

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Sedimentation Control Commission

RULE CITATION: 15A NCAC 04C .0103

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - Lack of statutory authority
 - Unclear or ambiguous
 - X Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

Staff recommends objection to the Rule for lack of necessity. The Rule states that the Secretary may assess civil penalties. However, both of the 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.

Amanda J. Reeder
Commission Counsel
Issued March 13, 2020

§ 113A-55. Authority of the Secretary.

The sedimentation control program developed by the Commission shall be administered by the Secretary under the direction of the Commission. To this end the Secretary shall employ the necessary clerical, technical, and administrative personnel, and assign tasks to the various divisions of the Department for the purpose of implementing this Article. The Secretary may bring enforcement actions pursuant to G.S. 113A-64 and G.S. 113A-65. The Secretary shall make final agency decisions in contested cases that arise from civil penalty assessments pursuant to G.S. 113A-64. (1973, c. 392, s. 6, c. 1417, s. 3; 1993 (Reg. Sess., 1994), c. 776, s. 6.)

§ 113A-64. Penalties.

(a) Civil Penalties. -

(1) Any person who violates any of the provisions of this Article or any ordinance, rule, or order adopted or issued pursuant to this Article by the Commission or by a local government, or who initiates or continues a land-disturbing activity for which an erosion and sedimentation control plan is required except in accordance with the terms, conditions, and provisions of an approved plan, is subject to a civil penalty. The maximum civil penalty for a violation is five thousand dollars (\$5,000). A civil penalty may be assessed from the date of the violation. Each day of a continuing violation shall constitute a separate violation. When the person has not been assessed any civil penalty under this subsection for any previous violation and that person abated continuing environmental damage resulting from the violation within 180 days from the date of the notice of violation, the maximum cumulative total civil penalty assessed under this subsection for all violations associated with the land-disturbing activity for which the erosion and sedimentation control plan is required is twenty-five thousand dollars (\$25,000).

(2) The Secretary or a local government that administers an erosion and sedimentation control program approved under G.S. 113A-60 shall determine the amount of the civil penalty and shall notify the person who is assessed the civil penalty of the amount of the penalty, the reason for assessing the penalty, the option available to that person to request a remission of the civil penalty under G.S. 113A-64.2, the date of the deadline for that person to make the remission request regarding this particular penalty, and, when that person has not been assessed any civil penalty under this section for any previous violation, the date of the deadline for that person to abate continuing environmental damage resulting from the violation in order to be subject to the maximum cumulative total civil penalty under subdivision (1) of this subsection. The notice of assessment shall be served by any means authorized under G.S. 1A-1. A notice of assessment by the Secretary shall direct the violator to either pay the assessment or contest the assessment within 30 days by filing a petition for a contested case under Article 3 of Chapter 150B of the General Statutes. If a violator does not pay a civil penalty assessed by the Secretary within 30 days after it is due, the Department shall request the Attorney General to institute a civil action to recover the amount of the assessment. A notice of assessment by a local government shall direct the violator to either pay the assessment or contest the assessment within 30 days by filing a petition for hearing with the local government as directed by procedures within the local ordinances or regulations adopted to establish and enforce the erosion and

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sedimentation control program. If a violator does not pay a civil penalty assessed by a local government within 30 days after it is due, the local government may institute a civil action to recover the amount of the assessment. The civil action may be brought in the superior court of any county where the violation occurred or the violator's residence or principal place of business is located. A civil action must be filed within three years of the date the assessment was due. An assessment that is not contested is due when the violator is served with a notice of assessment. An assessment that is contested is due at the conclusion of the administrative and judicial review of the assessment.

(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.

(4) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 776, s. 11.

(5) The clear proceeds of civil penalties collected by the Department or other State agency or a local government under this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Criminal Penalties. - Any person who knowingly or willfully violates any provision of this Article or any ordinance, rule, regulation, or order duly adopted or issued by the Commission or a local government, or who knowingly or willfully initiates or continues a land-disturbing activity for which an erosion and sedimentation control plan is required, except in accordance with the terms, conditions, and provisions of an approved plan, shall be guilty of a Class 2 misdemeanor that may include a fine not to exceed five thousand dollars (\$5,000). (1973, c. 392, s. 15; 1977, c. 852; 1987, c. 246, s. 3; 1987 (Reg. Sess., 1988), c. 1000, s. 5; 1989, c. 676, s. 6; 1991, c. 412, s. 2; c. 725, s. 5; 1993, c. 539, s. 873; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 776, s. 11; 1998-215, s. 52; 1999-379, s. 4; 2002-165, s. 2.12; 2013-413, s. 33; 2015-241, s. 14.26(b).)

1 15A NCAC 04C .0103 is readopted as published in the 34:02 NCR 120-135 with changes as follows:

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

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

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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. April 1, 2020.*

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AGENCY: Sedimentation Control Commission

RULE CITATION: 15A NCAC 04C .0106

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - X Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

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.

