replaced by specific sizing and design criteria.** Although the specifications of “70% of the 40-micron particle” had been considered for years to be an appropriately protective criterion for High Quality Waters, determining if it would be achieved in the field was practically impossible for an approving authority or the plan design technician. It was concluded by the Rules Review Workgroup that codifying the basin design criteria would provide a more reliable predictor of the treatment level that would be achieved. Having the specific criteria for how to design a sediment basin codified in the rules will not affect very many who design these basins. Almost all designers already use this design criterion



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which has been available in DEMLR's Erosion and Sediment Control Planning and Design Manual for years. Designers use this criterion because it provides greater certainty for getting plan approvals and often shortens the time needed for approval. DEMLR estimates the difference in cost between the current specifications and the proposed design criterion to be minor.

The proposed rules also provide written criteria to get a deviation from the specified criteria. Although data on how many alternative basin designs have been approved is not available, staff estimate the number of designs using the standard criteria in the Manual vastly outnumber designs that use alternative criteria. Although we don't have any estimate how many alternative designs have been approved in the past, we do not anticipate any major differences in costs. There is no cheap or easy short-cut to achieve erosion control on a site. Therefore, we would consider the economic impact of the rule change as minor.

3. **In rule 15A NCAC 04B .0124, Design Standards in Sensitive Watersheds, removed "15 working days or 60 calendar days."** The provisions for ground cover within "15 working days or 60 calendar days" was removed as applied to HQW zones. The rule wording seems to state that these requirements were "pursuant G.S. 113A-57(3)." G.S. 113A-57(3) only allows the Commission to adopt rules. Also, the statute applies to the application of final ground cover which as explained in #1 above, has also been confusing and not implemented for final ground without exception as the rule seems to specify. We do not see any fiscal impact of the rule change nor do we see any adverse environmental impact from the change. In fact, the added reference to the federal Construction General Permit in the rules, which clearly specifies 7 or 14-day temporary ground cover, within 7 or 14 days, provides assurance that was not previously specified.
4. **Rule 15A NCAC 04B .0131 was rewritten for clarity.** Most of the changes made were to make the rule more consistent with the state statutes and to clarify some areas of uncertainty. Sentences were added to provide clarity on issues such as "significant deviation" from a plan. Sentences were also added to explain that "visual verification" was allowed in some practices and measurement was required for others. These changes were made for clarity and should not have any noticeable effect on the techniques applied. However, it has been reported that some local governments have been requiring field measurements for silt fences, which was not required by most local governments or by the DEMLR. Because some local agencies may voluntarily change their ordinances to comply with this rule clarification, there could be some additional, one-time costs to the agencies. However, any local government can enforce a more-stringent requirement than the minimum provided on the state level.
5. **15A NCAC 04E .0201 ~~PETITIONS FOR RULEMAKING~~ PETITION FORM AND CONTENT OF PETITION**  
Late in the preparation of draft rule changes, it was determined that the Commission should adopt a rule with details on submitting and adopting petitions for rulemaking as required by the Administrative Procedure Act (APA). Rule 04E .0201 was rewritten to provide those specifics.

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Paragraph 04E.0201(b) is all information that an individual seeking a petition for a ruling would reasonably expect to provide and should not create significant additional workload or time investments for the petitioner.

Paragraph 04E .0201(c) of the proposed rule lists information that the petitioner may provide in support of a rulemaking petition. Because the petitioner is not required to provide this information, the rule change will not result in any additional costs or benefits.

The DEMLR staff in providing assistance to the Commission has always had some expense considering petitions for rulemaking and the modifications made by this rule are envisioned by the statute and are not unusual for Declaratory Ruling Requests in this state. Also, the time spent by staff on petitions is already factored into their salaries, and no additional staff will need to be hired. Any additional workload is expected to be minor because rule petitions are not frequent.

**6. 15A NCAC 04E .0502, PROCEDURE FOR REQUESTING DECLARATORY RULINGS.** It was determined that an updated, more detailed procedure for requesting a declaratory ruling was needed. There was discussion of options for third-party interventions and public notice for requests for intervention. The version of rule 15A NCAC 04E .0502 approved by the Sediment Commission on 5/29/19 noted the possibility for third-party intervention.

**7. 15A NCAC 04E .0503 DISPOSITION OF REQUEST** The version of rule 15A NCAC 04E .0503 approved by the Sedimentation Commission on 5/29/19 provided more detailed procedures for when the Commission receives a request for a declaratory ruling.

## **E. Table of All Proposed Rule Changes and Regulatory Impacts**

<b>Rules With Proposed Changes</b> ( <del>cross-out</del> = recommended deletion.)	<b>Action</b>	<b>Impact of Action</b>
15A NCAC 04A .0101	Updated DEMLR office addresses.	No regulatory impact
15A NCAC 04A .0105 DEFINITIONS	Added a definition of "The Act"  Added definition of "Approving Authority"  Modified definition of "Lake or Natural Watercourse"  Modified definition of "Person who violates."  Eliminated definition of "Phase of Grading"	Administrative in nature. No regulatory impact.  Done for rule clarity. No regulatory impact.  Done for rule clarity. No regulatory impact.  Term was incompatible with the statute. No regulatory impact.  Done for rule clarity. No regulatory impact.

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	Modified definition of “Velocity.”	Definition was confusing. No regulatory impact.
15A NCAC 04B .0105 PROTECTION OF PROPERTY	Removed the unenforceable and “aspirational” modifier “all reasonable.”	Done for rule clarity. No regulatory impact.
15A NCAC 04B .0106 BASIC EROSION <u>AND</u> <u>SEDIMENTATION</u> CONTROL <u>PLAN</u> OBJECTIVES	Removed and/or replaced some vague terminology.	No regulatory impact.
15A NCAC 04B .0107 MANDATORY STANDARDS FOR LAND- DISTURBING ACTIVITY	Removed “15 working days” and clarified that the 90 calendar days applied only to “permanent” ground cover.  Added a reference to the Construction General Permit.	Because of the more-stringent federal stormwater requirements, the 15 working days in the rule had not been used for years. Although it seems like a relaxation in the rules, it should have no effect on environmental protection. For practical purposes, final stabilization on some sites cannot be achieved within the 15 days and maintaining the temporary ground cover will provide adequate protection until the final stabilization is complete. There should be no adverse environmental impact.  Done to provide information to the regulated public to refer them to these separate requirements. The General Permit is not implemented or enforced through these rules: no regulatory impact.
15A NCAC 04B .0108 DESIGN AND PERFORMANCE STANDARD	Revised language for storm event calculations, including acceptance of different methodologies.	Done in response to RRC staff comments to provide clarity. No regulatory impact.
15A NCAC 04B .0109 STORMWATER OUTLET PROTECTION	Removed the “aspirational” statement regarding “Acceptable Management Measures.”  Clarified “sinuous channels” language.	Done in response to RRC staff comments to provide clarity. No regulatory impact.  No regulatory impact.

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Rules With Proposed Changes	Action	Impact of Action
15A NCAC 04B .0110 BORROW AND WASTE AREAS	Made minor grammar corrections.	No regulatory impact.
15A NCAC 04B .0111 ACCESS AND HAUL ROADS	Revised wording for clarity	Done in response to RRC staff comments. No regulatory impact.
15A NCAC 04B .0112 OPERATIONS IN LAKES OR NATURAL WATERCOURSES	Initially proposed deleting the rule. However the Commission voted keeping it as it is presently codified.	No regulatory impact.
15A NCAC 04B .0113 RESPONSIBILITY FOR MAINTENANCE	Eliminated the unclear adjective “necessary” and made minor format changes.	Done in response to RRC staff comments. No regulatory impact.
15A NCAC 04B .0115 ADDITIONAL MEASURES	Made revisions for clarity and removed unclear adjective “necessary.”	Done in response to RRC staff comments. No regulatory impact.
15A NCAC 04B .0118 APPROVAL OF PLANS	Made changes to clarify the requirement that an approving agency must act within 30 days of receipt of a plan.  Removed provisions for approval with “performance reservations,” which was not provided in the statutes and a statement on “rights to a contested case” and other provisions deemed inconsistent with the APA. (Administrative. Procedure Act)	Done in response to RRC staff comments. No regulatory impact.  Done in response to RRC staff comments. No regulatory impact.
15A NCAC 04B .0120 <del>INSPECTIONS AND</del> INVESTIGATIONS	Two paragraphs related to staff inspections were deleted because wording in the statutes made them unnecessary. A statement on “preconstruction conferences” was rewritten to make it consistent with the statute.	The two paragraphs were removed in response to RRC staff comments about repeating statutory requirements in rules. The language change related to conferences was made because the RRC staff indicated that the agency did not have authority to regulate who received “preconstruction conferences.” No regulatory impact.

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Rules With Proposed Changes	Action	Impact of Action
<p>15A NCAC 04B .0124 DESIGN STANDARDS IN SENSITIVE WATERSHEDS</p>	<p>Wording changes were made in the references to the NRCS Handbook 630 and options for substituting other criteria for runoff calculations. They could appear to be a reduction in flexibility for the plan designer although we don't expect any regulatory impact from the change.</p> <p>In paragraph (c), the existing provisions for requiring basin sizing based on "70% of the 40-micron particle" in HQW zones was replaced by specific sizing and design criteria</p> <p>Paragraph (d) was inserted to allow substitutions to the specific criteria assigned in paragraph (c).</p> <p>In paragraph (e), the provision for ground cover within "15 working days or 60 calendar days" was removed as applied to HQW zones.</p>	<p>Done in response to RRC staff comments. The provisions in the rule were very vague and needed clarification.</p> <p>It was concluded that the "40-micron" criteria had little if any effect on basin sizing and the guidance that is proposed for adoption has been used in most projects and is very clear. It is possible that for some projects, the flexibility in the existing processes allowed greater choice in E&amp;SC control practices. However, there is no evidence that the alternative controls provided any savings and therefor the projected impacts of the rule changes are considered minor.</p> <p>The flexibility included in Paragraph (d) does help the project applicant but it must provide "equal or more effective" level of treatment so the change should not adversely affect the environment.</p> <p>Because of the federal stormwater permit, the ground cover requirements had no application to existing control requirements. Those conditions had not affected ground cover for over 8 years.</p>
<p>15A NCAC 04B .0125 BUFFER ZONE REQUIREMENTS</p>	<p>Several changes were made to address administrative comments made by the RRC staff. These provided better-written rules but did not result</p>	<p>Done in response to RRC staff comments. No regulatory impact.</p>

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	in any substantive changes in rule implementation.	
15A NCAC 04B .0126 <del>PLAN REVIEW APPLICATION</del> FEE	Several changes were made for administrative purposes or to eliminate outdated provisions.	Done for clarity, no regulatory impact.
15A NCAC 04B .0127 PLAN APPROVAL CERTIFICATE	Several changes were made for administrative purposes or to eliminate outdated provisions.	Done for clarity, no regulatory impact.
15A NCAC 04B .0129 EROSION CONTROL PLAN EXPIRATION DATE	Only one minor change was made.	Done for clarity, no regulatory impact.
15A NCAC 04B .0130 EMERGENCIES	A few minor administrative changes were made.	No regulatory impact.
15A NCAC 04B .0131 SELF-INSPECTIONS	<p>Much of the text of the rule was rewritten. Most of the changes made were to make the rule more consistent with the statutes and the existing federal stormwater permit. Sentences were added to provide clarity on issues such as “significant deviation” from a plan. Sentences were also added to explain that “visual verification” was allowed in some practices and measurement was required for others.</p> <p>Added a reference to the NCG01 General Permit requirements.</p>	<p>These changes were made for clarity and should not have any effect on the sedimentation and erosion control techniques applied. An issue related to measurement of silt fences was specifically addressed. It had been reported that some local governments have been requiring field measurements for silt fences, which was not required by most local governments or the DEMLR. Since local governments can still have more-stringent requirements, this change is not mandatory and the impact negligible.</p> <p>Reference to General Permit added for informational purposes to refer the regulated community to these separate requirements. The General Permit is not implemented or enforced through these rules: no regulatory impact.</p>
15A NCAC 04B .0132 DESIGN STDS FOR UPPER NEUSE	Made minor changes to a referenced federal document.	No regulatory impact

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15A NCAC 04C .0103 WHO MAY ASSESS	No changes proposed.	No regulatory impact
15A NCAC 04C .0106 CRITERIA	Minor changes to reference G.S. 113A-64.	No regulatory impact
<b>Rules With Proposed Changes</b>	<b>Action</b>	<b>Impact of Action</b>
15A NCAC 04C .0107 PROCEDURES: NOTICES	Minor change. Removed a vague term "reasonable particularity."	No regulatory impact
<del>15A NCAC 04C .0108 REQUESTS FOR ADMINISTRATIVE HEARING</del>	Recommend removing the rule. The DEMLR staff noted that it repeats the statute and is not needed.	No regulatory impact
<del>15A NCAC 04C .0110 ADMINISTRATIVE HEARING</del>	Recommend removing the rule. The RRC staff noted that it repeats the statute, is misleading, and is not necessary.	No regulatory impact
<del>15A NCAC 04C .0111 FURTHER REMEDIES</del>	Recommend removing the rule. The RRC staff noted that it is confusing and is not necessary.	No regulatory impact
<del>15A NCAC 04D .0102 MODEL ORDINANCE</del>	Recommend removing the rule. The RRC staff noted that it is confusing and is not necessary.	No regulatory impact
<del>15A NCAC 04E .0101 GENERAL PURPOSE</del>	Recommend removing the rule. The DEMLR staff noted that it is confusing and not necessary.	No regulatory impact
<del>15A NCAC 04E .0102 DEFINITIONS</del>	Recommend removing the rule. The definitions are provided in the Act or in rule 04B .0105 and are not needed here.	No regulatory impact
15A NCAC 04E .0104 COPIES OF RULES: INSPECTIONS	Minor administrative changes.	No regulatory impact
15A NCAC 04E .0201 <u>PETITIONS FOR RULEMAKING FORM AND CONTENT OF PETITION</u>	The existing rules 04E .0201 was rewritten at the advice of Department counsel. The existing rule was outdated and inaccurate. The procedures are more-clearly outlined in the revised rule and should help the petitioner and the	The rules do not add any specifications that are not supported by statute or that are considered unusual for a regulatory agency in the Department.

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	Commission in dealing with rulemaking petitions.	
Rules With Proposed Changes	Action	Impact of Action
<del>15A NCAC 04E .0203</del> DISPOSITION OF PETITIONS	The proposed rule changes have the rule deleted and rule 04E .0201 is modified to include both form and content and disposition of petitions for rulemaking.	No regulatory impact. The requirements relating to addressing petitions are consistent with the statute and similar to those that other agencies in the Department use.
<del>15A NCAC 04E .0403</del> WRITTEN SUBMISSIONS	Because these procedures are specified in NCGS 150B, the DEQ attorney recommended that this rule be repealed.	The statute dictates how written requests for rulemaking hearings are handled and the rule is not needed. The rule is outdated and eliminating it should have no regulatory impact.
<del>15A NCAC 04E .0405</del> STATEMENT OF REASONS FOR DECISION	Because these procedures are specified in NCGS 150B, the DEQ attorney recommended that this rule be repealed.	No regulatory impact.
<del>15A NCAC 04E .0406</del> RECORD OF PROCEEDINGS	Because these procedures are specified in NCGS 150B, the RRC staff said that the rule could be repealed.	No regulatory impact.
<del>15A NCAC 04E .0501</del> SUBJECTS OF DECLARATORY RULINGS	Because a part of this rule is stated in NCGS 150B and the RRC staff said that the second sentence of the rule is unnecessary, the rule is proposed for repeal.	No regulatory impact.
15A NCAC 04E .0502 SUBMISSION OF REQUEST FOR RULING	Minor changes were made for clarity.	No regulatory impact.
15A NCAC 04E .0503 DISPOSITION OF REQUESTS FOR DECLARATORY RULING	The rule is proposed for a total revision. Most of the changes are in updating the rule wording to be consistent with the Administrative Procedure Act (APA) and will not make any significant change in the way the Commission addresses declaratory rulings. However, there has been a	The proposal is expected to have only minor regulatory impacts. The statutes dictate a set timeframe for the Commission to make a decision on a request for a declaratory ruling. (The following two sentences, that have now been crossed-out, were in the RIA that was given



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	<p>proposal to change the rule to specify that third-party interventions are allowed in a request for declaratory rulings.</p> <p>At the 5/29/19 SCC meeting, a revised version of Rule .0503 was presented by Attorney General Counsel Mary Crawley for consideration. The Commission voted to replace the initially-proposed changes to the rule with the one that had been given to the Commission on the 29<sup>th</sup>.</p>	<p><i>to the Commission for their 5/29/19 meeting. However, since rule .0503 was changed at that meeting, the RIA is updated by deleting them and adding the final two sentences in the discussion for this Rule.)</i></p> <p><i>Adding the option for third-party interventions will require the Division staff to notice the request on their webpage in case an outside party wants to join in the request for a ruling. This will require some additional, although minor, effort by the staff which can easily be covered by existing staff.</i></p> <p><i>Since the 5/29/19 Commission-approved changes to the proposed rules do not require a notice to be published within certain time limits, the impact to DEQ is less than the original proposal. The impact is still expected to be minor.</i></p>
<p><del>15A NCAC 04E .0504</del> RECORD OF DECISION</p>	<p>Based on the RRC staff comments about the role of the Department's retention schedule and the absence of a statutory mandate to include this information, it was recommended that this rule be deleted.</p>	<p>Since the Director's office will still be required to store all Records of Decision, even though theoretically, this rule deletion could change the timing of storage in the Division offices, the cost to the Division, and the availability of the records, should not be affected.</p>

**F. What Will Be the Fiscal Costs Resulting from the Rule Changes?**

- **To State government: No increase in costs.** None of the changes will require additional expenditures to state government agencies
- **To local governments: No increase in costs.** Some local governments may want to make changes to their local government ordinances to include the improved, sediment and erosion control language. However, none will be required to any changes.
- **To federal government: No increase in costs.** Some activities of the federal government are required to develop an erosion and sediment control plan but the changes in the rules will not require additional expenditures on any project.
- **Private entities: No increase in costs.** None of the proposed rule changes will add any additional requirements from what is required at this time.

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## **G. Potential Fiscal Benefits of Revised Rules**

The proposed rules do not include any explicit changes to provide a benefit to the regulator or the regulated development entities. However, many out-of-date rules have been updated, made more clear and in many cases deleted. These changes should result in less time spent by personnel trying to comply with or implement the erosion and sedimentation rules. There are over 50 local governments with responsibility for implementing the rules and having the more-clear and more, legally-accurate rules should result in efficiencies in governing and savings for the municipal governments. Similar time savings should be seen by the thousands of individuals in the state trying to understand and abide by the Chapter 04 rules.

