

# REQUEST FOR BOARD ACTION

## HENDERSON COUNTY PLANNING BOARD

**MEETING DATE:** June 16, 2022

**SUBJECT:** LDC Text Amendment – TX-2022-03, Required Amendments to the Soil Erosion and Sedimentation Control Regulations

**PRESENTER:** Natalie Berry, Project Engineer/Site Development Director  
Autumn Radcliff, Planning Director

**ATTACHMENTS:** 1. Session Law References  
2. Draft Amendment

### SUMMARY OF REQUEST:

Since the adoption of the soil erosion and sedimentation control regulations, several changes have been adopted at the State level. Henderson County's regulations were audited last year, and several changes were identified. These amendments are required in order for the county to be in compliance with the model ordinance and with recent statute changes.

Attached for the Board review is the identified session law for these changes, and the draft amendment to the soil erosion and control regulations and definitions. The Board may wish to make additional changes to the draft language following is discussion.

### BOARD ACTION:

Recommendation by the Planning Board is required prior to the Board of Commissioners adopting any text amendments to the Land Development Code.

**Suggested Motion:** I move that the Planning Board send forward a favorable recommendation on the proposed text amendment TX-2022-03 on the soil erosion and control regulations with any changes as discussed, and that these changes are consistent with the County Comprehensive Plan.

## Session Law 2021-121 (House Bill 489) Approved 08-30-2021, Effective 10-01-2021

Changes are shown in *Orange* Italics.

### § 113A-54.1. Approval of erosion control plans.

(f) For land-disturbing activities on a single-family residential lot involving new construction with land disturbance of less than one acre where the builder or developer is the owner of the lot being developed and the person financially responsible for the land-disturbing activity, the financial responsibility for land-disturbing activity on that lot transfers to the new G.S. 113A-54.1 Page 3 owner upon the builder's or developer's conveyance of the lot to the new owner, recording of the deed in the office of the register of deeds, and notification to the office or local program that approved the erosion control plan. (1989, c. 676, s. 2; 1993 (Reg. Sess., 1994), c. 776, s. 4; 1998-221, s. 1.11(a); 1999-379, s. 1; 2005-386, s. 7.1; 2006-250, s. 1; 2011-394, s. 3; 2012-143, s. 1(f); 2013-121, s. 3; **2021-121, s. 5(a).**)

**Except as may be required under federal law, rule or regulation, no periodic self-inspections or rain gauge installation is required on individual residential lots where less than one acre is being disturbed on each lot.**

### § 113A-54.2. Approval Fees.

(d) **G.S. 113A-60 governs** the authority of local programs approved pursuant to this Article to assess fees for the **review** of erosion and sedimentation control plans. (1989 (Reg. Sess., 1990), c. 906, s. 1; 1991 (Reg. Sess., 1992), c. 1039, s. 3; 1993 (Reg. Sess., 1994), c. 776, s. 5; 1999-379, s. 5; 2002-165, s. 2.4; 2007-323, s. 30.1(a); **2021-121, s. 5(b).**)

[NOTE: THE LOCAL PROGRAM SHALL CONSIDER THE ADMINISTRATIVE AND PERSONNEL COSTS INCURRED FOR REVIEWING THE PLANS AND FOR COMPLIANCE RELATED ACTIVITIES.]

**[NOTE: UNDER G.S. §113A-60(a), THE FEE FOR A SINGLE-FAMILY LOT IN A RESIDENTIAL, OR COMMON PLAN OF, DEVELOPMENT THAT IS LESS THAN ONE ACRE CANNOT EXCEED \$100.00 PER LOT.]**

### § 113A-60. Local erosion and sedimentation control programs.

(a) A local government may submit to the Commission for its approval an erosion and sedimentation control program for its jurisdiction and may adopt ordinances and regulations necessary to establish and enforce erosion and sedimentation control programs. An ordinance adopted by a local government may establish a fee for the review of an erosion and sedimentation control plan and related activities. **The fee shall be calculated on the basis of either the number of acres disturbed or in the case of a single-family lot in a residential development or common plan of development that is less than one acre set at no more than one hundred dollars (\$100.00) per lot developed.** Local governments are authorized to create or designate agencies or subdivisions of

local government to administer and enforce the programs. **Except as otherwise provided in this Article, an ordinance adopted by a local government shall at least meet and may exceed the minimum requirements of this Article and the rules adopted pursuant to this Article.**

