

**Division of Energy, Mineral, and Land Resources - Land Quality Section's
Proposed Guidelines on the Issuance of
Notices of Violation for Offsite Sedimentation
Under the Sedimentation Pollution Control Act of 1973**

October 14, 2015

Background:

In June 2013, the Supreme Court of North Carolina ruled in *Applewood Properties, LLC v. New South Properties, LLC* that for a private party to have standing to bring suit under the Sedimentation Pollution Control Act (SPCA) that the “defendant previously must have been cited for a violation of a law, rule, ordinance, order, or erosion and sedimentation control plan.” The Court ruled that a violation of the SPCA was not established unless a Notice of Violation had been issued. As a result of this ruling, the Sedimentation Control Commission had several discussions concerning the need to preserve the right of citizens to sue under the Sediment Act. The prevailing opinion was that it would be improper for Land Quality Section (LQS) or local program staff to be perceived as limiting someone’s rights under the SPCA by failing to cite violations of the Sediment Act (through a Notice of Violations) for any off-site sedimentation. Since the Supreme Court’s ruling, the Commission has encouraged LQS and local government staff to issue a Notice of Violation (NOV) any time off-site sedimentation occurs.

During the Sedimentation Control Commission’s (SCC) meeting on November 20, 2014, staff of the Land Quality Section (LQS) reported on its Annual Review of NC Department of Transportation’s (NCDOT) Erosion and Sedimentation Control Delegation. Several SCC members questioned LQS staff on why NCDOT did not issue Immediate Corrective Actions (ICA) – the equivalent to LQS’ Notices of Violation (NOV) – and whether or not LQS should have issued NOVs for two projects in light of offsite sedimentation noted during the inspection of the projects. LQS responded that judgment is used to determine the need for a Notice of Violation, including the amount of off-site sediment and its impact. This questioning evolved into a broader discussion of when LQS should issue Notices of Violation. As stated in the minutes of the November 20, 2014 SCC meeting, members of the SCC indicated “that the Commission wanted an NOV to be issued by local governments and LQS staff for all off-site sedimentation to protect the public’s right to sue under the Sediment Act.” After further discussion, the minutes indicated “that staff may need a more detailed policy and training with respect to offsite sedimentation and when NOVs should be issued.”

Subsequent to this SCC meeting, LQS program managers reminded regional offices and delegated programs to follow the SCC’s direction of a zero tolerance policy to issue NOVs any time there is offsite sedimentation from a regulated construction project until “a more detailed policy” or guidelines on issuance of NOVs for offsite sedimentation could be developed by LQS and approved by the SCC. When LQS staff received concerns regarding this policy from internal staff, NCDOT, contractors and other regulated parties, it reviewed previous SCC meeting minutes over the past two years to determine if the SCC guidance for staff to issue NOVs for any site with off-site sedimentation had been formally voted on and approved by the SCC. As no such evidence was found in the past SCC meeting minutes, it appears timely and appropriate for the LQS to study the current guidance and provide recommendations to the SCC on how state and local programs should handle the issuance of NOVs for off-site sedimentation, taking into account LQS staff’s input and the feedback received from its clientele on this matter.

The following sections outline the concerns with the current SCC zero tolerance NOV policy and staff's recommended guidelines for issuance of NOVs for off-site sedimentation on projects with approved erosion and sedimentation control plans for SCC consideration and approval.

Impact of Current SCC Zero Tolerance NOV Policy:

The following impacts have been noted when NOVs are required to be issued for any off-site sedimentation:

- Removes the flexibility and discretion of the inspector to evaluate specific site conditions in determining how to best gain compliance
- Hampers locally delegated programs by forcing issuance of a NOV, rather than the use of other tools available to them
- Requires substantial time and resources for drafting and review of paperwork, delivery, and follow up of some less significant issues onsite (slight sedimentation). This is especially pertinent given recent changes to the SPCA, which include hand delivery of NOVs to first time violators.
- Local (NC) contractors with a history of NOVs are viewed less favorably by NCDOT when awarding contracts for work, since compliance with state environmental regulations is a consideration in reviewing bids. Outside contractors with no history – or knowledge – of NC's rules and regulations can therefore be given preference for projects, since they have no previous history of NOVs in NC.

Recommendations for Issuance of NOVs for Offsite Sedimentation on Sites with Approved E&SC Plans:

The following recommendations have been developed by DEMLR LQS staff in order to evaluate whether off-site sedimentation observed during an inspection warrants the issuance of a Notice of Violation under the Sediment Act:

- Moderate to Severe Off-site Sedimentation: A NOV should be issued, unless:
 - adequately designed measures were installed and maintained as per the approved E&SC plan, and
 - the design storm was exceeded immediately prior to the inspection or an extreme flooding event occurred
- Slight Off-site Sedimentation: The inspector shall use his/her best judgment in determining whether a NOV is appropriate for the specific site conditions. Among the factors to consider when making this determination are:
 - Did the sedimentation reach a buffer or stream?
 - Was the off-site sedimentation self-reported by the operator/financially responsible party, and were efforts underway to complete clean up/restoration of the affected area?
 - Was the design storm exceeded?
 - Can the sedimentation damage be cleaned up/remediated within 24 hours?

- Have complaints been received from impacted persons (adjoining property owners, etc.)?
- Prior compliance history of the site and/or financially responsible party

In cases where a NOV is not issued, the agency will still issue an inspection report with an appropriate deadline for compliance. A follow up inspection will be scheduled to ensure that the deadline for compliance was met through proper implementation of appropriate measures at the site. If such deadline is not met, an NOV will be issued to gain timely compliance.