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## ATTACHMENT D *Rule as sent to public notice*

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*Julian Mann III, Director*  
*Molly Masich, Codifier of Rules*  
*Dana McGhee, Publications Coordinator*  
*Lindsay Woy, Editorial Assistant*  
*Cathy Mathews-Thayer, Editorial Assistant*

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## PROPOSED RULES

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(b) Driver to Possess Permit. Any person applying for and receiving this permit shall require the driver or operator of any truck, tractor, or trailer to have in his ~~the driver's possession a copy of the permit together with the bills of lading of the spirituous liquors being transported disclosing the consignor and consignee of the spirituous liquors being transported, all the documents required pursuant to G.S. 18B-1115(d)(3) and (4).~~

(c) Commission to Provide Forms. Blank forms for the bond will be supplied by the Commission upon request.

(d) A local board owning and operating trucks for the purpose of transporting spirituous liquors from a local warehouse to the various local stores within an a local ABC system shall not be required to give bond and shall be permitted to operate its trucks without a common carrier permit.

*Authority G.S. 18B-100; 18B-207; 18B-1115.*

### 14B NCAC 15A .1304 DIRECT SHIPMENTS

(a) A "direct shipment" means a shipment from the distiller or a warehouse of spirituous liquors, or from an antique spirituous liquor ~~seller of antique spirituous liquor, seller,~~ directly to a local board without passing through the State ABC warehouse.

(b) Direct shipments shall be allowed by the Commission in emergency situations when the State ABC warehouse is closed due to natural or other disasters or in a situation where for transportation reasons it is mutually advantageous to local boards, the Commission, or the operator of the State ABC warehouse.

(c) Direct shipment shall have prior written approval from the Commission. Merchandise authorized to be shipped by direct shipment shall be consigned by the State ABC warehouse to the distiller's account in care of the local board. The local board shall acknowledge receipt of the merchandise on the shipping documents and forward them to the Contractor for processing through the accounting system as though the merchandise were shipped from the State ABC warehouse.

(d) Upon compliance with 14B NCAC 15A .1403 and obtaining a transportation permit as required by G.S. 18B-403, an antique spirituous liquor seller may deliver antique spirituous liquor listed in its inventory directly to the local board that placed the special order for that inventory.

*Authority G.S. 18B-100; 18B-204; 18B-207; 18B-403; 18B-701(a)(1).*

### SECTION .1400 - PURCHASE OF ALCOHOLIC BEVERAGES BY LOCAL BOARDS

#### 14B NCAC 15A .1404 COMMEMORATIVE BOTTLES

The Commission shall approve local boards' orders and sales of specially designed bottles commemorating particular events, occasions, or ceremonies, provided advertising borne upon commemorative bottles is limited to commemorating historical events of the local board and non-profit, charitable ~~enterprises (i.e., ordinary profit-oriented businesses enterprises. Other businesses, other than the distiller, are not permitted to advertise themselves or their products via commemorative bottles.) bottles.~~

*Authority G.S. 18B-100; 18B-207; 18B-807.*

#### 14B NCAC 15A .1405 RECORDS REQUIRED

(a) A record of all orders, receipts, invoices, and payments shall be maintained by local boards and be available for inspection by any representative of the Commission at any reasonable time.

(b) ~~More specifically, local~~ Local boards shall retain the following records as follows: for the length of time specified in this Subparagraph:

- (1) sales report (~~until until the annual audit completed;~~ is completed.)
- (2) warehouse report (~~one year;~~ for one year.)
- (3) daily store report (~~until until the annual audit completed;~~ is completed.)
- (4) stock difference report (~~three years;~~ for three years.)
- (5) receiving report (~~until until the annual audit completed;~~ is completed.)
- (6) clerk's daily sales and cash report (~~until until the annual audit completed;~~ is completed, and paid invoices (three years); for three years.)
- (7)

(c) In addition, local boards shall retain the Loss and Damage Claim records and required records related to the sale of mixed beverages for a period of three years.

*Authority G.S. 18B-100; 18B-203(a)(4); 18B-205; 18B-207; 18B-702(s), (u).*

#### 14B NCAC 15A .1406 PAYMENT

(a) Local boards shall remit full payment of the ~~contractor's~~ Contractor's statement of account pertaining to the bailment fee within 30 days of receipt of the statement.

(b) Local boards shall remit full payment of the ~~contractor's~~ Contractor's statement of account pertaining to the bailment surcharge within ~~45 30~~ days of receipt of the statement.

(c) Local boards shall remit full payment of the distiller's invoice within 30 days of delivery of the liquor.

(d) Local boards that obtain spirituous liquor from another local board pursuant to 14B NCAC 15A .1301(e) shall remit full payment within 15 days of the transaction.

*Authority G.S. 18B-100; G.S. 18B-207; 18B-702(u).*

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## TITLE 15A – DEPARTMENT OF ENVIRONMENTAL QUALITY

*Notice is hereby given in accordance with G.S. 150B-21.2 and G.S. 150B-21.3A(c)(2)g. that the Sedimentation Control Commission intends to amend the rules cited as 15A NCAC 04A .0101; 04E .0104, .0201, .0501-.0503, repeal the rules cited as 15A NCAC 04C .0110, .0111; 04E .0101, .0102, .0203, .0403, .0405, .0406, .0504, readopt with substantive changes the rules cited as 15A NCAC 04A .0105; 04B .0105-.0110, .0112, .0115, .0118, .0120, .0124-.0127, .0129-.0132; 04C .0103, .0106, .0107, readopt without substantive changes the rules cited as 15A NCAC 04B .0111, .0113, and repeal through readoption the rules cited as 15A NCAC 04C .0108 and 04D .0102.*

*Pursuant to G.S. 150B-21.2(c)(1), the text of the rule(s) proposed for readoption without substantive changes are not required to be*

# HEARING OFFICER'S REPORT

## PROPOSED RULES

published. The text of the rules are available on the OAH website: <http://reports.oah.state.nc.us/ncac.asp>.

Link to agency website pursuant to G.S. 150B-19.1(c): <https://deq.nc.gov/permits-regulations/rules-regulations/proposed-rules>

Proposed Effective Date: January 1, 2020

### Public Hearing:

Date: August 1, 2019

Time: 3:00 p.m.

Location: Ground floor conference room, Archdale Building, 512 N. Salisbury Street, Raleigh, NC 27604

Reason for Proposed Action: S.L. 2013-413 requires a periodic review of all rules used by state agencies. The Division of Energy, Mineral and Land Resources and the Sedimentation Control Commission have initiated the review of the rules codified in 15A NCAC 04. Most of the proposed rule changes are administrative in nature and add clarity to the rules.

In addition to the proposed changes, the Sedimentation Control Commission is requesting comments on:

Rule 04A .0105(29), regarding 'bank full flows', for example changing to 'bank flow height' or 'bank flow elevation'.

Rule 04B .0107, regarding permanent ground cover considerations for restraining erosion, for example including 7-14 day temporary ground cover.

Rule 04B .0124, regarding potential for future measurement for meeting design standards for turbidity, for example adding flocculants or settling efficiencies standards and maintaining the existing, 40-micron requirement until changes are made.

Comments may be submitted to: *Boyd DeVane*, NC Division of Energy, Mineral and Land Resources, 1612 Mail Service Center, Raleigh, NC 27699-1612; phone (919) 707-9212; email [boyd.devane@ncdenr.gov](mailto:boyd.devane@ncdenr.gov)

Comment period ends: September 13, 2019

**Procedure for Subjecting a Proposed Rule to Legislative Review:** If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact. Does any rule or combination of rules in this notice create an economic impact? Check all that apply.

- State funds affected  
 Local funds affected  
 Substantial economic impact ( $\geq$  \$1,000,000)  
 Approved by OSBM  
 No fiscal note required

## CHAPTER 04 - SEDIMENTATION CONTROL

### SUBCHAPTER 04A - SEDIMENTATION CONTROL COMMISSION ORGANIZATION

#### 15A NCAC 04A .0101 OFFICES OF THE SEDIMENTATION CONTROL COMMISSION

Persons may ~~write or visit~~ **contact** the North Carolina Sedimentation Control Commission offices at the Archdale Building, 512 N. Salisbury Street, P.O. Box 27687, Raleigh, North Carolina 27611. Persons may ~~write or visit~~ **contact** regional offices of the Commission's staff in the Division of Energy, Mineral, and Land Resources at the following locations:

- (1) **Interchange Building**  
50 Woodfin Place  
P.O. Box 270  
Asheville, N.C. 28801  
Asheville Regional Office  
2090 U.S. 70 Hwy.  
Swannanoa, NC 28778-8211
- (2) 585 Waightown Street  
Winston-Salem Regional Office  
450 W. Hanes Mill Rd., Suite 300  
Winston-Salem, N.C. ~~27103~~ 27105
- (3) 919 North Main Street  
Mooresville Regional Office  
610 E. Center Avenue, Suite 301  
P.O. Box 050  
Mooresville, N.C. 28115 - 28115-2578
- (4) Raleigh Regional Office  
3800 Barrett Drive  
P.O. Box 27687  
Raleigh, N.C. 27611 27609-7222
- (5) **Wachovia Building**  
Suite 714  
Fayetteville Regional Office  
225 Green Street, Suite 714  
Fayetteville, N.C. ~~28304~~ 28301-5095
- (6) 1424 Carolina Avenue  
Washington Regional Office  
1424 Carolina Ave.  
P.O. Box 2188 Washington, N.C. ~~27880~~ 27889-3314
- (7) Wilmington Regional Office  
127 Cardinal Dr., Ext.  
Wilmington, N.C. 28405-3845

Authority G.S. 143B-298; 113A-54.

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### 15A NCAC 04A .0105 DEFINITIONS

In addition to the terms defined in G.S. 113A-52, as used in this Chapter, the following terms definitions shall apply in this Chapter and have these meanings:

- (1) "Accelerated Erosion" means any increase over the rate of natural erosion, as a result of land-disturbing activities.
- (2) "Act" means the Sedimentation Pollution Control Act of 1973 in G.S. 113A-50 et seq.
- ~~(3)(4)~~ "Adequate Erosion Control ~~Measure, Structure, or Device~~ Devices or Structures" means one ~~which that~~ controls the soil material within the land area under responsible control of the person conducting the land-disturbing activity.
- (4) "Approving Authority" means the Division or other state or a local government agency that has been delegated erosion and sedimentation plan review responsibilities in accordance with the provisions of the Act.
- ~~(5)(14)~~ "Being Conducted" means a land-disturbing activity has been initiated and ~~permanent stabilization of the site has not been completed. not deemed complete.~~
- ~~(6)(3)~~ "Borrow" means fill material ~~which that~~ is required for on-site construction ~~and that~~ is obtained from other locations.
- ~~(7)(4)~~ "Buffer Zone" means the strip of land adjacent to a lake or natural watercourse.
- ~~(8)(37)~~ "Coastal ~~counties~~ Counties" means the following counties: Beaufort, Bertie, Brunswick, Camden, Carteret, Chowan, Craven, Currituck, Dare, Gates, Hertford, Hyde, New Hanover, Onslow, Pamlico, Pasquotank, Pender, Perquimans, ~~Tyrrell~~ Tyrrell, and Washington.
- ~~(9)(23)~~ "Completion of Construction or Development" means that no further land-disturbing activity is required on a phase of a project except that which is necessary for establishing a permanent ground cover.
- ~~(10)(26)~~ "Director" means the Director of the Division of Energy, Mineral, and Land Resources of the Department of ~~Environment, Health, and Natural Resources.~~ Environmental Quality.
- ~~(11)(22)~~ "Discharge ~~Point~~ Point or Point of Discharge" means that point where runoff leaves a tract of ~~land.~~ land where a land-disturbing activity has occurred or enters a lake or natural watercourse.
- (12) "Division" or "DEMLR" means the Division of Energy, Mineral, and Land Resources of the Department of Environmental Quality.
- ~~(13)(18)~~ "Energy Dissipator" means a structure or a shaped channel section with mechanical armoring placed at the outlet of pipes or conduits to receive and break down the energy from high velocity flow.
- ~~(14)(5)~~ "Ground Cover" means any natural vegetative growth or other material ~~which that~~ renders the soil surface stable against accelerated erosion.
- ~~(15)(24)~~ "High Quality Waters" means those ~~classified as such described in 15A NCAC 02B .0101(a)(5).~~ General Procedures, which is incorporated herein by reference to include further amendments, 02B .0224 which is herein incorporated by reference including subsequent amendments and editions, and may be accessed at no cost at <http://reports.oah.state.nc.us/pdf>.
- (16) "High Quality Water (HQW) Zones" means areas in the Coastal Counties that are within 575 feet of High Quality Waters and for the remainder of the state State areas that are within one mile of and drain to HQW's.
- (17) "Lake or Natural Watercourse" means any stream, river, brook, swamp, sound, bay, creek, run, branch, canal, waterway, estuary, and any ~~reservoir, lake lake, or pond pond, natural or impounded in which sediment may be moved or carried in suspension, and which could be damaged by accumulation of sediment.~~
- ~~(18)(7)~~ "Natural Erosion" means erosion "erosion" as defined in G.S. 113A-52(5) under natural environmental conditions undisturbed by man.
- ~~(19)(9)~~ "Person Conducting the Land-Disturbing Land-Disturbing Activity" means any person who may be held responsible for a violation unless ~~expressly~~ provided otherwise by the Sedimentation Pollution Control Act of 1973, ~~G.S. 113A-50 to 66, the North Carolina Administrative Code, Title 15A Chapter 4 the Act, the Rules of this Chapter, or any order or local ordinance adopted pursuant to these Rules or the Act.~~ Sedimentation Pollution Control Act of 1973, G.S. 113A-50 to 69.
- ~~(2)~~ "~~Person Who Violates~~" ~~as used in G.S. 113A-64, means:~~
  - ~~(a)~~ the developer or other person who has or holds himself or herself out as having financial or operational control over the land-disturbing activity; or
  - ~~(b)~~ the landowner or person in possession or control of the land when he has directly or indirectly allowed the land-disturbing activity or has directly benefitted from it or he has failed to comply with any provision of the Sedimentation Pollution Control Act of 1973, G.S. 113A-50 to 66, the North Carolina Administrative Code, Title 15A, Chapter 4, or any order or local ordinance adopted pursuant to the Sedimentation Pollution Control Act of 1973, G.S. 113A-50 to 66, as imposes a duty upon him.
- (20) "Person Who Violates", or "Violator", as used in G.S. 113A-64 means: any landowner or

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other person who has financial or operational control over the land-disturbing activity, or who has directly or indirectly allowed the activity, and who has failed to comply with any provision of the Act, the Rules of this Chapter, or any order or local ordinance adopted pursuant to the Act, as it imposes a duty upon that person

- (10) ~~"Phase of Grading" means one of two types of grading, rough or fine.~~
- (21)(14) "Plan" means an erosion and sedimentation control plan.
- (22)(13) "Sedimentation" means the process by which sediment resulting from accelerated erosion has been or is being transported off the site of the land-disturbing activity or into a lake or natural watercourse.
- (23)(10) "Storm Drainage Facilities" means the system of inlets, conduits, channels, ditches and appurtenances that serve to collect and convey stormwater through and from a given drainage area.
- (24)(13) "Storm Water "Stormwater Runoff" means the direct runoff of water resulting from precipitation in any form.
- (25)(20) "Ten Year Storm" means ~~the surface runoff resulting from a rainfall of an intensity that, based on historical data, is expected~~ predicted to be equaled or exceeded, on the average, once in 10 years, and of a duration ~~that which~~ will produce the maximum peak rate of runoff ~~for~~ from the watershed of interest under average antecedent wetness conditions.
- (26)(24) "Twenty-five Year Storm" Storm or Q25" means ~~the surface runoff resulting from a rainfall of an intensity expected that, based on historical data, is predicted~~ to be equaled or exceeded, on the average, once in 25 years, and of a duration that will produce the maximum peak rate of runoff from the watershed of interest under average antecedent wetness conditions.
- (27)(15) "Uncovered" means ~~the removal of~~ having had ground cover removed from, on, or above the soil surface.
- (28)(16) "Undertaken" means the initiating of any activity or phase of activity which activity or phase of activity that results or will result in a change in the ground cover or topography of a tract of land.
- (29)(21) "Velocity" means the average velocity speed of flow through ~~a the cross-section~~ cross-section perpendicular to the direction of the main channel at the peak flow of the storm of interest, ~~interest but not exceeding bank full flows.~~ The cross section of the main channel shall be that area defined by the geometry of the channel plus the area of flow below the flood height defined by vertical lines at the main channel

~~banks. Overland flows are not to be included for the purpose of computing velocity of flow.~~

- (30)(17) "Waste" means surplus materials resulting from on-site construction and to be disposed ~~of at~~ other locations offsite.

Authority G.S. 113A-52; 113A-54.

## SUBCHAPTER 04B - EROSION AND SEDIMENT CONTROL

### 15A NCAC 04B .0105 PROTECTION OF PROPERTY

Persons conducting land-disturbing activity shall ~~take~~ reasonable follow the measures specified in this Chapter and the Act to protect all public and private property from sedimentation and erosion damage caused by ~~each~~ the land-disturbing activities.

Authority G.S. ~~113A-54(b);~~ 113A-54(d)(2).

### 15A NCAC 04B .0106 BASIC EROSION AND SEDIMENTATION CONTROL PLAN OBJECTIVES

~~(a)~~ An erosion and sedimentation control plan developed pursuant to this Chapter shall ~~may be disapproved pursuant to 15A NCAC 04B-0118 if the plan fails to be designed~~ to address the following, following control objectives:

- (1) Identify Critical ~~Areas;~~ Areas. Identify site areas subject to severe accelerated erosion, and off-site areas especially vulnerable to damage from erosion and sedimentation.
- (2) Limit Exposed Areas. Limit the size of the area exposed at any one time.
- (3) Limit Time of Exposure. Limit exposure to the shortest feasible time. ~~time specified in G.S. 113A-57, the rules of this Chapter, or as directed by the approving authority.~~
- (4) Control Surface Water. Control surface water run-off originating upgrade of exposed areas in order to reduce erosion and sediment loss during exposure.
- (5) Control Sedimentation. All land-disturbing activity ~~is to~~ shall be planned and conducted so as to prevent off-site sedimentation damage.
- (6) Manage Storm Water Stormwater Runoff. ~~When the increased Plans shall be designed so that any increase in velocity of storm-water stormwater runoff resulting from a land-disturbing activity causes will not result in accelerated erosion of the receiving watercourse; stormwater conveyance within the project boundary, or at the point of discharge, plans shall include measures to control the velocity to the point of discharge.~~

~~(b) When deemed necessary by the approving authority a preconstruction conference may be required.~~

Authority G.S. 113A-54(d)(4); 113A-54.1.