(b1) When a development project contains an approved erosion control plan for the entire development, a separate erosion control plan shall not be required by the local government for development of individual residential lots within that development that disturb less than one acre if the developer and the builder are the same financially responsible person. For review of an erosion control plan for a single-family lot in a common plan of development under this subsection where the developer and builder are different, the local government may require no more than the following information:

- (1) Name, address, telephone number, and email of owner of lot being developed.
- (2) Street address of lot being developed.
- (3) Subdivision name.
- (4) Lot number.
- (5) Tax parcel number of lot being developed.
- (6) Total acreage of lot being developed.
- (7) Total acreage disturbed.
- (8) Anticipated start and completion date.
- (9) Person financially responsible.
- (10) Signature of person financially responsible.
- (11) Existing platted survey of the lot.
- (12) A sketch plan showing erosion control measures for the lot being developed, but the sketch shall not be required to be under the seal of a licensed engineer, landscape architect, or registered land surveyor unless there is a design feature requiring such under federal or State law or regulation.

(b2) Except as may be required by federal law, rule, or regulation, a local erosion control program under this Article shall provide for all of the following:

- (1) That no periodic self-inspections or rain gauge installation is required on individual residential lots where less than one acre is being disturbed on each lot.
- (2) For a land-disturbing activity on more than one residential lot where the total land disturbed exceeds one acre, the person conducting the land-disturbing activity may submit for approval a single erosion control plan for all of the disturbed lots or may submit for review and approval under subsection (b1) of this section the erosion control measures for each individual lot.

(b3) No development regulation under Chapter 160D of the General Statutes or any erosion and sedimentation control plan under a local program shall require any of the following:

- (1) A silt fence or other erosion control measure to be placed in a location where, due to the contour and topography of the development site, that erosion control measure would not substantially and materially retain the sediment generated by the land-disturbing activity within the boundaries of the tract during construction upon and development of the tract.
- (2) A wire-backed reinforced silt fence where, due to the contour and topography of the development site, that fence would not substantially and materially retain the sediment generated by the land-disturbing activity within the boundaries of the tract during construction upon and development of the tract.

(1973, c. 392, s. 11; 1993 (Reg. Sess., 1994), c. 776, s. 7; 2002-165, s. 2.8; 2006-250, s. 3; **2021-121, s. 5(c).**) Section 5(c) of this act becomes effective October 1, 2021, and applies to erosion control plans submitted for review and approval on or after that date. The remainder of this section is effective when it becomes law.

#### **§ 113A-61.1. Inspection of land-disturbing activity; notice of violation.**

(d) The damage or destruction of a silt fence occurring during land-disturbing activities or construction on a development project shall not be assessed a civil penalty under this Article provided that the silt fence is repaired or replaced within the compliance period noted in the inspection report or Notice of Violation. (1989, c. 676, s. 5; 1993 (Reg. Sess., 1994), c. 776, s. 10; 1999-379, s. 6; 2002-165, s. 2.10; 2015-241, s. 14.26(d); 2017-108, s. 6(c); 2021-121, s. 5(d); **2021-158, s. 10(a).**)

[NOTE: UNDER G.S. §113A-61.1(d), DAMAGE OR DESTRUCTION OF A SILT FENCE OCCURRING DURING LAND-DISTURBING ACTIVITIES OR CONSTRUCTION ON A DEVELOPMENT PROJECT SHALL NOT BE ASSESSED A CIVIL PENALTY PROVIDED THAT THE SILT FENCE IS REPAIRED OR REPLACED WITHIN THE COMPLIANCE PERIOD/DEADLINE NOTED IN THE INSPECTION REPORT OR NOTICE OF VIOLATION. ENSURE VIOLATORS HAVE AN OPPORTUNITY TO CORRECT THESE VIOLATIONS. THIS STATUTE DOES NOT APPLY TO OFF-SITE SEDIMENT THAT OCCURS DUE TO THE SILT FENCE NOT BEING IN PLACE, BUT MERELY DAMAGE TO THE SILT FENCE ITSELF.]

## **Session Law 2021-158 (Senate Bill 389) Approved 09-16-2021.**

Changes are shown in *Purple* Italics.

### **§ 113A-64.2. Remission of civil penalties.**

- (a) A request for remission of a civil penalty imposed under G.S. 113A-64 may be filed with the Commission within **30 days** of receipt of the notice of assessment. A remission request must be accompanied by a waiver of the right to a contested case hearing pursuant to Chapter 150B of the General Statutes and a stipulation of the facts on which the assessment was based.

