

MINUTES
NORTH CAROLINA SEDIMENTATION CONTROL COMMISSION
November 12, 2015
GROUND FLOOR HEARING ROOM, ARCHDALE BUILDING
RALEIGH, NORTH CAROLINA

The North Carolina Sedimentation Control Commission met on November 12, 2015 at 10:00 a.m. in the Ground Floor Hearing Room, Raleigh, North Carolina. The following persons were in attendance for all or part of the meeting:

COMMISSION MEMBERS

Ms. Robin K. Smith (Chair)
Mr. Jonathan Bivens
Ms. Heather Jacobs Deck
Ms. Karla Hammer Knotts
Dr. Susan White
Dr. John Havlin
Mr. Douglas Randolph
Ms. Natalie Berry (via telephone conference)

OTHERS

Mr. Tracy Davis, Director, DEMLR
Mr. Toby Vinson, Section Chief, Land Quality Section
Mr. Brad Cole, Chief Engineer, Land Quality
Ms. Stephanie Lane, Administrative Secretary
Ms. Evangelyn Lowery-Jacobs, Sed. Education Specialist, Land Quality Section
Ms. Ashley Rodgers, Sedimentation Specialist, Land Quality Section
Ms. Karyn Pageau, Asst. Sedimentation Specialist, Land Quality Section
Mr. Robert Josey, Rule Making Coordinator, DEMLR
Mr. Bradley Bennett, Stormwater Permitting, Land Quality Section
Mr. James Bernier Jr., Attorney General's Office
Mr. Kirk Stafford, Town of Cary
Mr. Steven Webb, NCHBA
Mr. Berry Jenkins, Carolina AGC
Mr. David Harris, NCDOT
Mr. Don Lee, NCDOT
Ms. Holly Miller, Town of Wake Forest
Ms. Jennifer Everett, DEQ Rule Making Coordinator, General Counsel's Office

PRELIMINARY MATTERS

Ms. Smith called the meeting to order and read Executive Order No. 1.

Those in attendance introduced themselves.

Ms. Smith asked for a motion to approve the minutes from the May 7, 2015 meeting.

The motion to approve the minutes with changes was made by Ms. Knotts. Mr. Bivens seconded the motion, and it carried unanimously.

Ms. Deck recused herself from Action Item B - Periodic Rules Review Final Determinations of the North Carolina Administrative Code.

ACTION ITEMS

Local Program Reviews – Ms. Karyn Pageau

Ms. Pageau gave a report on the reviews of the City of Burlington and the Town of Wake Forest delegated programs. A copy of the Local Program Report to the SCC is attached to the original minutes.

City of Burlington

On March 26, 2015, Tim Latham and Karyn Pageau conducted a review of the City of Burlington's Local Program. Two people contribute one full time equivalent to the erosion control program. The County reports having 14 active projects. The County completed 19 plan reviews with 11 approvals and 8 disapprovals last year. Staff has conducted 170 inspections, issued 3 notices of violations, and have not assessed any civil penalties in the past 12 months. During our review of the program, we reviewed 4 plans and inspected 4 projects located within the Jordan Lake Watershed.

The City of Burlington's Local Program is visiting sites on a frequent basis and their files were very organized. Comments made on previous formal review were being implemented by the program as evidenced in their inspection reports. The local program should implement the following recommendations to improve the program:

- 1) Request concrete washout area location and details through the plan review process.
- 2) Update the Construction Stormwater permit clause in the approval letter to reflect the most recently signed Permit NCG010000.

Staff recommended continued delegation.

Ms. Smith asked whether a NOV was issued for offsite sediment for the Park Rural Retreat Road project. Ms. Pageau indicated a NOV was not issued because the offsite sediment, which was located at the project entrance, was cleaned up prior to staff leaving the site. Ms. Deck asked if the City staff addressed the concerns of noncompliance for the project. Ms. Pageau stated contractors were actively working to make repairs during the site visit.

Mr. Bivens encouraged staff to clarify the issue regarding gradation of stone on the Mackintosh on the Lake project. Ms. Pageau indicated larger stone is typically seen on projects for permanent stream stabilization.

Mr. Bivens made a motion to approve the continued delegation. Dr. White seconded the motion, and it was approved unanimously.

Town of Wake Forest

On September 30, 2015, Joe Dupree and Karyn Pageau conducted a review of the Town of Wake Forest's Local Program. Six staff members contribute 2.5 full time equivalents to the erosion control program, 2 are new employees to the Town. The town has 55 projects and has completed 72 plan reviews, with 31 approvals and 41 disapprovals. The town has conducted 497 inspections, issued 5 notices of violations, 5 stop work orders and one civil penalty in the past 12 months. Four projects were reviewed.