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### 15A NCAC 04B .0107 MANDATORY STANDARDS FOR LAND-DISTURBING ACTIVITY

(a) No land-disturbing activity subject to these Rules shall be undertaken except in accordance with ~~the G.S. 113A-57, 113A-57 and the standards established in these Rules,~~

~~(b) Pursuant to G.S. 113A-57(3), Unless where otherwise specified in the Act or the rules of this Chapter, provisions for a permanent ground cover sufficient to restrain erosion ~~must~~ shall be accomplished within 15 working days or 90 calendar days following completion of construction or development, development, whichever period is shorter, except as provided in 15A NCAC 04B .0124(a).~~

~~(c) Pursuant to G.S. 113A-57(4) and 113A-54(d)(4), an erosion and sedimentation control plan ~~must~~ shall be both filed and approved by the agency having jurisdiction: approving authority.~~

~~(d) All individuals that obtain a State or locally-approved erosion and sedimentation control plan that disturb one acre or more of land, are required by the U.S. Environmental Protection Agency to obtain coverage under the N.C. Department of Environmental Quality Construction General Permit No. NCG010000 (NCG01). The requirements in NCG01 for temporary or permanent ground cover may differ from the ground cover, or stabilization, requirements in this Chapter. It is the responsibility of the person conducting the land-disturbing activity to ensure compliance with the NCG01.~~

*Authority G.S. 113A-54(d)(4); 113A-57; 113A-57(3)(4).*

### 15A NCAC 04B .0108 DESIGN AND PERFORMANCE STANDARD

~~Except where otherwise specified in this Chapter, erosion Erosion and sedimentation control measures, structures, and devices shall be so planned, designed, and constructed to provide protection from the run off of that a 10-year 10-year storm that which produces the maximum peak rate of run off as calculated according to procedures in the United States Department of Agriculture Agriculture, Soil Natural Resources Conservation Service's "National Engineering Field Manual Handbook 630 (Handbook 630)" This document is herein incorporated by reference including subsequent amendments and editions, and may be accessed at no cost at <https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/water/manage/hydrology/?cid=stelordb1043063> or according to procedures adopted by any other agency of this state or the United States or any generally recognized organization or association. Other methodologies can be used if based on generally accepted engineering standards that are shown to be equivalent to or improved over the procedures in Handbook 630. The approving authority shall determine acceptability of an alternative~~

~~methodology based upon a showing that the runoff model used was based on observed data in agreement with the predictive model.~~

*Authority G.S. 113A-54.*

### 15A NCAC 04B .0109 STORM WATER STORMWATER OUTLET DISCHARGE POINT PROTECTION

(a) Persons shall ~~conduct~~ provide a design for the land disturbing activity so that the post-construction post-construction velocity of the ~~ten-year 10-year storm run-off run-off~~ in the receiving watercourse stormwater conveyance ~~to to, and including~~, the discharge ~~point point~~, does not exceed the greater of:

- (1) the velocity established by the table in Paragraph (d) of this Rule; or
- (2) the projected velocity of the ten-year 10-year storm ~~run-off runoff~~ in the receiving watercourse stormwater conveyance prior to development.

If projected conditions in Subparagraphs (1) or (2) of this Paragraph cannot be met, then the receiving watercourse stormwater conveyance ~~to to, and including~~ including, the discharge point shall be designed and constructed to withstand the expected velocity anywhere the velocity exceeds the "prior to development" velocity prior to development by ten percent.

~~(b) Acceptable Management Measures. The commission recognizes that management of storm water run off to control downstream erosion constitutes a developing technology and consequently invites the use of innovative techniques shown to produce successful results. Alternatives include: The Commission shall allow alternative measures to control downstream erosion, including:~~

- (1) ~~Compensate compensation~~ for increased run-off runoff from areas rendered impervious by designing measures to promote infiltration. Infiltration; or
- (2) ~~Avoid avoiding~~ increases in storm-water stormwater discharge velocities by using vegetated or roughened swales and waterways in place of closed drains and paved sections; or
- (3) Provide providing energy dissipators at storm drainage outlets to reduce flow velocities to the discharge points; points; or
- (4) ~~Protect protecting~~ watercourses stormwater conveyances subject to accelerated erosion by improving cross sections ~~and/or~~ or providing erosion-resistant lining.



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(c) ~~Exceptions.~~ This Rule shall not apply when ~~storm water~~ ~~stormwater~~ discharge velocities will not create an erosion problem ~~result~~ ~~accelerated erosion~~ in the receiving ~~watercourse.~~ ~~stormwater conveyance or discharge point.~~

(d) The following table sets maximum permissible velocity for storm water discharges:

Material	Maximum Permissible Velocities <del>for</del> in feet and Meters Per Second*	
	F.P.S.	M.P.S.
Fine Sand (noncolloidal)	2.5	.8
Sandy Loam (noncolloidal)	2.5	.8
Silt Loam (noncolloidal)	3.0	.9
Ordinary Firm Loam	3.5	1.1
Fine Gravel	5.0	1.5
Stiff Clay (very colloidal)	5.0	1.5
Graded, Loam to Cobbles (noncolloidal)	5.0	1.5
Graded, Silt to Cobbles (colloidal)	5.5	1.7
Alluvial Silts (noncolloidal)	3.5	1.1
Alluvial Silts (colloidal)	5.0	1.5
Coarse Gravel (noncolloidal)	6.0	1.8
Cobbles and Shingles	5.5	1.7
Shales and Hard Pans	6.0	1.8

Source: Adapted from recommendations by Special Committee on Irrigation Research, American Society of Civil Engineers, 1926, for channels with straight alignment. For sinuous channels, multiply allowable velocity by 0.95 for slightly sinuous, by 0.9 for moderately sinuous channels, and by 0.8 for highly sinuous channels.

\* For sinuous channels, multiply allowable velocity by 0.95 for slightly sinuous, by 0.9 for moderately sinuous channels, and by 0.8 for highly sinuous channels. Source: Adapted from recommendations by Special Committee on Irrigation Research, American Society of Civil Engineers, 1926, for channels with straight alignment.

Authority G.S. 113A-54(b)(c).

**15A NCAC 04B .0110 BORROW AND WASTE AREAS**  
If the same person conducts the ~~land-disturbing~~ ~~land-disturbing~~ activity and any related borrow or waste activity, the related borrow or waste activity shall constitute part of the ~~land-disturbing~~ ~~land-disturbing~~ activity, unless the borrow or waste activity is regulated under the Mining Act of 1971, G.S. 74, Article 7, or is a landfill regulated by the Division of Solid Waste Management. If the ~~land-disturbing~~ ~~land-disturbing~~ activity and any related borrow or waste activity are not conducted by the same person, they shall be considered separate land-disturbing activities.

Authority G.S. 74-67; 113A-54(b); 130A-166.21.

**15A NCAC 04B .0111 ACCESS AND HAUL ROADS (READOPTION WITHOUT SUBSTANTIVE CHANGES)**

**15A NCAC 04B .0112 OPERATIONS IN LAKES OR NATURAL WATERCOURSES**  
~~Land-disturbing~~ ~~Land-disturbing~~ activity in connection with construction in, on, over, or under a lake or natural watercourse shall minimize the extent and duration of disruption of the stream channel. Where relocation of a stream forms an essential part of the proposed activity, the relocation shall minimize unnecessary changes in the stream flow characteristics.

Authority G.S. 113A-54.

**15A NCAC 04B .0113 RESPONSIBILITY FOR MAINTENANCE (READOPTION WITHOUT SUBSTANTIVE CHANGES)**

**15A NCAC 04B .0115 ADDITIONAL MEASURES**  
Whenever the ~~commission~~ ~~Commission~~ or a local government determines that ~~significant~~ ~~accelerated~~ erosion and sedimentation continues despite the installation of protective practices, the person conducting the ~~land-disturbing~~ ~~land-disturbing~~ activity ~~will be required to~~ and shall take additional protective ~~action~~ ~~to achieve compliance with the conditions specified in the Act or the rules of this Chapter.~~

Authority G.S. 113A-54(b); 113A-54.1(b).

**15A NCAC 04B .0118 APPROVAL OF PLANS**

(a) Persons conducting land-disturbing activity on a tract ~~which~~ that covers one or more acres shall file ~~three copies of~~ the erosion and sedimentation control plan with the local government having jurisdiction or with the Commission if no local government has ~~jurisdiction;~~ ~~jurisdiction.~~ ~~The approving agency shall act on the plan~~ at least 30 days ~~prior to beginning such activity and within receipt of the plan or the plan shall be deemed approved,~~ ~~shall keep another A paper copy of the approved plan shall be kept on file at the job site.~~ After approving a plan, if the Commission or local government determines, either upon review of such plan or ~~on~~ ~~upon~~ inspection of the job site, that ~~a significant risk of~~

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~~accelerated erosion or off-site sedimentation exists; the plan is inadequate to meet the requirements of the Act and of this Chapter.~~ the Commission or local government shall require a revised plan. Pending the preparation of the revised plan, work shall cease or shall continue under conditions outlined by the appropriate authority.

(b) Commission Approval:

- (1) The Commission shall review plans for all land-disturbing activity over which the Commission has exclusive jurisdiction ~~by statute pursuant to G.S. 113A-56,~~ and all other land-disturbing activity ~~if where~~ no local government has jurisdiction.
- (2) The Commission shall complete its review of any completed plan within 30 days of receipt and shall notify the person submitting the plan in writing that it has been:
  - (A) ~~approved,~~ approved;
  - (B) approved with ~~modification,~~ ~~modification,~~ or;
  - (C) ~~approved~~ with performance ~~reservations,~~ or
  - (C)(D) disapproved.
- (3) The Commission's ~~disapproval,~~ approval with modification, or ~~performance reservations~~ ~~disapproval~~ of any proposed ~~plan,~~ plan shall entitle the person submitting the plan to an administrative hearing in accordance with the provisions of G.S. 150B-23. (This Section does not modify any other rights to a contested case hearing which may arise under G.S. 150B-23).
- (4) ~~Subparagraph (b)(2) of this Rule shall not apply to the approval or modification of plans reviewed by the Commission Appeals of local government decisions shall be conducted pursuant to G.S. 113A-61(c).~~
- (5) Any plan submitted for a land-disturbing activity for which an environmental document is required by the North Carolina Environmental Policy Act as set forth in Article 1 or G.S. 113 and the rules of this Department as set forth in 15A NCAC 01C shall be deemed incomplete until a complete ~~an~~ environmental document is available for review. The Commission shall promptly notify the person submitting the plan that the ~~30-day~~ 30-day time limit for review of the plan pursuant to Subparagraph ~~(b)(2)~~ (2) of this Rule Paragraph shall not begin until a complete ~~the~~ environmental document is available for review.

(c) ~~Erosion~~ An erosion and sedimentation control ~~plans may~~ plan shall also be disapproved unless they include ~~the application~~ includes an authorized statement of financial responsibility and ~~documentation of property ownership.~~ This statement shall be signed by the person financially responsible for the land-disturbing activity or his or her attorney in fact. The statement shall include the mailing and street addresses of the

principal place of business of the person financially responsible and of the owner of the land or their registered agents.

(d) Local Government Approval:

- (1) Local Governments administering erosion and sedimentation control programs shall develop and publish procedures for approval of plans. ~~Such The~~ procedures shall respect ~~follow~~ applicable laws, ordinances, and rules, and shall contain procedures for appeal consistent with the local government's organization and operations.
- (2) The ~~secretary~~ Secretary shall appoint ~~each~~ employee(s) ~~employees~~ of the Department as he or she deems necessary to consider appeals from the local government's final disapproval or modification of a plan. Within 30 days following receipt of notification of the appeal, such departmental employee shall complete the review and shall notify the local government and the person appealing the local government's decision that the plan should be approved, approved with modifications, ~~approved with~~ performance reservations, or disapproved.
- (3) If either the local government or the person submitting the plan disagrees with the decision reached by ~~an employee of the Department a~~ Departmental employee, then he or she may appeal the decision to the Commission by filing notice within 15 days with the Director of the Division of Energy, Mineral, and Land Resources. The ~~director~~ Director shall make the proposed erosion control plan and the records relating to the local government's and ~~departmental employees'~~ Departmental employee's review, available to an ~~appeals~~ review erosion and sedimentation control plan review committee consisting of three members of the Commission appointed by the chairman. Within 10 days following receipt of the notification of appeal, the ~~appeals~~ erosion and sedimentation control plan review committee shall notify the local government and the person submitting the plan of a place and time ~~for a~~ hearing for consideration of the ~~appeal,~~ appeal and shall afford both ~~Both~~ parties shall be given at least 15 days' notice of the hearing and an opportunity to present written or oral arguments. The ~~appeals~~ erosion and sedimentation plan review committee shall notify both parties of its decision concerning the approval, disapproval, or modification of the proposed plan within 30 days following ~~such the~~ hearing.

(e) The applicant's right under G.S. 113A-54.1(d) to appeal the Director's disapproval of an erosion control plan under G.S. 113A-54.1(c) gives rise to a right to a ~~contested case under G.S. 150B,~~ Article 3, an appeal to the Commission. An applicant desiring to appeal the ~~Director's~~ Commission's disapproval of an erosion control plan shall file with the Office of Administrative

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Hearings a contested case petition under G.S. 150B, Article 3. ~~The general time limitation for filing a petition, and the commencement of the time limitation, shall be as set out in G.S. 150B-22(a). Contested cases shall be conducted under the procedures of G.S. 150B, Article 3 and applicable rules of the Office of Administrative Hearings. The Commission shall make the final decision on any contested case under G.S. 150B-36.~~

Authority G.S. 113A-2; 113A-54; 113A-54.1; ~~113A-57; 113A-60(a); 113A-61(b); 113A-61(c); 150B, Article 3. 150B-22;~~

### 15A NCAC 04B .0120 INSPECTIONS AND INVESTIGATIONS

(a) The Commission, Department of ~~Environment, Health, and Natural Resources~~ Environmental Quality or local government may require written ~~statements~~, statements related to items ~~including but not limited to NOVs or Stop-Work orders~~ or the filing of reports under oath, ~~such as self-inspection or engineering/design reports, concerning land-disturbing land-disturbing activity.~~

(b) ~~Inspection of sites shall be carried out by the staff of Department of Environment, Health, and Natural Resources or other qualified persons authorized by the Commission or Department of Environment, Health, and Natural Resources as necessary to carry out its duties under the Act.~~

(c) ~~No person shall refuse entry or access to any representative of the Commission or any representative of a local government who requests entry for purposes of inspection.~~

(b) ~~When a preconstruction conference is proposed pursuant to G.S. 113A-51, it shall be specified on the plans.~~

Authority G.S. ~~113A-51; 113A-54(b); 113A-58; 113A-61.1.~~

### 15A NCAC 04B .0124 DESIGN STANDARDS IN SENSITIVE WATERSHEDS

(a) Uncovered areas in HQW zones shall be limited ~~at any time~~ to a maximum total area ~~of 20 acres~~ within the boundaries of the ~~tract~~ ~~tract of 20 acres~~. Only ~~the portion of~~ the land-disturbing activity within a HQW zone shall be governed by this Rule. Larger areas may be uncovered within the boundaries of the tract with the written approval of the Director. ~~Director upon providing engineering justification with a construction sequence that considers phasing, limiting exposure, weekly submitted self-inspection reports and more-conservative design than the 25-year storm. The Director may also include other conditions as necessary based on specific site conditions.~~

(b) Erosion and sedimentation control measures, structures, and devices within HQW zones shall be ~~so~~ planned, ~~designed~~ designed, and constructed to provide protection from the runoff of the ~~25-year~~ 25-year storm ~~which that~~ produces the maximum peak rate of runoff as calculated according to procedures in the United States Department of ~~Agricultural Soil Conservation~~ Agriculture, Natural Resources Conservation Service's "National Engineering Field ~~Manual Handbook 630~~ for Conservation Practices" ~~Practices~~, or according to procedures adopted by any other agency of this state or the United States or any generally recognized organization or association. ~~Other methodologies can be used if based on generally accepted engineering standards that are shown to be equivalent to or improved over the procedures in~~

~~Handbook 630. The Division shall determine acceptability of an alternative methodology based upon a showing that the runoff model used was based on observed data in agreement with the predictive model.~~

(c) ~~Sediment basins within HQW zones shall be designed and constructed such that the basin will have a settling efficiency of at least 70 percent for the 40 micron (0.04mm) size soil particle transported into the basin by the runoff of that two-year storm which produces the maximum peak rate of runoff as calculated according to procedures in the United States Department of Agriculture Soil Conservation Service's "National Engineering Field Manual for Conservation Practices" or according to procedures adopted by any other agency of this state or the United States or any generally recognized organization or association.~~

(c) ~~In order to provide for water quality protection in HQW Zones, sediment basins that discharge to those areas shall be designed and constructed to meet the following criteria:~~

- (1) ~~use a surface withdrawal mechanism, except when the basin drainage area is less than 1.0 acre;~~
- (2) ~~have a minimum of 1800 cubic feet of storage area per acre of disturbed area;~~
- (3) ~~have a minimum surface area of 325 square feet per cfs of  $Q_{24}$  peak inflow;~~
- (4) ~~have a minimum dewatering time of 48 hours; and~~
- (5) ~~incorporate 3 baffles, unless the basin is less than 20 feet in length, in which case 2 baffles are sufficient.~~

(d) ~~Upon a written request of the applicant, the Director may allow alternative design or control measures in lieu of meeting the conditions required in Subparagraphs (c)(2) through (c)(5) of this Rule if the applicant demonstrates that meeting all of those conditions will result in design or operational hardships and that the alternative measures will provide an equal or more effective level of erosion and sedimentation control on the site. Alternative measures may include, but are not limited to, quicker application of ground cover, use of sediment flocculants and use of enhanced ground cover practices.~~

(e) ~~Newly constructed open channels in HQW zones shall be designed and constructed with side slopes no steeper than two horizontal to one vertical if a vegetative cover is used for stabilization stabilization, unless soil conditions permit a steeper slope or where the slopes are stabilized by using mechanical devices, structural devices devices, or other forms of acceptable ditch ~~liners, liners proven effective and acceptable to the Division.~~~~

~~In any event, the The angle for side slopes shall be sufficient to restrain accelerated erosion.~~

(e) ~~Pursuant to G.S. 113A-57(2) provisions for a ground cover sufficient to restrain erosion must be provided for any portion of a land-disturbing activity in a HQW zone within 15 working days or 60 calendar days following completion of construction or development, whichever period is shorter.~~

Authority G.S. 113A-54(b); 113A-54(c)(1).