This section becomes effective October 1, 2021, and applies to penalties assessed on or after that date.

### **Model Ordinance Revisions (required by NC State audit of our local program in 2021)**

The Model Local Ordinance was first distributed in 2004, with revisions in 2006, 2014, 2018, 2020, and November 2021. Our ordinance became effective on October 1, 2007. We have not updated our ordinance since that date with exception of the 160D changes last year.

changes shown in *Blue* Italics.

Summary of Revisions:

## Subpart E. Soil Erosion and Sedimentation Control

### §42-252 Purpose

This subpart is adopted for the purposes of: (1) regulating certain *land-disturbing activity* to control *accelerated erosion* and *sedimentation* in order to prevent the pollution of water and other damage to lakes, watercourses, and other public and private property by *sedimentation*; (2) protecting economic and ecological integrity of the County; and (3) establishing procedures through which these purposes can be fulfilled.

### §42-253. Scope and Exclusions

- A. Geographical Scope of Regulated Land-Disturbing Activity. This subpart shall apply to *land-disturbing activity* within the unincorporated areas of Henderson County and its municipalities as allowed by agreement between *local governments*, [the extent of annexation](#) or other appropriate legal instrument or law.
- B. Exclusions from Regulated Land-Disturbing Activity. Notwithstanding the general applicability of this subpart to all *land-disturbing activity*, this subpart shall not apply to the following types of *land-disturbing activity*:
- (1) Activities, including the production and activities relating or incidental to the production of crops, grains, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and all other forms of agriculture undertaken on agricultural land for the production of plants and animals useful to man, including, but not limited to:
    - a. forage and sod crops, grain and feed crops, tobacco, cotton, ~~orchards and~~ [fruit crops](#), and peanuts.
    - b. dairy animals and dairy products.
    - c. poultry and poultry products.
    - d. livestock, including beef cattle, llamas, sheep swine, horses, ponies, mules, and goats.
    - e. bees and apiary products.
    - f. fur producing animals.
    - g. mulch, ornamental plants, and other horticultural products. For purposes of this section, "mulch" means substances composed primarily of plant remains or mixtures of such substances.
  - (2) An activity *undertaken* on forestland for the production and harvesting of timber and timber products and conducted in accordance with standards defined by the Forest Practice Guidelines Related to Water Quality (Best Management Practices), as adopted by [North Carolina Department of Agriculture and Consumer Services. NCDENR](#). If *land-disturbing activity undertaken* on forestland for the production and harvesting of timber and timber products is not conducted in accordance with standards defined by the Forest Practice Guidelines Related to Water Quality, the provisions of this subpart shall apply to such activity and any related *land-disturbing activity* on the *tract*.
  - (3) An activity for which a permit is required under the Mining Act of 1971, Article 7 of Chapter 74 of the [NCGS General Statutes](#).

- (4) A *land-disturbing activity* over which the State has exclusive regulatory jurisdiction as provided in [NCGS G.S. §113A-56\(a\)](#).
  - (5) An activity which is essential to protect human life during an emergency.
  - (6) Activities undertaken to restore the wetland functions of converted wetlands to provide compensatory mitigation to offset impacts permitted under Section 404 of the Clean Water Act.
  - (7) Activities undertaken pursuant to Natural Resources Conservation Services standards to restore the wetlands functions of converted wetlands as defined in Title 7 Code of Federal Regulations §12.2.
- C. Plan Approval Requirement for Land-Disturbing Activity. No *person* shall undertake any *land-disturbing activity* subject to this subpart without first obtaining a *an Erosion and Sedimentation Control* Plan approval from the *Soil Erosion and Sedimentation Control Administrator*.
- (1) For the purpose of the subpart, an erosion control plan shall be required for:
    - a. Any *land-disturbing activity* which uncovers one or more acres (43,560 square feet) of land.
    - ~~b. Any *land-disturbing activity* which uncovers one-half (1/2) acre or more (21,780 square feet) of land with an average slope of 16 percent (7.2 degrees) to 25 percent (11.25 degrees) in its natural state. The average slope shall be calculated only for the disturbed area.~~
    - ~~c. Any *land-disturbing activity* which uncovers one-quarter (1/4) acre or more (10,890 square feet) of land with an average slope over 25 percent (11.25 degrees in its natural state). The average slope shall be calculated only for the disturbed area.~~
- D. Protection of Property. *Persons* conducting *land-disturbing activity* shall take all reasonable measures to protect all public and private property from damage caused by such activity.
- E. More Restrictive Rules Shall Apply. Whenever conflicts exist between federal, state, or local laws, ordinances, or rules, the more restrictive provision shall apply.
- F. Plan Approval Exceptions. Notwithstanding the general requirement to obtain an Erosion and Sedimentation Control Plan approval prior to undertaking *land-disturbing activity*, ~~an Erosion and Sedimentation Control~~ Plan approval shall not be required for *land-disturbing activity* that does not exceed *one acre of land disturbance* ~~the provisions as specified in §42-253 (Scope and Exclusions) C (Plan Approval Requirement for Land-Disturbing Activity)~~. No Erosion and Sedimentation Control Plan approval is required if a building permit has been obtained prior to the effective date of this subpart (October 1, 2007) and Erosion and Sedimentation Control Plan approval was not required under State rules. In determining the area, lands under one or diverse ownership being developed as a unit will be aggregated.