Amanda J. Reeder
Commission Counsel
Issued March 13, 2020

§ 113A-64. Penalties.

(a) Civil Penalties. -

(1) Any person who violates any of the provisions of this Article or any ordinance, rule, or order adopted or issued pursuant to this Article by the Commission or by a local government, or who initiates or continues a land-disturbing activity for which an erosion and sedimentation control plan is required except in accordance with the terms, conditions, and provisions of an approved plan, is subject to a civil penalty. The maximum civil penalty for a violation is five thousand dollars (\$5,000). A civil penalty may be assessed from the date of the violation. Each day of a continuing violation shall constitute a separate violation. When the person has not been assessed any civil penalty under this subsection for any previous violation and that person abated continuing environmental damage resulting from the violation within 180 days from the date of the notice of violation, the maximum cumulative total civil penalty assessed under this subsection for all violations associated with the land-disturbing activity for which the erosion and sedimentation control plan is required is twenty-five thousand dollars (\$25,000).

(2) The Secretary or a local government that administers an erosion and sedimentation control program approved under G.S. 113A-60 shall determine the amount of the civil penalty and shall notify the person who is assessed the civil penalty of the amount of the penalty, the reason for assessing the penalty, the option available to that person to request a remission of the civil penalty under G.S. 113A-64.2, the date of the deadline for that person to make the remission request regarding this particular penalty, and, when that person has not been assessed any civil penalty under this section for any previous violation, the date of the deadline for that person to abate continuing environmental damage resulting from the violation in order to be subject to the maximum cumulative total civil penalty under subdivision (1) of this subsection. The notice of assessment shall be served by any means authorized under G.S. 1A-1. A notice of assessment by the Secretary shall direct the violator to either pay the assessment or contest the assessment within 30 days by filing a petition for a contested case under Article 3 of Chapter 150B of the General Statutes. If a violator does not pay a civil penalty assessed by the Secretary within 30 days after it is due, the Department shall request the Attorney General to institute a civil action to recover the amount of the assessment. A notice of assessment by a local government shall direct the violator to either pay the assessment or contest the assessment within 30 days by filing a petition for hearing with the local government as directed by procedures within the local ordinances or regulations adopted to establish and enforce the erosion and sedimentation control program. If a violator does not pay a civil penalty assessed by a local government within 30 days after it is due, the local government may institute a civil action to recover the amount of the assessment. The civil action may be brought in the superior court of any county where the violation occurred or the violator's residence or principal place of business is located. A civil action must be filed within three years of the date the assessment was due. An assessment that is not contested is due when the violator is served with a notice of assessment. An assessment that is contested is due at the conclusion of the administrative and judicial review of the assessment.

(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

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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.

(4) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 776, s. 11.

(5) The clear proceeds of civil penalties collected by the Department or other State agency or a local government under this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Criminal Penalties. - Any person who knowingly or willfully violates any provision of this Article or any ordinance, rule, regulation, or order duly adopted or issued by the Commission or a local government, or who knowingly or willfully initiates or continues a land-disturbing activity for which an erosion and sedimentation control plan is required, except in accordance with the terms, conditions, and provisions of an approved plan, shall be guilty of a Class 2 misdemeanor that may include a fine not to exceed five thousand dollars (\$5,000).

(1973, c. 392, s. 15; 1977, c. 852; 1987, c. 246, s. 3; 1987 (Reg. Sess., 1988), c. 1000, s. 5; 1989, c. 676, s. 6; 1991, c. 412, s. 2; c. 725, s. 5; 1993, c. 539, s. 873; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 776, s. 11; 1998-215, s. 52; 1999-379, s. 4; 2002-165, s. 2.12; 2013-413, s. 33; 2015-241, s. 14.26(b).)

1 15A NCAC 04C .0106 is readopted as published in the 34:02 NCR 120-135 with changes as follows:

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3 **15A NCAC 04C .0106 CRITERIA**

4 In determining the amount of the civil penalty assessment, the ~~director~~ Secretary shall consider the following
5 ~~criteria:~~ 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) eause,~~ cause;
- 11 ~~(6) (5) extent of any off-site damage which that may have resulted,~~ resulted;
- 12 ~~(7) (6) effectiveness of action taken by violator,~~ violator;
- 13 ~~(8) (7) adherence to plan submitted by violator,~~ violator;
- 14 ~~(9) (8) effectiveness of plan submitted by violator,~~ violator;
- 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,~~
19 ~~actions; and~~
- 20 ~~(13) (10) staff investigative costs [eests;] costs.~~
- 21 ~~[(14) — the amount of money the violator saved by noncompliance; and]~~
- 22 ~~[(15) — whether the violation was committed willfully.]~~

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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. April 1, 2020.*
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