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### 15A NCAC 04B .0125 BUFFER ZONE REQUIREMENTS

(a) ~~Unless otherwise provided, the~~ The width of a buffer zone is ~~shall be~~ measured from the edge of the water to the nearest edge of the disturbed area, with the 25 percent of the strip nearer the land-disturbing activity containing natural or artificial means of confining visible siltation.

(b) ~~The 25-foot~~ A 25-foot minimum width ~~width for an~~ undisturbed buffer zone ~~shall be protected~~ adjacent to designated trout waters ~~designated by the Environmental Management Commission. The 25-foot width buffer zone~~ shall be measured horizontally from the top of the ~~bank. To the nearest area of disturbance.~~

(c) Where a temporary and minimal disturbance is permitted as an exception by G.S. 113A-57(1), land-disturbing activities in the buffer zone adjacent to designated trout waters shall be limited to a maximum of ten percent of the total length of the buffer zone within the tract ~~to be~~ and distributed such that there is not more than 100 linear feet of disturbance in each 1000 linear feet of buffer zone. ~~Larger areas may be disturbed with the written approval of the Director.~~

(d) ~~If, upon a written request of the applicant, the Director may allow a larger area of disturbance than provided in Paragraph (c) of this Rule if the applicant demonstrates that additional measures will be utilized that will achieve an equally effective or more effective level of erosion and sedimentation control than would be achieved had the specifications prescribed in Paragraph (c) of this Rule been followed.~~

(e) ~~No land-disturbing activity shall be undertaken within a buffer zone adjacent to designated trout waters that is predicted by the plan approving authority to will cause adverse stream temperature fluctuations, violations in these waters as set forth in 15A NCAC 2B 02B .0211 "Fresh Surface Water Classification and Standards", Standards in these for Class C waters, which is hereby incorporated by reference including subsequent amendments and editions. Copies of 15A NCAC 02B .0211 are available at <https://www.oah.state.nc.us/> at no cost.~~

Authority G.S. 113A-54(b); 113A-54(c)(1); 113A-57(1).

### 15A NCAC 04B .0126 PLAN REVIEW APPLICATION FEE

(a) ~~A~~ The nonrefundable plan review processing application fee, in the amount ~~stated in Paragraph (c) of this Rule, provided in G.S. 113A-54.2~~ shall be paid when an erosion and sedimentation control plan is filed in accordance with ~~15A NCAC 04B .0118, Rule .0118 of this Section.~~

(b) Each plan shall be deemed incomplete until the ~~plan review processing application fee~~ is paid.

(c) ~~The plan review processing fee shall be based on the number of acres, or any part of an acre, of disturbed land shown on the plan.~~

(d) ~~No plan review processing application fee shall be charged for review of a revised plan unless the revised plan contains an increase in the number of acres to be disturbed. If the revised plan contains an increase in the number of acres to be disturbed, the plan review processing fee to be charged shall be the amount stated in Paragraph (c) of the Rule specified in G.S. 113A-54.2 for each additional acre (or any part thereof) disturbed.~~

(e) ~~The nonrefundable plan review processing fee shall be fifty dollars (\$50.00) for each acre or part of any acre of disturbed land.~~

(f) ~~Payment of the plan review processing fee may be by check or money order made payable to the "N.C. Department of Environment and Natural Resources". The payment shall refer to the erosion and sedimentation control plan.~~

Authority G.S. 113A-54; 113A-54.2.

### 15A NCAC 04B .0127 PLAN APPROVAL CERTIFICATE

(a) ~~Approval of a sedimentation and erosion control plan will be contained in a document called "Certificate of Plan Approval" to be issued by the Commission.~~

(b) ~~The Certificate of Plan Approval must be posted at the primary entrance of the job site before construction begins.~~

(c) ~~The Commission shall issue a "Certificate of Approval" or a similar written documentation of approval that is provided to the applicant by hard copy or electronic submittal. Before construction begins, that documentation shall be posted at the primary entrance of the job site or other location that is easily observable to the public and inspectors.~~

(d) ~~No person may initiate a land-disturbing activity until notifying the agency approving authority that issued the Plan Approval of the date that the land-disturbing activity will begin.~~

Authority G.S. 113A-54(b).

### 15A NCAC 04B .0129 EROSION CONTROL PLAN EXPIRATION DATE

~~An erosion control plan shall expire three years following the date of approval, if If no land-disturbing activity has been undertaken, undertaken on a site, an erosion control plan shall expire three years following the date of approval.~~

Authority G.S. 113A-54.1(a).

### 15A NCAC 04B .0130 EMERGENCIES

Any person who conducts an emergency repair essential to protect human ~~life, life that results in constitutes~~ a land-disturbing activity within the meaning of G.S. 113A-52(6) and these Rules: ~~Rules shall take the following actions:~~

- (1) ~~shall notify the Commission of such the repair as soon as reasonably possible, but in no event later than five working days after the emergency ends; has ended, as determined by the Division, and~~
- (2) ~~shall take all reasonable measures to protect all public and private property from damage caused by the each repair as soon as reasonably possible, but in no event later than 15 working days after the emergency ends.~~

Authority G.S. 113A-52.01(4); 113A-54(b).

### 15A NCAC 04B .0131 SELF-INSPECTIONS

~~Where inspections are required by G.S. 113A-54.1(c), the following apply:~~

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- (1) The person who performs the inspection shall make a record of the site inspection by documenting the following items:
- (a) ~~all of the erosion and sedimentation control measures, practices and devices, as called for in a construction sequence consistent with the approved erosion and sedimentation control plan, including but not limited to sedimentation control basins, sedimentation traps, sedimentation ponds, rock dams, temporary diversions, temporary slope drains, rock check dams, sediment fence or barriers, all forms of inlet protection, storm drainage facilities, energy dissipaters, and stabilization methods of open channels, have initially been installed and do not significantly deviate (as defined in Sub-item (1)(a) of this Rule) from the locations, dimensions and relative elevations shown on the approved erosion and sedimentation plan. Such documentation shall be accomplished by initialing and dating each measure or practice shown on a copy of the approved erosion and sedimentation control plan or by completing, dating and signing an inspection report that lists each measure, practice or device shown on the approved erosion and sedimentation control plan. This documentation is required only upon the initial installation of the erosion and sedimentation control measures, practices and devices as set forth by the approved erosion and sedimentation control plan or if the measures, practices and devices are modified after initial installation;~~
  - (b) ~~the completion of any phase of grading for all graded slopes and fills shown on the approved erosion and sedimentation control plan, specifically noting the location and condition of the graded slopes and fills. Such documentation shall be accomplished by initialing and dating a copy of the approved erosion and sedimentation control plan or by completing, dating and signing an inspection report;~~
  - (c) ~~the location of temporary or permanent ground cover, and that the installation of the ground cover does not significantly deviate (as defined in Sub-item (1)(a) of this Rule) from the approved erosion and sedimentation control plan. Such documentation shall be accomplished by initialing and dating a copy of the approved erosion and sedimentation control plan or by completing, dating and signing an inspection report;~~
  - (d) ~~that maintenance and repair requirements for all temporary and permanent erosion and sedimentation control measures, practices and devices have been performed. Such documentation shall be accomplished by completing, dating and signing an inspection report (the general storm water permit monitoring form may be used to verify the maintenance and repair requirements); and~~
  - (e) ~~any significant deviations from the approved erosion and sedimentation control plan, corrective actions required to correct the deviation and completion of the corrective actions. Such documentation shall be accomplished by initialing and dating a copy of the approved erosion and sedimentation control plan or by completing, dating and signing an inspection report. A significant deviation means an omission, alteration or relocation of an erosion or sedimentation control measure that prevents the measure from performing as intended.~~
- (2) The documentation, whether on a copy of the approved erosion and sedimentation control plan or an inspection report, shall include the name, address, affiliation, telephone number, and signature of the person conducting the inspection and the date of the inspection. Any relevant licenses and certifications may also be included. Any documentation of inspections that occur on a copy of the approved erosion and sedimentation control plan shall occur on a single copy of the plan and that plan shall be made available on the site. Any inspection reports shall also be made available on the site. The inspection shall be performed during or after each of the following phases of a plan:
- (a) installation of perimeter erosion and sediment control measures;
  - (b) clearing and grubbing of existing ground cover;
  - (c) completion of any phase of grading of slopes or fills that requires provision of temporary or permanent ground cover pursuant to G.S. 113A-57(2);
  - (d) completion of storm drainage facilities;

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- ~~(e) completion of construction or development; and~~
- ~~(f) quarterly until the establishment of permanent ground cover sufficient to restrain erosion or until the financially responsible party has conveyed ownership or control of the tract of land for which the erosion and sedimentation control plan has been approved and the agency that approved the plan has been notified. If the financially responsible party has conveyed ownership or control of the tract of land for which the erosion and sedimentation control plan has been approved, the new owner or person in control shall conduct and document inspections quarterly until the establishment of permanent ground cover sufficient to restrain erosion.~~

All land-disturbing activities required to have an approved erosion and sedimentation control plan under G.S. 113A-54.1 shall conduct self-inspections for initial installation or modification of any erosion and sedimentation control devices and practices described in an approved plan. In addition, weekly and rain-event self-inspections are required by federal regulations that are implemented through the NPDES Construction General Permit No. NCG 010000.

- (1) For self-inspections required pursuant to G.S. 113A-54.1, the inspection shall be performed after the implementation of each of the following components of a project:
  - (a) installation of land-disturbance, perimeter erosion, and sediment control measures;
  - (b) clearing and grubbing of existing ground cover;
  - (c) installation of temporary or permanent sediment and erosion control measures to include ground cover pursuant to G.S. 113A-57(2);
  - (d) completion of storm drainage facilities;
  - (e) completion of all land-disturbing activity, construction or development, including permanent ground cover establishment and removal of all temporary measures; and
  - (f) transfer of ownership or control of the tract of land where the erosion and sedimentation control plan has been approved and work has begun. The new owner or person in control shall conduct and document inspections until the project is permanently stabilized as in Sub-Item (c) of this Item.
- (2) Documentation of self-inspections performed under Item (1) of this Rule shall include:

- (a) Verification of all erosion and sedimentation control measures, practices, and devices, as called for in the approved construction sequence and the erosion and sedimentation control plan;
- (b) The name, address, organization affiliation, telephone number, and signature of the person conducting the inspection and the date of the inspection shall be included, whether on a copy of the approved erosion and sedimentation control plan or an inspection report. A template for an example of an inspection and monitoring report is provided on the DEMIR website at: <https://deq.nc.gov/about/divisions/ene-rev-mineral-land-resources/erosion-sediment-control/forms>. Any relevant licenses and certifications may also be included. Any documentation of inspections that occur on a copy of the approved erosion and sedimentation control plan shall occur on a single copy of the plan and that plan shall be made available on the site.
- (c) A record of any "significant deviation" from any erosion or sedimentation control measure made from that on the approved plan. For the purpose of this Rule, a "significant deviation" means an omission, alteration or relocation of an erosion or sedimentation control measure that may change the intended performance of the measure. The record shall include measures required to correct the deviation along with documentation of when those measures were taken. Deviations from the approved plan may also be recommended to enhance the intended performance of the sedimentation and erosion control measures.
- (d) All self-inspection documentation shall be made available on the site for at least 30 calendar days or maintained until permanent ground cover has been established, whichever is longest.

Authority G.S. 113A-54; 113A-54.1(e).

### 15A NCAC 04B .0132 DESIGN STANDARDS FOR THE UPPER NEUSE RIVER BASIN (FALLS LAKE WATERSHED)

In addition to any other requirements of State, federal, and local law, land-disturbing activity in the watershed of the drinking water supply reservoir that meets the applicability requirements

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of Session Law 2009-486, Section 3.(a), shall meet all of the following design standards for sedimentation and erosion control:

- (1) Erosion and sedimentation control measures, structures, and devices shall be planned, designed, and constructed to provide protection from the runoff of the 25-year storm that produces the maximum peak rate of runoff as calculated according to procedures set out in the United States Department of Agriculture Agriculture, Natural Resources Soil Conservation Service's "National Engineering Field ~~Manual~~ Handbook 630 for Conservation Practices" or according to procedures adopted by any other agency of the State or the United States.
- (2) Sediment basins shall be planned, designed, and constructed so that the basin will have a settling efficiency of at least 70 percent for the 40-micron size soil particle transported into the basin by the runoff of the two-year storm that produces the maximum peak rate of runoff as calculated according to procedures in the United States Department of Agriculture Agriculture, Natural Resources Soil Conservation Service's "National Engineering Field ~~Manual~~ Handbook 630 for Conservation Practices" or according to procedures adopted by any other agency of the State or the United States.
- (3) Newly constructed open channels shall be planned, designed, and constructed with side slopes no steeper than two horizontal to one vertical if a vegetative cover is used for stabilization unless soil conditions permit steeper side slopes or where the side slopes are stabilized by using mechanical devices, structural devices, or other ditch liners sufficient to restrain accelerated erosion. The angle for side slopes shall be sufficient to restrain accelerated ~~erosion~~ erosion, as determined by the Division, based on soil conditions.
- (4) For an area of land-disturbing activity where grading activities have been completed, temporary or permanent ground cover sufficient to restrain erosion shall be provided as soon as practicable, but ~~in no case~~ not later than seven days after completion of grading. For an area of land-disturbing activity where grading activities have not been completed, temporary ground cover shall be provided as follows:
  - (a) For an area with no slope, temporary ground cover shall be provided for the area if it has not been disturbed for a period of 14 days.
  - (b) For an area of moderate slope, temporary ground cover shall be provided for the area if it has not been

disturbed for a period of 10 days. For purposes of this Item, "moderate slope" means an inclined area, the inclination of which is less than or equal to three units of horizontal distance to one unit of vertical distance.

- (c) For an area of steep slope, temporary ground cover shall be provided for the area if it has not been disturbed for a period of seven days. For purposes of this Item, "steep slope" means an inclined area, the inclination of which is greater than three units of horizontal distance to one unit of vertical distance.

*Authority G.S. 113A-54(b); S.L. 2009-486.*

### SUBCHAPTER 04C - SEDIMENTATION CONTROL CIVIL PENALTIES

#### 15A NCAC 04C .0103 WHO MAY ASSESS

The ~~director~~ Secretary may assess civil penalties against any person responsible for a violation.

*Authority G.S. 113A-55; 113A-64; 143B-10.*

#### 15A NCAC 04C .0106 CRITERIA

In determining the amount of the civil penalty assessment, the ~~director~~ Secretary shall consider the following criteria:

- (1) severity of the ~~violation~~ violation;
- (2) degree and extent of the ~~harm~~ harm;
- (3) type of ~~violation~~ violation;
- (4) ~~duration~~ duration;
- (5) ~~cause~~ cause;
- (6) extent of any off-site damage which may have ~~resulted~~ resulted;
- (7) effectiveness of action taken by ~~violatee~~ violatee;
- (8) adherence to plan submitted by ~~violatee~~ violatee;
- (9) effectiveness of plan submitted by ~~violatee~~ violatee;
- (10) cost of rectifying any ~~damage~~ damage;
- (11) the violator's previous record in complying with ~~rules the Act or any rule or order of the commission~~ Commission;
- (12) estimated cost of ~~installing and/or maintaining~~ taking corrective sediment control ~~measures~~ actions; and
- (13) staff investigative ~~costs~~ costs;
- (14) ~~the amount of money the violator saved by noncompliance~~ and;
- (15) ~~whether the violation was committed willfully~~ and.

*Authority G.S. 113A-54(b); 113A-55; 113A-64(a).*

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### 15A NCAC 04C .0107 PROCEDURES: NOTICES

(a) The notice of violation shall describe the violation ~~with reasonable particularity~~; request that all illegal activity cease, and inform the violator that a civil penalty may be assessed pursuant to G.S. 113A-64. If particular actions need to be taken to comply with the Sedimentation Pollution Control Act, the notice shall specify the actions to be taken, shall specify a time period for compliance, and shall state that upon failure to comply within the allotted ~~time~~ time, the person shall become subject to the assessment of a civil penalty for each day of the continuing violation beginning with the date of the violation.

(b) The ~~stop-work~~ stop-work order provided in G.S. 113A-65.1 shall serve as the notice of violation for purposes of the assessment of a civil penalty pursuant to G.S. 113A-64(a)(1). Copies of the ~~stop-work~~ stop-work order shall be served upon persons the Department has reason to believe may be responsible for the violation ~~by any means authorized under~~ pursuant to G.S. 1A-1, Rule 4.

*Authority G.S. 113A-54; 113A-61.1; 113A-64; 113A-65.1. ~~442B-10.~~*

### 15A NCAC 04C .0108 REQUESTS FOR ADMINISTRATIVE HEARING

~~After receipt of notification of any assessment, the assessed person must select one of the following options within 20 days:~~

- (1) ~~tender payment; or~~
- (2) ~~file a petition for an administrative hearing in accordance with G.S. 150B-23.~~

*Authority G.S. 113A-64; 143B-10; 150B-23.*

### 15A NCAC 04C .0110 ADMINISTRATIVE HEARING

~~Administrative hearings shall be conducted in accordance with the procedures outlined in G.S. 150B-22 et seq. and the contested case procedures in 15A NCAC 1B-0200.~~

*Authority G.S. 113A-55; 150B-22 et seq.*

### 15A NCAC 04C .0111 FURTHER REMEDIES

~~No provision of this Subchapter shall be construed to restrict or impair the right of the secretary, the director, or the Sedimentation Control Commission to pursue any other remedy provided by law for violations of the Sedimentation Pollution Control Act.~~

*Authority G.S. 113A-54; 113A-60; 113A-64 through 113A-66.*

## SUBCHAPTER 04D - LOCAL ORDINANCES

### 15A NCAC 04D .0102 MODEL ORDINANCE

~~The commission has adopted a model ordinance. Local governmental units wishing to establish a local erosion and sedimentation control program may obtain a copy of the model ordinance upon writing to:~~

North Carolina Department of Environment, Health, and Natural Resources  
Land Quality Section  
P.O. Box 27687  
Raleigh, North Carolina 27611

*Authority G.S. 113A-54(d); 113A-60.*

## SUBCHAPTER 04E - RULEMAKING PROCEDURES

### SECTION .0100 - GENERAL PROVISIONS

#### 15A NCAC 04E .0101 GENERAL PURPOSE

~~Rules of 15A NCAC 1B-0100 are adopted by reference and with the rules of this Subchapter shall govern rule making hearings conducted under the purview of the commission.~~

*Authority G.S. 113A-54; 113A-55; 150B.*

#### 15A NCAC 04E .0102 DEFINITIONS

~~As used in this Subchapter:~~

- (1) ~~"Commission" means the North Carolina Sedimentation Control Commission.~~
- (2) ~~"Director" means the Director of the Division of Energy, Mineral, and Land Resources of the Department of Environment, Health, and Natural Resources.~~

*Authority G.S. 113A-54; 113A-55.*

#### 15A NCAC 04E .0104 COPIES OF RULES:

##### INSPECTION RULES

(a) Anyone desiring to obtain a copy of any or all of the rules of the ~~commission~~ Commission may do so by requesting such from the ~~director~~ Director at the address of the ~~commission~~ Commission as set forth in ~~15A NCAC 04A .0101, at Rule .0001 of Subchapter A of this Chapter.~~ The request ~~must~~ shall specify the rules requested, for example, 15A NCAC ~~4, 04,~~ 4, 04, Sedimentation Control, or 15A NCAC ~~4E, Rulemaking Procedures.~~ 04B .0113, Responsibility for Maintenance. The ~~director~~ Director may charge reasonable fees to recover mailing and duplication costs for requests of more than one copy of the same rule(s).

