

Sediment Control Rules Adoption: Update and Action Required

At the SCC meeting, DEMLR staff will provide an update on the rules adoption process and explain the options for the Commission to consider.

Because of the statutorily mandated review of all State agency rules, the DEMLR staff has been working with the Sedimentation Control Commission (SCC) and the Rules Review Commission (RRC) for over two years to take the Chapter 04 Sedimentation Control rules through the process. A major action during this process was the adoption of the revised rules by the SCC on November 4, 2019. The rules were then sent to the staff of the RRC for a final review. The RRC staff noted many, mostly minor, technical issues and asked numerous questions about the SCC approved rules. The DEMLR staff agreed with almost all of them and made the minor changes specified in the RRC comments. However, the RRC staff noted two rules where they advised the Rules Review Commission to provide “objections” for approval. At their March 19, 2020 meeting, the Commission accepted its staff’s recommendations on all the actions including the objections on approval for the two rules described below.

1.) 15A NCAC 04C .0103 WHO MAY ASSESS

- **Proposed rule:** “The ~~director~~ Secretary may assess civil penalties against any person responsible for a violation.”
- **RRC staff comment:** “*Staff recommends objection to the Rule for lack of necessity. The Rule states that the Secretary may assess civil penalties. However, both statutes cited in the History Note, G.S. 113A-55 and 113A-64, state that the Secretary assesses civil penalties. As this Rule simply repeats statute, staff believes it is unnecessary.*”

2.) 15A NCAC 04C .0106 CRITERIA (for civil penalty assessments)

- **Proposed rule:** “In determining the amount of the civil penalty assessment, the ~~director~~ Secretary shall consider the following criteria in addition to the factors pursuant to G.S. 113A-64(a)(3):” (*The proposed change in the rule was to remove the criteria that were stated in the statute and leave the criteria that had been added over the years.*)
- **RRC staff comment:** “*Staff recommends objection to this Rule for lack of statutory authority. Specifically, this Rule purports to set criteria the Secretary will use in assessing civil penalties. The Rule sets these criteria in addition to the criteria set forth in statute.*

G.S. 113A-64(a)(3) states:

(3) In determining the amount of the penalty, the Secretary or a local government shall consider the degree and extent of harm caused by the violation, the cost of rectifying the damage, the amount of money the violator saved by noncompliance, whether the violation was committed willfully and the prior record of the violator in complying or failing to comply with this Article, or any ordinance, rule, or order adopted or issued pursuant to this Article by the Commission or by a local government.

None of the criteria set forth in the Rule are included in this statutory list. Staff is not aware of any authority for the agency to add factors that are not included in the statute. As such, staff recommends objection to this Rule for lack of statutory authority.”

The Sedimentation Control Commission is required by statute to respond to the RRC. The SCC’s action on May 12, 2020 could be either of the following options:

- Option #1)** Respond to RRC objections by repealing rules 15A NCAC 04C .0103 and 04C .0106.
- Option #2)** Respond to the RRC that the Sediment Commission disagrees with the objections.
- Option #3)** Revise the rules’ wording to try to address the RRC objections.

Discussion and Recommendation to the Commission

Option #1) The staff of DEMLR, with the support of the Counsel to the Commission, recommends that that the Commission vote to repeal Rules 15A NCAC 04C .0103 and 04C .0106.

In **Rule 04C .0103**, it is clear in the Act that the Secretary of the DEQ is given authority to assess penalties. The Secretaries have used their statutory authority to delegate those functions to the Director of the Division. The DEMLR staff supports the RRC's position that this does not need to be in the rule and is considered as an unnecessary duplication.

In **Rule 04C .0106**, the criteria that can be used to assess the amount of civil penalties is provided in the Act. The Act contains five specific criteria that can be used in determining the civil penalty assessments. Sometime since the initial rule was written in 1976, the Commission chose to add other terms to describe criteria that can be used in determining assessments. In this recent Rules Review process, the Commission's counsel recommended to the DEMLR staff that we remove the criteria that were specified in the Act since that would be an unnecessary duplication. This was done in the rules the SCC approved in November of 2020. However, the RRC staff noted that those remaining criteria were not specifically listed in the Act and that they were "*not aware of any authority for the agency [the SCC] to add factors that are not included in the statute.*" Based on the recommendation of the Sedimentation Commission's General Counsel and the belief that the adverse effect on program implementation will be minimal, the DEMLR staff has concluded that deleting rule 04C .0106 is the most beneficial recommendation for the Sediment Commission.

Option #2 is to disagree with the objections of the RRC on one or both rules. The DEMLR staff does not recommend this option. The RRC has stated their position on opposition and without the SCC providing some solid legal arguments, the RRC will likely remove these two rules from the Code.

Option #3 is to try to rewrite one or both rules, is also not recommended. The DEMLR staff believes that the possibility of rewriting either rule in a form acceptable to the RRC is low.