The Town of Wake Forest Local Program is visiting sites on a frequent basis. The local program should also implement the following recommendations to improve the program:

- 1) Continue to check for self-inspection records and concrete washout areas on site and request this information and the NPDES stabilization timetable be placed on the drawings during plan review.
- 2) Keep hard copies of calculations in plan folder or store electronically in file folder for particular project.
- 3) Document when slopes have been graded or areas are left idle in the comments section of inspection reports in order to establish a time frame for establishing ground cover.

Staff recommended continued delegation.

Ms. Miller, Assistant Town Engineer, addressed the SCC to provide an update on the progress of sites evaluated. Mr. Bivens asked if there was only one inlet for the sediment basin being short circuited on the Holding Village project. Ms. Miller indicated there were two inlets for the basin, and the baffles were later adjusted to be consistent with the erosion control plan.

Dr. White made a motion to approve the continued delegation. Ms. Deck seconded the motion, and it was approved unanimously.

Periodic Rules Review Final Determinations – Ms. Ashley Rodgers

Ms. Rodgers mentioned two sets of public comments received regarding the initial determinations of the Sediment Rules. The first comments from Southern Environmental Law Center (SELC) had concerns with two designations of unnecessary:

The Rule enabling enforcement of sedimentation control for existing uncovered areas, and the Rule limiting sedimentation from railroad construction and operation. The SELC recommended changing the initial determination to necessary without substantive public interest. The second comment was from the National Waste and Recycling Association supporting the categorization of the rules as presented.

Staff recommended keeping the unnecessary designations on the two rules questioned by the SELC.

Ms. Smith asked if the SCC should change the initial determination in response to the comments received. Ms. Rodgers indicated changes could be made at the discretion of the SCC. The Administrative Procedure Act (APA) defines public comment as "a written objection to a rule or part of the rule." The comments received were objections to the rule classification, and technically were not public comments as defined. Ms. Everett added the rules review process does not have an avenue to address objections to rule classifications as opposed to the content of a rule.

Ms. Knotts made a motion to accept staff comments in response to the comments received regarding the classifications, and to accept the rules classifications as presented. Mr. Bivens seconded the motion, and it was approved unanimously.

Dr. White asked for clarification on the projected timeline for the rules review process. Ms. Rodgers indicated the report is due to the Rules Review Commission (RRC) by December 15, 2015. Ms. Everett added the RRC will review the report at their January 2016 meeting, and then forward the report to the Administrative Procedure Oversight (APO) Committee. If the APO meets in February, the rules will be accepted during that session. If the rules have not been accepted within 60 days, then the rules will automatically be accepted on Day 61. Once the report is finalized, the RRC staff attorney will contact DEQ to discuss establishing a re-adoption date for rules categorized as necessary with substantive public interest.

Dr. White requested staff present a plan of action for the re-adoption process at the February SCC meeting.

Guidance on Issuance of Notices of Violation for Offsite Sedimentation – Mr. Tracy Davis

Mr. Davis discussed the background matters which have driven the need for developing NOV guidelines for offsite sedimentation. He indicated the policy allows for flexibility with NOVs through tiered enforcement action, and utilizes the expertise of staff to make professional judgement calls.

Ms. Smith expressed concern regarding consideration of prior compliance history when issuing a NOV, which takes away the right of a citizen to take action against another for property damages. Mr. Vinson indicated this action does not eliminate the ability of an

individual to sue for damages, only limits their ability to sue for damages under the SPCA.

Ms. Berry asked about considerations for issuance of NOV if the 10-year storm event is exceeded. Mr. Davis indicated during such unusual occurrences the situation will be evaluated to determine if additional action was needed to prevent the sediment loss. Ms. Rodgers added a NOV would not be issued if measures had been properly installed and maintained as shown on the approved plan. A NOV could still be issued if measures were not installed as designed or there had been a history of maintenance issues with the project site.

Ms. Deck asked how maintenance will be verified with limited staff. Mr. Davis indicated review of the self-inspection reports and evaluation of the measures installed on site helps determine effectiveness of maintenance. Ms. Rodgers added the burden of proof is on the inspector to prove failure to maintain measures.

Ms. Knotts agreed staff should have flexibility to issue NOVs. Mr. Bivens added consideration should be given to those actively trying to clean up sedimentation when determining issuance of a NOV. Consideration should also be given to determine if there is permanent damage to the property, or if there is monetary damage to the property owner due to the impacts of the offsite sedimentation.

Dr. White asked for clarification of slight and moderate sedimentation. Ms. Rodgers indicated that is a judgement call of the inspector, and depends upon the specific site, especially the amount of sediment lost and the size of the receiving waterbody. Dr. White indicated additional verbiage needs to be added to the guidelines to define slight and moderate sedimentation, and include example scenarios. Mr. Davis reiterated the fact that the terms "slight", "moderate", and "severe" are judgment calls made by the inspectors based on their best professional judgment and consideration of site specific information. Defining these terms would be difficult ("moderate" damage will be different for different sites) and would serve to limit the flexibility being sought by this guidance.