(b) The rules of the ~~commission~~ Commission (15A NCAC-4 NCAC 04) ~~and other documents specified in G.S. 150B-11 are available for public inspection at the Office of the Director (P.O. Box 27687, 512 N. Salisbury Street, Raleigh, N.C. 27611) during regular office hours.~~ can also be found on the website of the NC Office of Administrative Hearings at: <https://www.oah.state.nc.us/>.

*Authority G.S. 113A-54; 113A-55. ~~150B-11.~~*

### SECTION .0200 - PETITIONS FOR RULEMAKING

#### 15A NCAC 04E .0201 PETITION FOR RULEMAKING HEARINGS FORM AND CONTENT OF PETITION

~~Any person wishing to submit a petition requesting the adoption, amendment, or repeal of a rule by the commission shall forward the petition to the director at the address of the commission in Rule .0001 of Subchapter A of this Chapter. The first page of the petition should clearly bear the notation: RULEMAKING PETITION-RE and then the subject area (for example, RE PLAN REQUIREMENTS, RE PENALTIES, RE INSPECTIONS) or an indication of any other area over which the commission may have rulemaking authority.~~



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(a) Any person wishing to request the adoption, amendment, or repeal of a rule of the Commission shall make the request in a petition to the Commission addressed to the:

Director  
Division of Energy, Mineral, and Land Resources  
1612 Mail Service Center  
Raleigh, North Carolina 27699-1612

(b) The petition shall contain the following information:

- (1) the text of the proposed rule(s) for adoption or amendment;
- (2) a statement of the reasons for adoption or amendment of the proposed rule(s), or the repeal of an existing rule(s);
- (3) a statement of the effect on existing rules or orders;
- (4) the name(s) and address(es) of the petitioner(s); and

(c) In its review of the proposed rule, the Commission shall consider whether it has authority to adopt the rule; the effect of the proposed rule on existing rules, programs, and practices; probable costs and cost factors of the proposed rule; and the impact of the rule on the public and regulated entities. The petitioner may include the following information within the request:

- (1) the statutory authority for the agency to promulgate the rule(s);
- (2) a statement of the effect of the proposed rule(s) on existing practices in the area involved, including cost factors for persons affected by the proposed rule(s);
- (3) a statement explaining the computation of the cost factors;
- (4) a description including the names and addresses, if known, of those most likely to be affected by the proposed rule(s); and
- (5) documents and data supporting the proposed rule(s).

(d) Petitions that do not contain the information required by Paragraph (b) of this Rule shall be returned to the petitioner by the Director on behalf of the Commission.

*Authority G.S. 113A-54; ~~150B-16~~; 150B-20.*

### 15A NCAC 04E .0203 DISPOSITION OF PETITIONS

(a) The director will determine whether the petition contains sufficient information for the commission to determine whether the public interest will be served by granting the request. The director may request additional information from the petitioner(s), he may contact interested persons or persons likely to be affected by the proposed rule and request comments, and he may use any other appropriate method for obtaining additional information.

(b) The commission will render a decision within 30 days after the petition is submitted. If the decision is to grant the petition, the director, within 30 days of submission, will initiate a rulemaking proceeding. If the decision is to deny the petition, the director will notify the petitioner(s) in writing, stating the reasons therefor.

(c) If the commission is not scheduled to meet within 30 days of submission of a petition the director may either:

- (1) accept the petition and initiate a rulemaking proceeding; or
- (2) Ask the chairman of the commission to call a special meeting of the commission so that a decision can be made by the commission within the 30 day time period required by 150B-16 and in accordance with the procedures set out in (b) of this Rule.

*Authority G.S. 113A-54; 113A-55; 150B-16.*

## SECTION .0400 – RULEMAKING HEARINGS

### 15A NCAC 04E .0403 WRITTEN SUBMISSIONS

(a) Any person may file a written submission containing data, comments, or arguments after distribution or publication of a rulemaking notice until the day of the hearing, unless a longer period has been prescribed in the notice or granted upon request. These written comments should be sent to the director at the address of the commission.

(b) The first page of any written submission shall clearly identify the rulemaking proceeding or proposed rule to which the comments are addressed and include a statement of the position of the person making the submission (for example, "In support of adopting proposed Rule .0000," "In opposition to adopting proposed Rule .0000").

(c) Upon receipt of written comments, acknowledgment will be made with an assurance that the comments therein will be considered fully by the commission.

*Authority G.S. 113A-54; 150B-12(e).*

### 15A NCAC 04E .0405 STATEMENT OF REASONS FOR DECISION

(a) Any interested person desiring a concise statement of the principal reasons for and against the adoption of a rule by the commission and the factors that led to overruling the considerations urged for or against its adoption may submit a request to the director of the address of the commission.

(b) The request must be made in writing and submitted prior to adoption of the rule or within 30 days thereafter.

*Authority G.S. 113A-54; 150B-12(e).*

### 15A NCAC 04E .0406 RECORD OF PROCEEDINGS

A record of all rulemaking proceedings will be maintained by the director for as long as the rule is in effect, and for five years thereafter, following filing with the Office of Administrative Hearings. Record of rulemaking proceedings will be available for public inspection during the hours of 8:30 AM to 5:30 PM on workdays.

*Authority G.S. 113A-54; 150B-11(2).*

## SECTION .0500 - DECLARATORY RULINGS

# HEARING OFFICER'S REPORT

## PROPOSED RULES

### 15A NCAC 04E .0501 SUBJECTS OF DECLARATORY RULINGS: GENERALLY

~~Any person aggrieved by a statute administered or rule promulgated by the commission may request a declaratory ruling as to either the manner in which a statute or rule applies to a given factual situation, if at all, or whether a particular agency rule is valid. For purposes of this Section, an aggrieved person means a person substantially affected by a statute administered by the commission or a rule promulgated by the commission. At the request of any person aggrieved, as defined in G.S. 150B-2(6), the Sedimentation Control Commission may issue a declaratory ruling as provided in G.S. 150B-4.~~

~~Authority G.S. 113A-54; 150B-17; 150B-4.~~

### 15A NCAC 04E .0502 PROCEDURE FOR REQUESTING DECLARATORY RULINGS: SUBMISSION OF REQUEST FOR RULING

~~All requests for declaratory rulings shall be written and mailed to the director at the address of the commission. The first page of the request should bear the notation: REQUEST FOR DECLARATORY RULING. The request must include the following information:~~

- ~~(1) name and address of petitioner;~~
- ~~(2) statute or rule to which petition relates;~~
- ~~(3) concise statement of the manner in which petitioner is aggrieved by the rule or statute or its potential application to him;~~
- ~~(4) a statement of whether an oral hearing is desired and, if so, the reason therefor.~~

~~(a) All requests for a declaratory ruling shall be filed with the Director, Division of Energy, Mineral and Land Resources, Department of Environmental Quality, 1612 Mail Service Center, Raleigh, NC 27699-1612.~~

~~(b) All requests shall include the following:~~

- ~~(1) name and address of petitioner(s);~~
- ~~(2) the rule, statute or order upon which a ruling is desired;~~
- ~~(3) a statement as to whether the request is for a ruling on the validity of a rule or on the applicability of a rule, order or statute to a given factual situation;~~
- ~~(4) arguments or data which demonstrate that the petitioner is aggrieved by the rule, statute or order, or its potential application to petitioner;~~
- ~~(5) a statement of the consequences of a failure to issue a declaratory ruling in favor of the petitioner;~~
- ~~(6) a statement of the facts proposed for adoption by the Commission;~~
- ~~(7) a draft of the proposed ruling; and~~
- ~~(8) a statement of whether an oral argument is desired and, if so, the reason(s) for requesting such an oral argument.~~

~~(c) A request for a ruling on the applicability of a rule, order or statute shall include a description of the specific factual situation on which the ruling is to be based and documentation supporting those facts. A request for a ruling on the validity of a Commission rule shall state the aggrieved person's reason(s) for questioning~~

~~the validity of the rule and a brief or legal memorandum supporting the aggrieved person's position. A person may ask for both types of declaratory rulings in a single request.~~

~~(d) In the manner provided in G.S. 150B-23(d), any other person may request to intervene in the request for declaratory ruling. The request to intervene shall be determined by the Chairman.~~

~~Authority G.S. 113A-54; 150B-17; 150B-4.~~

### 15A NCAC 04E .0503 DISPOSITION OF REQUESTS

~~**REQUEST**  
(a) Upon receiving a request, the director is authorized to initiate a declaratory ruling proceeding to receive information concerning the request. A declaratory ruling proceeding may consist of written submissions, an oral hearing, or other procedures as may be appropriate in the circumstances of the particular request. If the proceeding takes the form of an oral hearing the director may direct that the proceeding take place before the commission.~~

~~(b) The director will compile the information collected in the proceeding, along with other relevant information, in a recommendation to the commission on whether to issue the ruling and what the ruling should be.~~

~~(c) A decision whether to issue the ruling will be made by the commission at the next regularly scheduled meeting of the commission within the 60 day period required by 150B-17 and after the director's recommendation is presented. If no meeting is scheduled within that time period, the director will ask the chairman of the commission to call a special meeting so that the commission can comply with the requirements of G.S. 150B-17.~~

~~(d) If the decision of the commission is to issue the ruling, the ruling will be issued by the commission with the 60 day period required by G.S. 150B-17. If necessary, the chairman of the commission will call a special meeting so that the commission can comply with this requirement.~~

~~(e) If the decision of the commission is to deny the request, the director will notify the petitioner(s) in writing stating the reasons therefor.~~

~~(f) For purposes of this Rule, the commission will ordinarily refuse to issue a declaratory ruling:~~

- ~~(1) unless the rule is unclear on its face;~~
- ~~(2) unless the petitioner shows that the circumstances are so changed since the adoption of the rule that such a ruling would be warranted;~~
- ~~(3) unless the petitioner shows that the agency did not give to the factors specified in the request for a declaratory ruling a full consideration at the time the rule was issued;~~
- ~~(4) where there has been a similar controlling factual determination in a contested case or where the factual content being raised for a declaratory ruling was specifically considered upon the adoption of the rule or directive being questioned, as evidenced by the rulemaking record; or~~
- ~~(5) where the subject matter of the request is involved in pending litigation in any state or federal court in North Carolina.~~

# HEARING OFFICER'S REPORT

## PROPOSED RULES

(a) The Commission Chairman shall make a determination on the completeness of the request for declaratory ruling based on the requirements of this Section and the Chairman shall make a recommendation to the Commission on whether to grant or deny a request for a declaratory ruling.

(b) Before deciding the merits of the request, the Commission may:

- (1) request additional written submissions from the petitioner(s);
- (2) request a written response from the Department or any other person; and
- (3) hear oral arguments from the petitioner(s) and the Department or their legal counsel.

(c) Whenever the Commission believes for "good cause" that the issuance of a declaratory ruling is undesirable, the Commission may refuse to issue such ruling. The Commission shall notify in writing the person requesting the ruling, stating the reason(s) for the refusal to issue a ruling on the request.

(d) "Good cause" as set out in Paragraph (c) of this Rule shall include:

- (1) finding that there has been a similar determination in a previous contested case or declaratory ruling;
- (2) finding that the matter is the subject of a pending contested case hearing or litigation in any North Carolina or federal court;
- (3) finding that no genuine controversy exists as to the application of a statute, order or rule to the specific factual situation presented; or
- (4) finding that the factual context put forward as the subject of the declaratory ruling was specifically considered upon the adoption of the rule being questioned, as evidenced by the rulemaking record.

(e) The Commission, through the Department, shall keep a record of each declaratory ruling, which shall include at a minimum the following items:

- (1) the request for a ruling;
- (2) any written submission by a party;
- (3) the given state of facts on which the ruling was based;
- (4) any transcripts of oral proceedings, or, in the absence of a transcript, a summary of all arguments;
- (5) any other matter considered by the Commission in making the decision; and

(6) the declaratory ruling, or the decision to refuse to issue a declaratory ruling, together with the reasons therefore.

(f) For purposes of this Section, a declaratory ruling shall be deemed to be in effect until:

- (1) the statute or rule interpreted by the declaratory ruling is repealed or the relevant provisions of the statute or rule are amended or altered;
- (2) any court of the Appellate Division of the General Court of Justice shall construe the statute or rule which is the subject of the declaratory ruling in a manner plainly irreconcilable with the declaratory ruling;
- (3) the Commission changes the declaratory ruling prospectively; or
- (4) any court sets aside the declaratory ruling in litigation between the Commission or Department of Environmental Quality and the party requesting the ruling.

(g) The party requesting a declaratory ruling may agree to allow the Commission to issue a ruling on the merits of the request beyond the time allowed by G.S. 150B-4.

(h) A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case. Unless the requesting party consents to the delay, failure of the Commission to issue a ruling on the merits within the time allowed by G.S. 150B-4 shall constitute a denial of the request as well as a denial of the merits of the request and shall be subject to judicial review.

*Authority G.S. 113A-54; 113A-55; 150B-17; 150B-4*

### 15A NCAC 04E .0504 RECORD OF DECISION




A record of all declaratory rulemaking proceedings will be maintained in the director's office for as long as the ruling is in effect and for five years thereafter. This record will contain: the petition, the notice, all written submissions filed in the request, whether filed by the petitioner or any other person, and a record or summary of oral presentations, if any. Records of declaratory rulemaking proceedings will be available for public inspection during the regular office hours of the director.

*Authority G.S. 113A-54; 150B-11.*

# HEARING OFFICER'S REPORT

## ATTACHMENT E

### Handout provided at 5/29/19 SCC meeting

Rules With Proposed Changes ( <del>cross-out</del> = recommended deletion.)	Type of Change		Recommendations
15A NCAC 04A .0101 OFFICES OF THE SEDIMENTATION CONTROL COMMISSION ORGANIZATION	Update addresses		Recommend taking rule to public notice.
15A NCAC 04A .0105 DEFINITIONS	Added 3 definitions Modified 11 definitions Deleted two definitions		Recommend taking rule to public notice.
15A NCAC 04B .0105 PROTECTION OF PROPERTY	Removed the unenforceable and “aspirational” modifier “all reasonable.”		Recommend taking rule to public notice.
15A NCAC 04B .0106 BASIC EROSION <u>AND</u> <u>SEDIMENTATION</u> <u>CONTROL PLAN</u> OBJECTIVES	Removed and/or replaced some vague terminology.		Recommend taking rule to public notice.
15A NCAC 04B .0107 MANDATORY STANDARDS FOR LAND-DISTURBING ACTIVITY	Removed “15 working days” and clarified that the 90 calendardays applied only to “permanent” ground cover. Added a reference to the Construction General Permit.		Recommendations for including the 7 and 14 day groundcover need to be addressed.
15A NCAC 04B .0108 DESIGN AND PERFORMANCE STANDARD	Revised language for storm event calculations, including acceptance of different methodologies.		Recommend taking rule to public notice.
15A NCAC 04B .0109 STORMWATER OUTLET PROTECTION	Removed the “aspirational” statement regarding “Acceptable Management Measures.” Clarified “sinuous channels” language.		Recommend taking rule to public notice.
15A NCAC 04B .0110 BORROW AND WASTE AREAS	Made minor grammar corrections.		Recommend taking rule to public notice.
15A NCAC 04B .0111 ACCESS AND HAUL ROADS	Revised wording for clarity		Recommend taking rule to public notice.
  	<p>Indicates rule had some differing opinions.</p> <p>Indicates rule is proposed to be repealed.</p> <p>Indicates that rule received very little attention and no objections.</p>		

# HEARING OFFICER'S REPORT

15A NCAC 04B .0112 OPERATIONS IN LAKES OR NATURAL WATERCOURSES	Originally proposed deleting the rule because of RRC comments.		Recommend taking rule to public notice. <del>(Received attention but now acceptable to all.)</del>
15A NCAC 04B .0113 RESPONSIBILITY FOR MAINTENANCE	Eliminated the unclear adjective “necessary” and made minor format changes.		Recommend taking rule to public notice.
15A NCAC 04B .0115 ADDITIONAL MEASURES	Made revisions for clarity and removed unclear adjective “necessary.”		Recommend taking rule to public notice
15A NCAC 04B .0118 APPROVAL OF PLANS	<p>Made changes to clarify the requirement that an approving agency must act within 30 days of receipt of a plan.</p> <p>Removed provisions for approval with “performance reservations,” which was not provided in the statutes and a statement on “rights to a contested case” and other provisions deemed inconsistent with the APA. (Administrative. Procedure Act)</p>		Recommend taking rule to public notice
15A NCAC 04B .0120 <del>INSPECTIONS AND</del> INVESTIGATIONS	Two paragraphs related to staff inspections were deleted because wording in the statutes made them unnecessary. A statement on “preconstruction conferences” was rewritten to make it consistent with the statute.		Recommend taking rule to public notice
15A NCAC 04B .0124 DESIGN STANDARDS IN SENSITIVE WATERSHEDS	<p>Wording changes were made in the references to the NRCS Handbook 630 and options for substituting other criteria for runoff calculations.</p> <p>In paragraph (c), the existing provisions for requiring basin sizing based on “70% of the 40-micron particle” in HQW zones was replaced by specific sizing and design criteria</p> <p>In paragraph (e), removed the provision for ground cover within “15 working days or 60 calendar days”</p>		Need to resolve differences
15A NCAC 04B .0125 BUFFER ZONE REQUIREMENTS	Several changes were made to address administrative comments made by the RRC staff. These provided better-written rules but did not result in any substantive changes in rule implementation.		Recommend taking rule to public notice

# HEARING OFFICER'S REPORT

15A NCAC 04B .0126 <del>PLAN REVIEW</del> <del>APPLICATION FEE</del>	Several changes were made for administrative purposes or to eliminate outdated provisions.		Recommend taking rule to public notice
15A NCAC 04B .0127 PLAN APPROVAL CERTIFICATE	Several changes were made for administrative purposes or to eliminate outdated provisions.		Recommend taking rule to public notice
15A NCAC 04B .0129 EROSION CONTROL PLAN EXPIRATION DATE	Only one minor change was made.		Recommend taking rule to public notice
15A NCAC 04B .0130 EMERGENCIES	A few minor administrative changes were made.		Recommend taking rule to public notice
15A NCAC 04B .0131 SELF-INSPECTIONS	Much of the text of the rule was rewritten. Most of the changes made were to make the rule more consistent with the statutes and the existing federal stormwater permit. Sentences were added to provide clarity on issues such as “significant deviation” from a plan. Sentences were also added to explain that “visual verification” was allowed in some practices and measurement was required for others.  Added a reference to the NCG01 General Permit requirements.		Recommend taking rule to public notice
15A NCAC 04B .0132 DESIGN STDS FOR UPPER NEUSE RIVER BASIN	Minor changes to title of referenced document.		
15A NCAC 04C .0103 WHO MAY ASSESS	No changes proposed.		Recommend taking rule to public notice
15A NCAC 04C .0106 CRITERIA	No changes proposed.		Recommend taking rule to public notice
15A NCAC 04C .0107 PROCEDURES: NOTICES	Minor change. Removed a vague term “reasonable particularity.”		Recommend taking rule to public notice
<del>15A NCAC 04C .0108</del> <del>REQUESTS FOR</del> <del>ADMINISTRATIVE</del> <del>HEARING</del>	Recommend removing the rule. The DEMLR staff noted that it repeats the statute and is not needed.		Recommend repeal of this rule.
<del>15A NCAC 04C .0110</del> <del>ADMINISTRATIVE</del> <del>HEARING</del>	Recommend removing the rule. The RRC staff noted that it repeats the statute, is misleading, and is not necessary.		Recommend repeal of this rule.
<del>15A NCAC 04C .0111</del> <del>FURTHER REMEDIES</del>	Recommend removing the rule. The RRC staff noted that it is confusing and is not necessary.		Recommend repeal of this rule.