## §42-254. Mandatory Standards for Land Disturbing Activity

No *land-disturbing activity* subject to the control of this subpart shall be *undertaken* except in accordance with the following mandatory standards:

### A. Buffer Zone

- (1) Standard Buffer. No *land-disturbing activity* during periods of construction or improvement to land shall be permitted in proximity to a *lake or natural watercourse* unless a *buffer zone* is provided along the margin of the watercourse of sufficient width to confine visible *siltation* within the 25 percent of the *buffer zone* nearest the *land-disturbing activity*.
  - a. Projects On, Over or Under Water. This subsection shall not apply to a *land-disturbing activity* in connection with the construction of facilities to be located on, over, or under a *lake or natural watercourse*.
  - b. Buffer Measurement. Unless otherwise provided, the width of a *buffer zone* is measured horizontally from the edge of the *bankfull elevation 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*.
- (2) Trout Buffer. Waters that have been classified as trout waters by the Environmental Management Commission shall have an undisturbed *buffer zone* 25 feet wide or of sufficient width to confine visible *siltation* within the 25 percent of the *buffer zone* nearest the *land-disturbing activity*, whichever is greater. Provided, however, that the *North Carolina Sedimentation Control Commission* may approve plans which include *land-disturbing activity* along trout waters when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal.
  - a. Projects On, Over or Under Water. This subsection shall not apply to a *land-disturbing activity* in connection with the construction of facilities to be located on, over, or under a *lake or natural watercourse*.
  - b. Trout Buffer Measurement. The 25 foot minimum width for an undisturbed *buffer zone* adjacent to designated trout waters shall be measured horizontally from the top of the bank to the nearest edge of the disturbed area.
  - c. Limit on Land Disturbance. Where a temporary and minimal disturbance has been permitted as an exception to the trout buffer, *land-disturbing activities* in the *buffer zone* adjacent to designated trout waters shall be limited to a maximum of ten (10) percent of the total length of the *buffer zone* within the *tract* to be disturbed 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 *of the Division of Land Resources of NCDENR*.
  - d. Limit on Temperature Fluctuations. No *land-disturbing activity* shall be *undertaken* within a *buffer zone* adjacent to designated trout waters that



will cause adverse temperature fluctuations in the trout waters, as set forth in 15 NCAC 2B.0211 "Fresh Surface Water Classification and Standards."