Ms. Smith suggested contacting absent SCC members to get feedback on the NOV protocol. Mr. Bivens proposed voting on the guidelines as presented with the option of revisiting the issue at a later time. Mr. Bernier indicated there would need to be a formal motion, and a vote by the SCC.

Mr. Bivens made a motion to accept the NOV guidance as proposed by staff and commit to considering future comments from stakeholders in revising the protocol at a future date. Ms. Knotts seconded the motion.

Ms. Deck indicated hesitancy to vote on protocol that may take away legal option for someone, but would rather delay the vote until more information is available. Mr. Bivens agreed the guidelines need a few modifications, but indicated the SCC needs to act on the matter to alleviate issues the regulatory community is experiencing.

Dr. White stated without contributions from the entire SCC body, the guidelines as proposed may not capture the breadth of the issue, and immediate action may not be necessary. She asked how many NOVs have been issued during the past year. Ms. Rodgers indicated 43 NOVs have been issued by the State program (this number does not include NOVs issued by local delegated programs).

Ms. Smith suggested a statement from staff to local programs indicating that there has been no formal action by the SCC for a zero tolerance policy, and formal guidance is in progress of being developed by the SCC. Ms. Berry indicated it would be least confusing for the local programs to return to business without the zero tolerance issue, and receive notification that the SCC is crafting language for NOV guidance rather than new guidance that would possibly be replaced soon after. Mr. Bivens expressed a preference to give some guidance to staff and local programs, even if it must be revised or updated at a later date.

Ms. Deck suggested amending the language for slight sedimentation to more closely mirror the moderate and severe guidance which note that an NOV shall be issued unless certain factors applied, but have a different set of factors for slight sedimentation. Ms. Rodgers indicated there are potential issues with loss of judgement by including scenarios for slight sedimentation and the many factors that we consider. The recommendation of staff was to include flexibility for slight only.

Ms. Smith called for a vote on the motion made by Mr. Bivens, and seconded by Ms. Knotts. The motion was approved by majority with two abstentions: Ms. Deck and Dr. White.

Adoption of Meeting Dates for 2016 – Mr. Toby Vinson

Mr. Vinson presented the following proposed dates for the Sedimentation Control Commission in 2016:

Thursday, February 4, 2016
Thursday, May 5, 2016
Thursday, August 4, 2016
Tuesday, November 1, 2016

Ms. Knotts made a motion to accept the proposed meeting dates of the Sedimentation Control Commission in 2016. Mr. Bivens seconded the motion, and it was approved unanimously.

INFORMATION ITEMS

Legislative Update - DENR Office of Legislative Affairs – Mr. Davis provided a report on the status update on changes to the Sediment Act and other Legislative activity. A

copy of this report is attached to the original minutes.

Education Program Status Report – Ms. Lowery-Jacobs presented a report on the past and current projects in the Sediment Education Program. A copy of this report is attached to the original minutes.

Enforcement Report – Ms. Rodgers gave a summary of the Attorney General's enforcement report. A copy of this report is attached to the original minutes.

Report on Local Program Assistance by Regional Offices – Ms. Pageau presented a report on Regional Office Contacts with the Delegated Local Programs. A copy of this report is attached to the original minutes.

Land Quality Section Active Sediment Cases Report – Ms. Rodgers presented the status of Civil Penalty Assessments. A copy of this report is attached to the original minutes.

NCDOT Report – Ms. Rodgers presented a report on ICA's that have been issued since April 29, 2015. No Trout Buffer Waivers for Secondary Road Projects have been issued. A copy of this report is attached to the original minutes.

Sediment Program Status Report – Mr. Vinson provided a report on the LQS current plan approval, inspection, and enforcement activities statewide.

Ms. Smith asked what the frequency of inspection by LQS staff is. Mr. Vinson indicated inspections are conducted once every 14 months. Problem sites have more frequent inspections, at least every 2-3 weeks.

Land Quality Section Report – Mr. Vinson provided a report on the current number of vacancies in the Section and other LQS activities and issues. He thanked staff for their efforts.

CONCLUSION

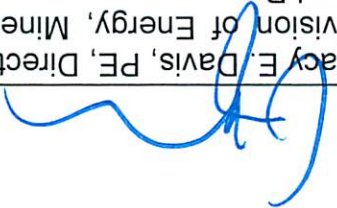
Remarks by the Director – Thanked the staff for their continued hard work.

Remarks by the Commission – Dr. White expressed concern about the workload issues of LQS staff. She indicated the SCC needs to find ways to support staff. She also thanked Ms. Smith for the informative conversation sessions by the SCC.

Remarks by the Chair – Ms. Smith thanked members for their contributions to the Sedimentation Control Commission.

Adjournment – Mr. Bivens made a motion to adjourn. The motion was seconded, and it was approved unanimously. As there was no further business, Ms. Smith adjourned the meeting at 1:50 pm.

Tracy E. Davis, PE, Director,
Division of Energy, Mineral, and
Land Resources



Stephanie Lane, Recording Secretary