# HEARING OFFICER'S REPORT

<del>15A NCAC 04D .0102</del> <del>MODEL ORDINANCE</del>	Recommend removing the rule. The RRC staff noted that it is confusing and is not necessary.		Recommend repeal of this rule.
<del>15A NCAC 04E .0101</del> <del>GENERAL PURPOSE</del>	Recommend removing the rule. The DEMLR staff noted that it is confusing and not necessary.		Recommend repeal of this rule.
<del>15A NCAC 04E .0102</del> <del>DEFINITIONS</del>	Recommend removing the rule. The definitions are provided in the Act or in rule 04B .0105 and are not needed here.		Recommend repeal of this rule.
15A NCAC 04E .0104 COPIES OF RULES. INSPECTIONS	Minor administrative changes.		Recommend taking rule to public notice
15A NCAC 04E .0201 <u>PETITIONS FOR</u> <u>RULEMAKING FORM</u> <u>AND CONTENT OF</u> <u>PETITION</u>	The existing rules 04E .0201 was rewritten at the advice of Department counsel. The existing rule was outdated and inaccurate. The procedures are more-clearly outlined in the revised rule and should help the petitioner and the Commission in dealing with rulemaking petitions.		Recommend taking rule to public notice
<del>15A NCAC 04E .0203</del> <del>DISPOSITION OF</del> <del>PETITIONS</del>	The proposed rule changes have the rule deleted and rule 04E .0201 is modified to include both form and content and disposition of petitions for rulemaking.		Recommend repeal of this rule.
<del>15A NCAC 04E .0403</del> <del>WRITTEN</del> <del>SUBMISSIONS</del>	Because these procedures are specified in NCGS 150B, the DEQ attorney recommended that this rule be repealed.		Recommend repeal of this rule.
<del>15A NCAC 04E .0405</del> <del>STATEMENT OF</del> <del>REASONS FOR</del> <del>DECISION</del>	Because these procedures are specified in NCGS 150B, the DEQ attorney recommended that this rule be repealed.		Recommend repeal of this rule.
<del>15A NCAC 04E .0406</del> <del>RECORD OF</del> <del>PROCEEDINGS</del>	Because these procedures are specified in NCGS 150B, the RRC staff said that the rule could be repealed.		Recommend repeal of this rule.
<del>15A NCAC 04E .0501</del> <del>SUBJECTS OF</del> <del>DECLARATORY</del> <del>RULINGS</del>	Because a part of this rule is stated in NCGS 150B and the RRC staff said that the second sentence of the rule is unnecessary, the rule is proposed for repeal.		Recommend xxxof this rule.
15A NCAC 04E .0502 SUBMISSION OF	New language proposed by AG attorney . Requiring 3 <sup>rd</sup> party		Recommend taking rule to public notice.

# HEARING OFFICER'S REPORT

REQUEST FOR RULING	intervention at first was controversial		(controversy has been addressed.)
15A NCAC 04E .0503 DISPOSITION OF REQUESTS FOR <u>DECLARATORY</u> <u>RULING</u>	.New language proposed by counsel.		Desire to have a notice requirement must be resolved.
<del>15A NCAC 04E .0504</del> <del>RECORD OF</del> <del>DECISION</del>	Based on the RRC staff comments about the role of the Department's retention schedule and the absence of a statutory mandate to include this information, it was recommended that this rule be deleted.		Recommend repeal of this rule.

- Indicates rule had some differing opinions.
- Indicates rule is proposed to be repealed.
- Indicates that rule received very little attention and no objections.



# HEARING OFFICER'S REPORT

## **Attachment F: Copies of Written Comments Received**

See next page.

# HEARING OFFICER'S REPORT



## Haw River Assembly

Phone: (919) 542-5790

P.O Box 187  
Bynum, NC 27228

[www.hawriver.org](http://www.hawriver.org)

September 10, 2019

Re: Proposed Rule Revisions for 15A NCAC Chapter 04, Sedimentation Control

Attn:

Agency: Department of Environmental Quality, Division of Energy, Mineral, and Land Resources (DEMLR)

Commission: N.C. Sedimentation Control Commission

Chapter Title: Sedimentation Control

Citation: 15A NCAC Chapter 04 (See attached APPENDIX for proposed rule changes.)

Rulemaking Authority: GS 113A-54; 113A-56

Staff Contacts:

Boyd DeVane, Assistant Dam Safety Engineer [Boyd.devane@ncdenr.gov](mailto:Boyd.devane@ncdenr.gov)  
(919-707-9212)

Julie Coco, State Sediment Engineer [Julie.coco@ncdenr.gov](mailto:Julie.coco@ncdenr.gov)  
(919-707-9201)

Toby Vinson, Land Quality Section Chief [Toby.vinson@ncdenr.gov](mailto:Toby.vinson@ncdenr.gov)  
(919-707-9201)

Emily Sutton, Riverkeeper  
Haw River Assembly  
P.O Box 187  
Bynum, NC 27228

Haw River Assembly is the Waterkeeper organization responsible for protecting the Haw River watershed in North Carolina. Our organization represents over 1,000 members and supporters in 8 counties throughout our watershed. We have serious concerns about the sediment rule revisions and the tendency to cater to regulated entities rather than meet requirements to protect our surface waters. By volume, sediment is the most significant pollutant in surface waters in our state. These rules give regulatory agencies the ability to target that pollutant and alleviate further problems as our state develops, and the current rule revision will not accomplish that goal. Sediment is a direct cause of many impairments faced by our waterways, including turbidity, dissolved oxygen, benthos, and nutrients. We have worked with county and state

# HEARING OFFICER'S REPORT

agencies to document and address sedimentation issues in the Haw River watershed for many years. Please consider the following comments in your rule revision process.

04B.0107

The intent behind this rule revision is unclear. Will local governments be permitted to keep their stronger requirements? This should not give regulated entities an opportunity to shirk responsible stabilization measures. Appropriate provisions should be applied within the 15 day period. I agree that clarity is important on time requirements for ground stabilization. However, the increase from 15 days to 90 days will allow continuous erosion and soil loss into our surface waters. The 15 day stabilization requirement has been enforced in many other states, and with careful attention to slope and stabilization, it can be done effectively. This rule change caters to the regulated entities while overlooking impacts to our surface waters.

04B. 0108

The Design and Performance standard should be raised from the 10-year design storm. These measurements are outdated and inadequate in protecting our surface waters. Under the current design standard, any potential violation would be exempt from regulatory action if more than 4.93 inches fall over a 24 hour duration, based on standards in the Piedmont region. This happens regularly, leaving our waterways laden with sediment and no responsible party to prevent future damage or mitigate.

04B.0109

The rule change to allow an increase in velocity prior to development by 10% will worsen our eroded banks downstream of development. Currently, many developments causing increased stormwater velocity are not held accountable due to clustered development and an inability to isolate one development responsible. This has led to significant in-stream erosion and steep banks making the creeks inaccessible. This destroys aquatic habitat dependent on rocks, riffles, and roots.

04D. 0102

The Model Ordinance should remain in this permit to serve as a minimum guidance for new programs.

One major component that has been left out of this rule revision is a requirement to treat turbid waters before being discharged with PAM. There is no financial or technological barrier to treating construction stormwater with PAM, and these compounds have significant success at settling sediment from surface waters and preventing turbidity issues downstream. This is a major concern for us in the Haw River basin, where we are seeing an increase in development. With one megadevelopment of nearly 8000 acres along the Haw River, we are already seeing

# HEARING OFFICER'S REPORT

degraded water quality in the Haven Creek wetlands. Jordan Lake is inundated with sediment and nutrients during each rain event. Protections upstream, and on all waters across the state, would limit further degradation to these Nutrient Sensitive Waters.

Many of our surface waters in the state are impaired due to poor macroinvertebrate life. Sampling data from our Department of Water Resources suggest that these trends are directly related to increases in development and sprawl. Development can be done in a way that does not jeopardize the health of our streams. Strong protections to prevent increases in turbidity and velocity through these rule revisions are critical to meet requirements under the Clean Water Act to prevent surface water degradation.

Thank you,

Emily Sutton  
Haw Riverkeeper  
Haw River Assembly  
P.O. Box 187  
Bynum, NC 27228  
[emily@hawriver.org](mailto:emily@hawriver.org)

# HEARING OFFICER'S REPORT

## SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 919-967-1450

601 WEST ROSEMARY STREET, SUITE 220  
CHAPEL HILL, NC 27516-2356

Facsimile 919-929-9421

September 13, 2019

*Via Electronic Mail*

Boyd DeVane  
N.C. Division of Energy, Mineral and Land Resources  
North Carolina Department of Environmental Quality  
1612 Mail Service Center  
Raleigh, NC 27699-1612  
Boyd.devane@ncdenr.gov

**Re: Proposed Rule Revisions for 15A N.C. Admin. Code Chapter 04,  
Sedimentation Control**

Dear Mr. DeVane:

The Southern Environmental Law Center submits the following comments on North Carolina Department of Environmental Quality, Division of Energy, Mineral and Land Resources' and the Sedimentation Control Commission's (collectively, "Agencies") proposed revisions to the Sedimentation Control Rules promulgated under the Sedimentation Pollution Control Act (the "Act").<sup>1</sup> These comments are submitted on behalf of Appalachian Voices, Cape Fear River Watch, Catawba Riverkeeper, Dan Riverkeeper, Dan River Basin Association, Haw River Assembly, Lower Neuse Riverkeeper, Lumber Waterkeeper, MountainTrue, North Carolina Coastal Federation, North Carolina Conservation Network, North Carolina League of Conservation Voters, Pamlico-Tar Riverkeeper, River Guardian Foundation, Upper Neuse Riverkeeper, Waccamaw Riverkeeper, Waterkeeper Alliance, Winyah Rivers Alliance, and Yadkin Riverkeeper.

**I. Sediment pollution is a major source of concern for North Carolina waterways; many of the proposed rule changes would exacerbate the pollution problem.**

Sediment pollution is a critical problem for North Carolina's lakes, rivers, and streams.<sup>2</sup> Millions of tons of sediment are generated annually by the construction industry.<sup>3</sup> When stormwater runoff from construction sites is not properly contained, this sediment flows into nearby lakes, rivers, and streams. The rate of erosion on a construction site varies with site conditions and soil types but is typically 100 to 200 tons per acre and may be as high as 500 tons per acre.<sup>4</sup> Soil types within North Carolina are particularly erodible, resulting in high rates of

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<sup>1</sup> 15A N.C. Admin. Code 04A .0101 *et seq.*; N.C. Gen. Stat. § 113A-50 *et seq.*

<sup>2</sup> N.C. Gen. Stat. § 113A-51 ("The sedimentation of streams, lakes, and other waters of this State constitutes a major pollution problem.").

<sup>3</sup> N.C. Erosion and Sediment Control Planning and Design Manual 2.1 (2013).

<sup>4</sup> *Id.*

# HEARING OFFICER'S REPORT

sedimentation within the state.<sup>5</sup> By volume, sediment is the largest water pollutant in North Carolina.<sup>6</sup>

Sedimentation occurs when water carrying eroded particles slows, allowing heavy particles like gravel and sand to settle on the bottom of a waterbody.<sup>7</sup> Lighter particles such as clay float in the water, making the water cloudy (*i.e.*, turbid). Damage from sediment pollution can be severe, and is costly both economically and environmentally. It affects water quality physically, chemically, and biologically.

Sediment pollution destroys habitat, reduces aquatic plant life, and smothers aquatic insects that live in the river.<sup>8</sup> Because fish feed on these insects, sediment pollution “affects the food chain from the bottom up.”<sup>9</sup> Sediment pollution contributes to massive declines in fish populations<sup>10</sup> and blue-green algae blooms that release toxins and can make swimmers sick.<sup>11</sup> It increases the potential for flooding and makes boating more difficult because it reduces water depth.<sup>12</sup> It clogs streams (and fish gills), and carries harmful bacteria, pathogens,<sup>13</sup> and industrial toxins like GenX and 1,4-dioxane into our rivers and streams.<sup>14</sup> It also makes it more difficult—and expensive—to clean water for drinking and bathing,<sup>15</sup> and can result in odor and taste issues. Understandably then, our General Assembly declared in the preamble to the Sedimentation Pollution Control Act that “[c]ontrol of erosion and sedimentation is . . . vital to the public interest and necessary to the public health and welfare.”<sup>16</sup>

As forecasted by the North Carolina General Assembly in 1973, “the continued development of this State will result in [more and more] pollution through sedimentation unless timely and appropriate action is taken.”<sup>17</sup> Unfortunately, resources devoted to addressing the

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<sup>5</sup> Annual Report to the General Assembly Environmental Review Commission Basinwide Water Resource Management Plans: July 2018 to July 2019, N.C. Dep’t of Env’tl. Quality, Div. of Water Res. at 14 (“Basinwide Management Plans”),

[https://files.nc.gov/ncdeq/Environmental%20Management%20Commission/Water\\_Quality\\_Committee\\_Meetings/2019/september/2019-Basinwide-Water-Resource-Management-Plan-Report-Final-Sep9.pdf](https://files.nc.gov/ncdeq/Environmental%20Management%20Commission/Water_Quality_Committee_Meetings/2019/september/2019-Basinwide-Water-Resource-Management-Plan-Report-Final-Sep9.pdf).

<sup>6</sup> N.C. State Extension, Soils and Water Quality, Erosion and Sedimentation (2015), <https://content.ces.ncsu.edu/soils-and-water-quality>.

<sup>7</sup> *Id.*

<sup>8</sup> Erica Batter, Sedimentation hurting lake’s natural balance, *The Charlotte Observer* (July 6, 2008), <https://www.charlotteobserver.com/news/local/community/lake-norman-mooresville/article8991263.html>.

<sup>9</sup> *Id.*

<sup>10</sup> American Fisheries Society, AFS Policy Statement #4: Sedimentation, <https://fisheries.org/policy-media/policy-statements/afs-policy-statement-4/>.

<sup>11</sup> What is Sediment Pollution?, Environmental Protection Agency, [https://cfpub.epa.gov/npstbx/files/ksmo\\_sediment.pdf](https://cfpub.epa.gov/npstbx/files/ksmo_sediment.pdf).

<sup>12</sup> See A Literature Review of the Effects of Turbidity and Siltation on Aquatic Life, Department of Chesapeake Bay Affairs at 2 (1964), <http://www.nativefishlab.net/library/textpdf/20478.pdf>; EPA, What is Sediment Pollution.

<sup>13</sup> See N.C. Erosion and Sediment Control Planning and Design Manual at 2.5; see also USGS, Turbidity and Water, [https://www.usgs.gov/special-topic/water-science-school/science/turbidity-and-water?qt-science\\_center\\_objects=0#qt-science\\_center\\_objects](https://www.usgs.gov/special-topic/water-science-school/science/turbidity-and-water?qt-science_center_objects=0#qt-science_center_objects).

<sup>14</sup> Basinwide Management Plans at 13.

<sup>15</sup> See *id.*

<sup>16</sup> N.C. Gen. Stat. § 113A-51.

<sup>17</sup> *Id.*

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problem have declined dramatically<sup>18</sup> and not enough action has been taken to prevent sedimentation across the state. Sediment pollution has led to the impairment of our rivers and streams from the turbidity, low dissolved oxygen, nutrient pollution, and high temperatures it causes.<sup>19</sup> Portions of the Calabash River, Cane River, Catawba River, Dan River, First Broad, French Broad River, Neuse River, Nolichucky River, North River, Rocky River, Yadkin River, Crabtree Lake, Falls Lake, and numerous creeks and streams are listed as impaired for turbidity.<sup>20</sup> Turbidity is also a basin-wide concern in the Broad, Catawba, Cape Fear, French Broad, New, Pasquotank, Roanoke, Savannah, and Tar-Pamlico River Basins.<sup>21</sup> Portions of the Dan River, the Yadkin River, Buffalo Creek, Little Richardson Creek, and Lake Lee are impaired for water temperature.<sup>22</sup> Numerous others are impaired for low dissolved oxygen, nutrients, and metals.<sup>23</sup>

The North Carolina Office of State Budget and Management projects that the state's population will grow by 11.7% from 2010-2020 and by an additional 11.3% from 2020-2030.<sup>24</sup> Over the next two decades, counties expected to have the fastest pace of growth include Durham, Orange, Wake, and Chatham in the Cape Fear and Neuse River Basins, as well as Cabarrus and Mecklenburg in the Catawba and Yadkin River Basins.<sup>25</sup> Increased growth means more construction, which in combination with increasingly intense rainfall will lead to even higher sedimentation, unless properly controlled. Already, the rapid growth across the state has led the number of erosion and sediment control plans submitted for review to reach its highest point in over a decade.<sup>26</sup>

Revisions to the state's Sedimentation Control Rules provide a valuable opportunity to address the serious and growing source of sedimentation pollution within our state. We applaud, for example, the Agencies' revised definition of "person who violates," which properly recognizes that companies with ultimate control over the development projects "direct or indirectly allow[ ] the activity"<sup>27</sup> and should, therefore, be held accountable for their harms. Prior

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<sup>18</sup> Consolidated Report on the Sedimentation Pollution Control Act and Stormwater Control Programs: July 1, 2017 – June 30, 2018, Division of Energy, Mineral, and Land Resources at 5 ("SPCA Consolidated Report") (noting a decline from 65 full time positions in the Sediment Control Program in 2008-09 to 36 in 2018-17).

<https://ncleg.gov/documents/sites/committees/ERC/ERC%20Reports%20Received/2018/DEQ/2018-Oct%20Combo%20Sediment%20SW%20Programs%20Rpt.pdf>.

<sup>19</sup> Federal Stream Corridor Restoration Handbook, Natural Resources Conservation Service (2001) 2-45; Basinwide Management Plans at 11, 14, 16, 20, 21, 27-33.

<sup>20</sup> N.C. Dept. of Env. Quality, Category 5 Assessments "303(d) List" Final (2018) ("2018 N.C. 303(d) List"), <https://files.nc.gov/ncdeq/Water%20Quality/Planning/TMDL/303d/2018/2018-NC-303-d--List-Final.pdf>. It is important to note that these impairments may be under inclusive and understated as the Division of Water Resources is reluctant to consider credible data from third parties concerning turbidity.

<sup>21</sup> Basinwide Management Plans at 11, 14, 16, 20, 21, 27-33.

<sup>22</sup> 2018 N.C. 303(d) List.

<sup>23</sup> *Id.*

<sup>24</sup> N.C. Office of State Budget and Management, County/State Population Projections,

<https://www.osbm.nc.gov/demog/county-projections>.

<sup>25</sup> *Id.*

<sup>26</sup> SPCA Consolidated Report at 3.

<sup>27</sup> 15A N.C. Admin. Code 04A .0105(20); Regulatory Impact Analysis for Proposed Rule Revisions for 15A N.C. Admin. Code Chapter 4, Sedimentation Control (May 14, 2019) at 14.

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to this revision, large real estate companies were able to avoid taking responsibility for failing to control erosion and sedimentation by creating undercapitalized subsidiaries. This practice made it difficult and costly to enforce the Sedimentation Pollution Control Act. The revised definition should ease enforcement and ensure that the proper parties are being held responsible.

Unfortunately, many of the Agencies' other proposed changes fail to address—and in fact exacerbate—the threat of sediment pollution. To ensure that erosion and sedimentation is controlled as contemplated by the Sedimentation Pollution Control Act, we urge the Agencies to incorporate the following changes.

## **II. The Agencies must set the trigger for ground cover at the cessation of a land-disturbing activity and require temporary ground cover be established within 15 days(15A N.C. Admin. Code 04B .0107 and .0124).**

Under the proposed changes, the requirement for temporary ground cover would be deleted from the Mandatory Standards for Land Disturbing Activity.<sup>28</sup> To protect against sediment pollution, and to comply with the Act, the Agencies should reinstate the temporary ground cover requirements for land disturbing activities. The Agencies should also set the trigger for ground cover at the cessation of a land-disturbing activity.

As an initial matter, the trigger for ground cover requirements under the rules is currently set at the “*completion of construction or development.*”<sup>29</sup> This directly contradicts the mandate of the Sedimentation Pollution Control Act, under which “the person conducting the land-disturbing activity *shall* install erosion and sedimentation control devices and practices that are sufficient to retain the sediment generated by the land-disturbing activity within the boundaries of the tract *during construction upon and development of* the tract.”<sup>30</sup> Consistent with the Act, the requirement for ground cover should be triggered *by the cessation of a land-disturbing activity*, which could occur on a portion of the construction or development site prior to completion of the entire project or development. Indeed, the point of temporary ground cover is to “control[] runoff and erosion [during construction] until permanent vegetation or other erosion control measures can be established.”<sup>31</sup>

Next, the Agencies must require temporary ground cover in the rules because the Act requires “*short-term* and long-term measures to control accelerated erosion and prevent off-site sedimentation.”<sup>32</sup> Many state agencies already recognize the need for temporary ground cover “rather than waiting for the major portion of the project to be completed.”<sup>33</sup> For example, the Department of Transportation calls for temporary ground cover to be installed immediately once an area has been graded.<sup>34</sup> They do so because they recognize that establishing temporary ground

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<sup>28</sup> 15A N.C. Admin. Code 04B .0107(b); Regulatory Impact Analysis at 2, 16.

<sup>29</sup> 15A N.C. Admin. Code 04B .0107 and .0124.

<sup>30</sup> N.C. Gen. Stat. § 113A-57(2) and (3) (emphasis added).

<sup>31</sup> N.C. Erosion and Sediment Control Planning and Design Manual, Ch. II, p. 6.10.1 (May 2013).

<sup>32</sup> H. Joseph Kleiss, Soil Facts: North Carolina Erosion and Sedimentation Pollution Control Program, North Carolina Cooperative Extension Service, <http://content.ces.ncsu.edu/19135.pdf>.

<sup>33</sup> See, e.g., Erosion and Sediment Control Design and Construction Manual, North Carolina Department of Transportation (2015) at 4-218.

<sup>34</sup> *Id.*



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cover is an inexpensive and effective way to prevent sedimentation when permanent long-term measures are not possible.

In addition, self-inspection under the revised rules is triggered upon the “installation of temporary or permanent erosion and sediment control measures.”<sup>35</sup> To ensure self-inspections take place during construction, it must be clear *from the rules* that temporary ground cover is required at least within 15 days after ceasing land-disturbance.

That N.C. Department of Environmental Quality Construction General Permit No. NCG010000 (“NCG01”) contains its own requirements for ground cover<sup>36</sup> is insufficiently protective. As explained more fully in Section X below, redundancies are necessary because of current federal efforts to limit the scope of the federal Clean Water Act.

To sufficiently protect against sediment pollution, and to comply with the Act, we urge the Agencies to make clear in the rules that ground cover requirements are triggered by the cessation of a land-disturbing activity and that temporary ground cover is required within 15 days after ceasing land-disturbance.

### **III. An erosion and sediment control plan should only be approved if it is complete (15A N.C. Admin. Code 04B .0118(a)).**

Under the proposed rule changes, the “approving agency must act on [the erosion and sediment control] plan within 30 days of receipt of the plan or the plan shall be deemed approved.”<sup>37</sup> As currently proposed, even an incomplete plan would be deemed approved if the oversight agency fails to act within 30 days. This proposal is inconsistent with the Act’s language and its goal to “keep sediment from entering our natural watercourses e.g. streams, rivers, lakes, swamps, and marshes.”<sup>38</sup>

Under the Act, any “land-disturbing activity shall be conducted in accordance with the approved erosion and sedimentation control plan.”<sup>39</sup> The rules spell out what constitutes a complete erosion and sediment control plan,<sup>40</sup> and the Act only contemplates “deemed approval” of a “*completed* plan.”<sup>41</sup> The rules similarly require the oversight agency to “complete its review of any *completed* plan within 30 days of receipt.”<sup>42</sup> These provisions underscore the importance of plan completion before approval (active or passive).

Consistent with these provisions, and to further the goals of the Act, we urge the Agencies to clarify that the 30 day-period for deemed approval under 15A N.C. Administrative Code 04B .0118(a) is triggered only upon submission of a plan that meets the requirements 15A

<sup>35</sup> 15A N.C. Admin. Code 04B .0131(1)(c); Regulatory Impact Analysis at 2, 16.

<sup>36</sup> North Carolina General Permit No. NCG010000 to Discharge Stormwater Under the National Pollutant Discharge Elimination System.

<sup>37</sup> 15A N.C. Admin. Code 04B .0118(a); Regulator Impact Analysis at 19.

<sup>38</sup> Erosion & Sediment Control Planner Packet, N.C. Dept. of Env'tl. Quality, Div. of Energy, Mineral, and Land Res. at 7,

[https://files.nc.gov/ncdeq/Energy%20Mineral%20and%20Land%20Resources/Erosion%20and%20Sediment%20Control/esc\\_education/Planner-Packet.pdf](https://files.nc.gov/ncdeq/Energy%20Mineral%20and%20Land%20Resources/Erosion%20and%20Sediment%20Control/esc_education/Planner-Packet.pdf).

<sup>39</sup> N.C. Gen. Stat. § 113A-57(5).

<sup>40</sup> See 15A N.C. Admin. Code 04B .0106 and .0126.

<sup>41</sup> N.C. Gen. Stat. § 113A-54.1(a) (emphasis added).

<sup>42</sup> 15A N.C. Admin. Code 04B .0118(b)(2) (emphasis added).

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N.C. Administrative Code 04B .0106 and .0126. Without this clarification, developers may have the incentive to submit incomplete erosion and sediment control plans. The vast majority of erosion and sediment control plans are reviewed within the statutory period;<sup>43</sup> therefore, this change acts as an important deterrent against incomplete submissions, while having minimal effect on the overall approval rates.

#### **IV. The rule revisions must require protection against runoff from higher intensity storms, which occur far more frequently in the current climate (15A N.C. Admin. Code 04B .0105, .0108, .0109, and .0124).**

Under the proposed rules, sediment and erosion control design standards are required to be sufficient to protect against 10-year or 25-year storms.<sup>44</sup> The proposed definitions of the 10-year and 25-year storms incorporate rainfall intensity projections based on “historical data.”<sup>45</sup> Historical data is of limited utility to predict future rainfall because heavy rainfall is becoming more common and more severe.<sup>46</sup> Thus, the proposal’s reliance on historical data and limited focus on 10-year and 25-year storms ensures that sediment pollution will continue at an alarming rate.

For example, under the design standards for Sensitive Watersheds, erosion and sediment control measures need only be designed to provide protection from runoff from a 25-year storm.<sup>47</sup> A 25-year storm is one that is predicted, based on historical data, to occur once every 25 years.<sup>48</sup> When the rule was originally enacted, protection from a 25-year rainfall event may have been protective of sensitive watersheds. Now, the pace of extreme weather events has accelerated and protection from rain events that historically occurred every 25 years is insufficient to prevent the sedimentation of our waterways.<sup>49</sup>

Under historical conditions, a 100-year storm was expected to occur only once every 100 years, or 1% of the time.<sup>50</sup> But, the data used to describe and predict the intensity, duration, and frequency of rainfall assume weather conditions remain static and have not taken into account the increased frequency of storms.<sup>51</sup> Today, storms that in the past occurred only once in a hundred years are now occurring at nearly the same rate as the regulations predict for 25-year

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<sup>43</sup> Opportunities Exist to Improve the Erosion and Sediment Control Program and Recover \$1.7 Million in Annual Costs: Final Report to the Joint Legislative Program Evaluation Oversight Committee, General Assembly Program Evaluation Division (Jan. 29, 2019) at 22.

<sup>44</sup> 15A N.C. Admin. Code 04B .0105, .0108, .0109 and .0124; Regulatory Impact Analysis at 17-18, 21.

<sup>45</sup> 15A N.C. Admin. Code 04A .0105; Regulatory Impact Analysis at 15.

<sup>46</sup> Daniel B. Wright, Christopher D. Bosma, Tania Lopez-Cantu, U.S. Hydrologic Design Standards Insufficient Due to Large Increases in Frequency of Rainfall Extremes. Geophysical Research Letters (2019), <https://www.sciencedaily.com/releases/2019/08/190801120209.htm>.

<sup>47</sup> 15A N.C. Admin. Code 04B .0124.

<sup>48</sup> 15A N.C. Admin. Code 04A .0105.

<sup>49</sup> Climate Adaption and Source Water Impacts, United State Environmental Protection Agency (last visited on Aug. 27, 2019), <https://www.epa.gov/arc-x/climate-adaptation-and-source-water-impacts>.

<sup>50</sup> See United States Geological Survey, The 100-Year Flood, [https://www.usgs.gov/special-topic/water-science-school/science/100-year-flood?qt-science\\_center\\_objects=0#qt-science\\_center\\_objects](https://www.usgs.gov/special-topic/water-science-school/science/100-year-flood?qt-science_center_objects=0#qt-science_center_objects).

<sup>51</sup> Daniel B. Wright, Christopher D. Bosma, Tania Lopez-Cantu, U.S. Hydrologic Design Standards Insufficient Due to Large Increases in Frequency of Rainfall Extremes. Geophysical Research Letters (2019), <https://www.sciencedaily.com/releases/2019/08/190801120209.htm>.

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storms. In fact, researchers found that in 2017, 100-year storm events were occurring 85% more often in the eastern United States than they did in 1950.<sup>52</sup> In the past 20 years, Wake County alone has had four 100-year rainfall events and since 1996 North Carolina has experienced a 100-year rainfall event on average every five years.<sup>53</sup> The revised rules must therefore address the weaknesses of historical data and require design standards to protect against more intense storms than have historically occurred every 10 to 25 years.

If the design standards are not updated to account for more intense storms, our state's water quality problems will grow. Sites that meet design standards for a 10- to 25-year storm will encounter more frequent rain events that are greater than, for example, the site's sediment basins are designed for, allowing turbid water to pour out from those basins and to inundate nearby land, creeks, streams, and even rivers in excess of the state's turbidity limit. Given how intensely sedimentation degrades water quality, this is unacceptable.

We urge the Agencies to require that the Design Standards for Sensitive Watersheds incorporate measures designed to provide protection from runoff from a 100-year storm. We also urge the Agencies to require design standards for other watersheds and stormwater discharge outlets that provide protection from the runoff from 25-year storms.

## **V. The Agencies should maintain the requirements for inspection access in the rules.**

The Agencies propose to remove the provisions that entitle "DEQ or other party authorized by the Commission . . . to conduct site inspections as necessary to carry out their duties" and forbid any party from preventing representatives of the Commission from inspecting the property.<sup>54</sup> While these provisions are also contained in North Carolina General Statutes § 113A-61.1, having them repeated in the rules, with which more people are likely familiar, provides a useful safeguard against obstructed agency access. We urge the Agencies to maintain this language in the rules.

## **VI. All buffer zones required under the Sedimentation Pollution Control Act should be measured from the top of the stream bank (15A N.C. Admin. Code 04B .0125).**

The revisions to 15A N.C. Administrative Code 04B .0125 require that buffer zones in areas that are not adjacent to trout waters be preserved between land disturbing activities and *the edge of the water*.<sup>55</sup> For areas adjacent to trout waters, however, buffer zones are to be measured horizontally from "the top of the bank."<sup>56</sup> All buffer zones should be measured from the top of the stream bank.

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<sup>52</sup> *Id.*

<sup>53</sup> Rainfall and Stream Analysis 1996-2018, Joint Select Committee on Storm-Related River Debris/Damage in North Carolina, North Carolina Department of Emergency Management (Nov. 26, 2018), [https://www.ncleg.gov/documentsites/committees/BCCI-6728//02%20-%20NCEM%20-%20Rainfall%20and%20River%20Flooding\\_Frequency\\_Leg\\_112618.pdf](https://www.ncleg.gov/documentsites/committees/BCCI-6728//02%20-%20NCEM%20-%20Rainfall%20and%20River%20Flooding_Frequency_Leg_112618.pdf).

<sup>54</sup> 15A N.C. Admin. Code 04B .0120(b) and (c); Regulatory Impact Analysis at 20-21.

<sup>55</sup> 15A N.C. Admin. Code 04B .0125; Regulatory Impact Analysis at 22.

<sup>56</sup> The revisions to 15A N.C. Administrative Code 04B .0125(b) appear to contain a typographical error deleting the word "bank." If this change was not in error, we strongly disagree with the decision to alter the method of measurement.

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First, buffer zones established in North Carolina are consistently measured from the “top of the bank.”<sup>57</sup> The Sedimentation Pollution Control Act defers to these protective regulations when contemplating erosion and sediment control plan denial;<sup>58</sup> therefore, buffer zones under the Sedimentation Pollution Control Act should be just as protective. Moreover, many of North Carolina’s rivers and streams flow only intermittently or ephemerally. Measuring from the edge of the water in those instances would, in many cases, be impossible, and in others would be under protective. For consistency, practicality, and protectiveness all buffer zones under the Sedimentation Pollution Control Act should be measured from the top of the stream bank.

## **VII. The rules should provide a clear expiration period for all erosion and sediment control plans, and erosion and sediment control plans should expire more quickly where no land-disturbing activity has occurred (15A N.C. Admin. Code 04B .0129).**

Under the rules, erosion and sediment control plans are set to expire three years following the date of approval if no land disturbing activity had been undertaken,<sup>59</sup> but there is no expiration date set for erosion and sedimentation control plans when land disturbing activity *has been* undertaken. The rules should provide a clear expiration period for all erosion and sediment control plans, and erosion and sediment control plans should expire within one year if no land disturbing activity has occurred.

First, the failure to set an expiration date for erosion and sediment control plans when land disturbing activity is underway fails to account for changed conditions and the need for the approval authority to have the flexibility to address those changes.<sup>60</sup> As discussed above, intensifying development patterns and changing weather patterns require program adaptability; therefore, the rules should be revised so that plans for developments that are underway expire three years after the date of approval. This will allow the approval authority to assess whether the plan is sufficiently protective or needs revision.

Additionally, where a plan has been approved, but no land-disturbing activity has begun, the rules should provide that the plan expires one year after approval. Providing this 1-year expiration period will help reduce unnecessary workload for agency staff and funding shortfalls because only “open” projects are required to be inspected<sup>61</sup> and application fees can be collected when erosion and sediment control plans for expired projects are resubmitted.<sup>62</sup>

## **VIII. Self-inspection should be required during and after each of the phases listed under 15A N.C. Admin. Code 04B .0131(1).**

The rule revisions altered the frequency of self-inspections by requiring self-inspection only after each phase listed in 15A N.C. Administrative Code 04B .0131(1). Previously, self-

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<sup>57</sup> See 15A N.C. Admin. Code 02B .0233(a)(4) (Neuse River Basin), .0243(4)(a)(i) (Catawba River), .0259(4)(a)(i) (Tar-Pamlico River), .and 0267(7)(a)(i) (Jordan Watershed).

<sup>58</sup> See N.C. Gen. Stat. § 113A-54.1(c) (“The Commission shall disapprove an erosion and sedimentation control plan if implementation of the plan would result in a violation of rules adopted by the Environmental Management Commission to protect riparian buffers along surface waters.”)

<sup>59</sup> 15A N.C. Admin. Code 04B .0129.

<sup>60</sup> 15A N.C. Admin. Code 04B .0129; Regulatory Impact Analysis t 23.

<sup>61</sup> See SPCA Consolidated Report at 4-5.

<sup>62</sup> See N.C. Gen. Stat. § 113A-54.2(a); 15A NCAC 04B .0126.

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inspection was required “during or after” each phase listed in 15A N.C. Administrative Code 04B .0131(3). Neither formulation requires the ideal frequency of self-inspection.

North Carolina General Statutes § 113A-54.1(e) sets the minimum frequency for self-inspections, but does not constrain the Agencies from requiring additional protection.<sup>63</sup> Additional protection is warranted here, and self-inspection should be required “during and after” each phase listed in 15A N.C. Administrative Code 04B .0131(3). The phases listed can take weeks, if not months, to complete and the rules should require that self-inspection continue throughout those time periods to protect against the harmful effects of sediment pollution in our rivers, lakes, and streams.

## **IX. The rules should be amended to promote greater transparency and public participation.**

The current Sedimentation Control Rules provide inadequate public access. Without broad and equitable access to information about projects, the general public is unable to protect their interests and engage with the erosion and sediment control program. Below are a variety of recommendations that would enhance public access to erosion and sediment control information, public participation, and, consequently, public trust.

### **a) The public should be adequately notified of their right to intervene in a request for a declaratory ruling (15A N.C. Admin. Code 04E .0502).**

We commend the Agencies for clarifying the rights of third parties to intervene in requests for declaratory rulings.<sup>64</sup> However, the rules should provide that the public receive adequate timely notice of any request for declaratory ruling made under 15A N.C. Administrative Code 04E .0502, as well as their right to request intervention in the process.

Large information disparities exist between large developers and surrounding landowners. Combined with a lack of legal knowledge, the general public may be unaware of ongoing proceedings that directly affect their interests. Given the requirement that intervention requests be “timely,”<sup>65</sup> the Commission should promptly notify adjoining and downstream landowners of requests for declaratory rulings and the right to request intervention. In addition, Commission should promptly publish all requests for declaratory rulings on their website.

### **b) The public should be notified when any petitions for rulemaking are initiated under 15A N.C. Administrative Code 04E .0201.**

Similarly, the Commission should improve its public notice requirements under 15A N.C. Administrative Code 04E .0201. The revised rules do not require that the Commission provide public notice that a petition for rulemaking has been filed. Nor do the revised rules require that the information included under 15A N.C. Administrative Code 04E .0201(b) and (c) be made publicly available. All petitions for rulemaking and their contents should be made publicly

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<sup>63</sup> N.C. Gen. Stat. § 113A-54.1(e) (“The landowner . . . shall perform an inspection of the area covered by the plan after each phase of the plan has been completed and after establishment of temporary groundcover .....”).

<sup>64</sup> Regulatory Impact Analysis at 4.

<sup>65</sup> N.C. Gen. Stat. § 1A-1, Rule 24.

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available. This improved transparency will allow the public better opportunities to provide meaningful feedback, avoid duplicative petitions for rulemaking, and provide better oversight of the program.

**c) Projects that receive approval for erosion and sediment control plans should be mapped and the project maps and other details should be accessible to the public.**

Currently, there is no easily accessible method for the public to learn about the proposed and active major development activities throughout the state. The public has a right to know the location, scope, and ownership of development activities that could impact them and the waterways they care about. Therefore, the Agencies should create and maintain a publicly-available database and mapping tool so that the public has access to this information. Delegated local programs should also be required to contribute the information related to development activities they are overseeing. The information could easily be included in the Department of Environmental Quality's Community Mapping System,<sup>66</sup> which would help provide communities with up-to-date information about the projects in their area, inform state regulators and businesses decision making, and raise awareness of disproportionately impacted communities.<sup>67</sup>

**d) The public should have greater access to erosion and sediment control plans, notices of violations, applications, and approvals.**

Similarly, the approval and enforcement of erosion and sediment control plans is not currently made available to the public. There is no easy way for the public to access erosion and sediment control plans, notices of violations, applications, or approvals. The Agencies should require any erosion and sediment control plan submitted be made publicly available by the approval authority within 5 days of receipt. This will allow adjoining landowners to express any concerns they may have before the approval authority take action on the plan. Similarly, any approvals and documents related to the approval authority's review of the erosion and sediment control plan<sup>68</sup> and notices of violation should promptly be made publicly available. If these documents are not made publicly available on a timely basis, nearby landowners may unknowingly be affected by sediment pollution. Public access to these documents will allow those parties to better protect their health and property from the damaging effects of sediment pollution.

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<sup>66</sup> N.C. Department of Environmental Quality, North Carolina Community Mapping System, <https://deq.nc.gov/outreach-education/environmental-justice/deq-north-carolina-community-mapping-system>.

<sup>67</sup> See Press Release, DEQ to unveil Community Mapping System with EJ Tool at the Secretary's Environmental Justice and Equity Advisory Board Meeting May 22 (May 21, 2019), <https://deq.nc.gov/news/press-releases/2019/05/21/deq-unveil-community-mapping-system-ej-tool-secretary%E2%80%99s-environmental>.

<sup>68</sup> See 15A N.C. Admin. Code 04B .0118(b)

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## **Self-inspection should require greater public notice and reporting requirements.**

The revised rules call for increased self-inspection by requiring weekly and rain-event inspections under 15A N.C. Administrative Code 04B .0131.<sup>69</sup> While we commend the Agencies for increasing the frequency of self-inspections, we believe that increased reliance on self-inspections necessitates increased public access to self-inspection reports. Increased public access will also allow interested parties to maintain an additional level of oversight, which may ease administrative burdens on agency staff and will strengthen public trust in the program.

Under both the previous rules and the revised rules, self-inspections are only required to be made available at the site location.<sup>70</sup> The Agencies should require that self-inspection reports be submitted to the Agencies, so that they are available to the public through Public Records Act requests. Even better, the Agencies should make self-inspection reports accessible to the public on the oversight agencies' website. Landowners surrounding and downstream from the land-disturbing activities should be made aware that these records are available to them. As development continues to increase despite agency staffing pressures, additional public oversight can only increase the success of the erosion and sedimentation control program and result in the protection of more of our state's waters.

## **X. Redundancies in the NCG01 permit and the Sedimentation Pollution Control Act are necessary to ensure that protective provisions remain in force even if the scope of the federal Clean Water Act is restricted.**

The proposed revisions to the rules remove many requirements based on reported redundancy with the NCG01 permit requirements. For example, the Agencies propose to delete the ground cover requirements for Sensitive Watersheds from the rules because North Carolina's NCG01 permit contains requirements for ground cover. The Agencies should reinstate all rule revisions made on this basis given the ongoing federal efforts to weaken federal Clean Water Act protections and redefine the definition of "waters of the United States."<sup>71</sup>

North Carolina's NCG01 permit is rooted in the federal Clean Water Act and incorporates federal national pollutant discharge elimination system ("NPDES") standards and regulations.<sup>72</sup> Therefore, if the federal Clean Water Act and its NPDES program are restricted in scope, the state NCG01 would also likely be restricted,<sup>73</sup> thereby leaving some waters of the state without the protections of the NCG01 permit.

In contrast, the Sedimentation Pollution Control Act program is not linked to the scope of federal jurisdiction, so the Commission's jurisdiction to regulate land-disturbing activity would

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<sup>69</sup> 15A N.C. Admin. Code 04B .0131; Regulatory Impact Analysis at 25.

<sup>70</sup> 15A N.C. Admin. Code 04B .0131(d); Regulatory Impact Analysis at 24-25.

<sup>71</sup> Definition of "Waters of the United States"-Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899 (Jul. 27, 2017); Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154 (Feb. 14, 2019).

<sup>72</sup> For example, the water quality classifications and standards that are the core of the NCG01 permit expressly incorporate federal standards. *See* 15A N.C. Admin. Code 02B.0101(f), (g); 02B.0201(a). Moreover, "wetlands classified as waters of the state are restricted to waters of the United States." 15A N.C. Admin. Code 02B. 0202(71).

<sup>73</sup> *See* N.C. Gen. Stat. § 150B-19.3(a).

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not be affected by any changes to the federal definition of “waters of the United States.”<sup>74</sup> Therefore, redundancies between the Sediment Control Rules and the NCG01 ensure that protective provisions remain in force even if the scope of the Clean Water Act and its NPDES program is restricted.

## **XI. Alternative erosion and sediment control measures should only be approved if they are proven effective and provide equal to or greater control (15A N.C. Admin. Code 04B .0109(b) and .0124).**

As an initial matter, the Commission should not be *required* to allow alternative erosion and sediment control measures as proposed in the rule changes. So that the Commission retains the discretion to ensure the maximum protection against sediment pollution, 15A N.C. Administrative Code 04B .0109(b) should read “The Commission *may* allow alternative measures . . . .” as opposed to “The Commission *shall* allow alternative measures . . . .” as proposed.<sup>75</sup> This change would make the requirements for alternative erosion and sediment control measures consistent with the Agencies’ proposed changes to the design standard criteria in 15A N.C. Administrative Code 04B .0124.

There, in order for alternative design or control measures to be authorized, it must be demonstrated that “the alternative measures will provide an equal or more effective level of erosion and sedimentation control on the site.”<sup>76</sup> Both rules should be revised to clarify that, before an alternative can be approved for erosion and sediment control measures or design standards, the Sedimentation Control Commission Technical Advisory Committee must determine upon demonstration in the field, if available, or other information that the proposed alternative will provide an equal or more effective level of control.

## **XII. Non-toxic flocculants should be required in sensitive waters and recommended in other waters (15A N.C. Admin. Code 04B .0124).**

Introducing non-toxic flocculants into turbid water is highly effective at reducing sediment erosion and turbidity.<sup>77</sup> Flocculants can be applied to various best management practices, which make them a highly flexible solution to turbidity issues.<sup>78</sup> Flocculants are also relatively inexpensive and widely used. The revised rules recognize that flocculants can be a valuable solution in sensitive watersheds;<sup>79</sup> however, the rule changes do not go far enough. The use of non-toxic flocculants should be required as part of the design standards required in High Quality Water Zones under 15A N.C. Administrative Code 04B .0124(c). In addition, the rules should recommend the use of non-toxic flocculants in all E&SC plans.

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<sup>74</sup> *Williams v. Allen*, 182 N.C. App. 121 (2007) (“We also observe that N.C. Gen. Stat. 113A–54(b)(2005) authorizes the Sedimentation Control Commission to adopt ‘rules and regulations for the control of erosion and sedimentation resulting from land-disturbing activities.’ This authority is not limited to circumstances where sedimentation actually reaches a waterway.”).

<sup>75</sup> Regulatory Impact Analysis at 17.

<sup>76</sup> 15A N.C. Admin. Code 04B .0124.

<sup>77</sup> J. Kang, J. W. Vetter, and R. A. McLaughlin, “Chemical Treatment to Reduce Turbidity in Pumped Construction Site Water,” 144 JOURNAL OF ENVIRONMENTAL ENGINEERING 12 (2018).

<sup>78</sup> *Id.*

<sup>79</sup> 15A N.C. Admin. Code 04B .0124; Regulatory Impact Analysis at 21.



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We note that in guidance issued in 2004 by the North Carolina Division of Water Quality, the agency determined that Polyacrylamide (“PAM”) products “may hold promise for reducing soil erosion and subsequent sedimentation in streams.”<sup>80</sup> However, the agency also recognized that “if PAMs are applied over certain levels, they become toxic to aquatic life.”<sup>81</sup> The Agencies should closely evaluate PAM products; determine their efficacy and toxicity; and, if they determine PAM should be used to combat sediment pollution, provide more specific guidance on how to safely and effectively use PAM products.<sup>82</sup>

### **XIII. The Director should have the authority to assess civil penalties, otherwise penalties—a key incentive for compliance—will be less likely to be imposed (15A N.C. Admin. Code 04C .0103 and .0106).**

The Agencies propose to revise the rules so that authority to assess civil penalties rests with the Secretary of the Department of Environmental Quality.<sup>83</sup> Although the Secretary has the authority to delegate civil penalty assessment to the Director of the Division of Energy, Mineral, and Land Resources, the Director will not have that authority unless and until the Secretary so delegates.<sup>84</sup> We urge the Secretary to issue the delegation at the same time or before the proposed rules are finalized so there is no gap in the Director’s authority. Otherwise, the additional level of bureaucracy required during the gap would complicate the enforcement of the sediment control program and likely reduce the number of penalties imposed, removing a significant deterrent of noncompliance from the program.

### **XIV. The rules should maintain the model ordinance so that local programs are more likely to adopt their own protective ordinances (15A N.C. Admin. Code 04D.0102)**

The revised rules remove the model ordinance provision entirely, which is not permitted under the Act.<sup>85</sup> The Commission must “[a]ssist and encourage local governments in developing erosion and sedimentation control programs and, as a part of this assistance, *the Commission shall develop a model local erosion and sedimentation control ordinance.*”<sup>86</sup> Moreover, if there is no model ordinance local governments can use as a guide, local governments are less likely to adopt a local ordinance, and if they do, it may not be sufficiently protective. Thus, the model must be maintained and should be regularly updated to encourage local programs to adopt and regularly re-examine their own ordinances.

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<sup>80</sup> Memorandum from M. Matthews & C. Brower re Use of Polyacrylamide (PAM) Products (July 19, 2004), [https://files.nc.gov/ncdeq/Water%20Quality/ATU%20Documents/Approved%20PAMS\\_Flocculants/1%203%20Use%20of%20Polyacrylamide\(PAM\)%20\(7-19-2004\).pdf](https://files.nc.gov/ncdeq/Water%20Quality/ATU%20Documents/Approved%20PAMS_Flocculants/1%203%20Use%20of%20Polyacrylamide(PAM)%20(7-19-2004).pdf).

<sup>81</sup> *Id.*

<sup>82</sup> *E.g.*, NC State Extension, Using Polyacrylamide (PAM) to Reduce Erosion at Construction Sites (Mar. 10, 2015), <https://content.ces.ncsu.edu/using-polyacrylamide-pam-to-reduce-erosion-on-construction-sites>.

<sup>83</sup> Regulatory Impact Analysis at 26-27.

<sup>84</sup> N.C. Gen. Stat. §§ 113A-55, 114A-64, and 143B-10(a).

<sup>85</sup> Regulatory Impact Analysis at 28.

<sup>86</sup> *See* N.C. Gen. Stat. § 113A-54(d)(1) (emphasis added).

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## **XV. Fees should be set at a level sufficient to sustain active and vigorous enforcement of the SPCA program.**

Application fees under the Sedimentation Pollution Control Act program are statutorily mandated, however, the fees associated with NCG01 permit applications are not. The Sedimentation Pollution Control Act program is vastly underfunded, which leads to ineffective enforcement.<sup>87</sup> Currently the program fees cover less than 50% of the programs expenditures.<sup>88</sup> The Agencies should either increase funding through implementation of new fees associated with NCG01 or request that the General Assembly remove the statutory cap on Sedimentation Pollution Control Act fees.

## **XVI. The “Operations in Lakes and Natural Watercourses” provision should be revised consistent with the Clean Water Act section 404 requirements (15A N.C. Admin. Code 04B .0112).**

As explained above, the federal government is currently attempting to redefine the term “waters of the United States” in order to reduce federal jurisdiction under the Clean Water Act. These changes would narrow federal jurisdiction under the 33 U.S.C. § 1344 (“Section 404”) program, which requires that dischargers receive a permit before discharging dredge or fill materials into a navigable water.<sup>89</sup> The provisions of 15A N.C. Administrative Code 04B .0112 could provide an important backstop should the scope of the Section 404 program be restricted.

To ensure the revised rules provide sufficient protection should Section 404 be restricted, we urge the Agencies to revise the section as follows: “Land disturbing activity in connection with construction in, on, over, or under a lake or natural watercourse shall minimize the extent and duration of disruption of the stream channel. *The disruption shall only be permitted if no practicable alternative exists that would have less adverse impact on the aquatic ecosystem and the water quality of downstream waters will not be degraded.*”<sup>90</sup> These requirements would be familiar with developers and would ensure that state water bodies are protected regardless of any changes to the scope of the Section 404 program.

## **XVII. Conclusion**

North Carolina’s rapid pace of development is expected to continue for the foreseeable future and new pressures from intensifying rainfall will increase the state’s sedimentation pollution issues.<sup>91</sup> Unless these issues are adequately addressed, the state’s valuable water resources will suffer from increased sediment pollution, fish kills, and harmful algae blooms. Families and communities will feel less safe swimming in the state’s rivers and lakes. And, the

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<sup>87</sup> Opportunities Exist to Improve the Erosion and Sediment Control Program (finding that none of the regional offices inspected approved sites at least once per month).

<sup>88</sup> *Id.* at 1.

<sup>89</sup> 33 U.S.C. § 1344(a).

<sup>90</sup> 33 C.F.R. § 230.10.

<sup>91</sup> A. J. Petryniak & A. B. Loveless, North Carolina Sedimentation Review, Duke University, Nicholas Institute for Environmental Policy Solutions (June 2013), [https://nicholasinstitute.duke.edu/sites/default/files/strategic-faculty-advisor-board/sedimentation\\_paper\\_a\\_petryniak\\_a\\_loveless\\_6-13\\_final.pdf](https://nicholasinstitute.duke.edu/sites/default/files/strategic-faculty-advisor-board/sedimentation_paper_a_petryniak_a_loveless_6-13_final.pdf).

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state and its municipalities will be forced to spend public funds for dredging and water treatment. By incorporating our requests into the rule revisions, the Agencies can reduce these problems, require the developers to stop their sediment pollution, and build public trust in the Sedimentation Pollution Control Act program. We respectfully request that the Agencies fully incorporate our requested changes.

Thank you for considering these comments. Please contact us at 919-967-1450 if you have any questions regarding this letter.

Sincerely,



Tirrill Moore  
Associate Attorney  
[TMoore@selcnc.org](mailto:TMoore@selcnc.org)



Kelly F. Moser  
Senior Attorney  
[kmoser@selcnc.org](mailto:kmoser@selcnc.org)

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