- B. Graded Slopes and Fills. The angle for graded slopes and fills shall be no greater than the angle that can be retained by vegetative cover or other adequate *erosion* control devices or *structures*. In any event, slopes left exposed will, within 21 calendar days of completion of any *phase of grading*, be planted or otherwise provided with temporary or permanent *ground cover*, devices, or *structures* sufficient to restrain *erosion*. The angle for graded slopes and fills must be demonstrated to be stable. Stable is the condition where the soil remains in its original configuration, with or without mechanical constraints.
- C. Fill Material. ~~Unless a permit from NCDENR's Division of Waste Management to operate a landfill is on file for the official site, acceptable fill material shall be free of organic or other degradable materials, masonry, concrete and brick in sizes exceeding 12 inches, and any materials which would cause the site to be regulated as a landfill by the State of North Carolina. Materials being used as fill shall be consistent with those described in 15A NCAC 13B .0562 unless the site is a permitted by the Department's from NCDENR's Division of Waste Management to operate as a landfill. Not all materials described in Section .0562 may be suitable to meet geotechnical considerations of the fill activity and should be evaluated accordingly. is on file for the official site, acceptable fill material shall be free of organic or other degradable materials, masonry, concrete and brick in sizes exceeding 12 inches, and any materials which would cause the site to be regulated as a landfill by the State of North Carolina.~~
- D. Ground Cover. Whenever *land-disturbing activity that will disturb more than one acre* is undertaken on a *tract*, 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 said *tract*, and shall plant or otherwise provide a permanent *ground cover* sufficient to restrain *erosion* after *completion of construction or development*. Except as provided in §42-257 (Design and Performance Standards) B(5) of this subpart, provisions for a *ground cover* sufficient to restrain *erosion* must be accomplished within ~~21~~ 90 calendar days following *completion of construction or development*.
- E. Prior Plan Approval. No person shall initiate any *land-disturbing activity that will disturb more than one acre* on a *tract* unless, 30 or more days prior to initiating the activity, a ~~An~~ *Erosion and Sedimentation Control* Plan for the activity is filed with and approved by the *Henderson County Soil Erosion and Sedimentation Control Administrator*. ~~An Erosion and Sedimentation Control Plan may be filed less than 30 days prior to initiation of a land-disturbing activity if the plan is submitted under an approved express permit program, and the land-disturbing activity may be initiated and conducted in accordance with the plan once the plan has been approved.~~ The County shall forward to the Director of the Division of Water Quality a copy of each *Erosion and Sedimentation Control Plan* for a *land-disturbing activity* that involves the utilization of ditches for the purpose of de-watering or lowering the water table of the *tract*.

F. *The land disturbing activity shall be conducted in accordance with the approved erosion and sedimentation control plan.*

#### **§42-255. Erosion and Sedimentation Control Plans**

- A. Pre-Submittal Conference. A pre-submittal conference can be requested by a *person* or an agent of that party conducting *land-disturbing activity*. At the pre-submittal, the *Soil Erosion and Sedimentation Control Administrator* shall inform the *applicant* of the processes involved with Erosion and Sedimentation Control Plan review and approval, issuance of an Erosion and Sedimentation Control Plan Certificate and Letter of Approval, and the relationship of said Erosion and Sedimentation Control Plan and Letter of Approval with zoning, building code, and other land-use regulations in effect in Henderson County. At the time of application submission, the *Soil Erosion and Sedimentation Control Administrator* also shall notify the *applicant* of the *appeal* process as provided in the subpart.
- B. Plan Submission. An Erosion and Sedimentation Control Plan shall be prepared for all *land-disturbing activities* subject to this subpart. An Erosion and Sedimentation Control Plan shall be prepared by a *design professional*. Three (3) copies of the Erosion and Sedimentation Control Plan shall be filed with the *Soil Erosion and Sedimentation Control Administrator* at least 30 days prior to the commencement of the proposed activity.
- C. Financial Responsibility and Ownership. Erosion and Sedimentation Control Plans may be disapproved when not accompanied by an authorized statement of financial responsibility and ownership. This statement shall be signed by the *person* financially responsible for the *land-disturbing activity* or his attorney in fact. The statement shall include the mailing and street addresses of the principal place of business of (1) the *person* financially responsible, (2) the *owner* of the land, and (3) any registered agents. If the *person* financially responsible is not a resident of North Carolina, a North Carolina agent must be designated in the statement for the purpose of receiving notice of compliance or non-compliance with the Erosion and Sedimentation Control Plan, the North Carolina Sedimentation Pollution Control Act of 1973, this subpart, or rules or orders adopted or issued pursuant to this subpart. If the *applicant* is not the *owner* of the land to be disturbed, the draft Erosion and Sedimentation Control Plan must include the *owner's* written consent for the *applicant* to submit a draft Erosion and Sedimentation Control Plan and to conduct the anticipated *land-disturbing activity*.
- D. Environmental Policy Act Document. Any Erosion and Sedimentation Control Plan submitted for a *land-disturbing activity* for which an environmental document is required by the North Carolina Environment Policy Act (*NCGS* §113A-1, et seq.) shall be deemed incomplete until a complete environmental document is available for review. The *Soil Erosion and Sedimentation Control Administrator* shall promptly notify the *person* submitting the Erosion and Sedimentation Control Plan that the 30 day time limit for review of the Erosion and Sedimentation Control Plan pursuant to this subpart shall not begin until a complete environmental document is available for review.
- E. Content. The Erosion and Sedimentation Control Plan required by this section shall contain architectural and engineering drawings, maps, assumptions, calculations, and narrative statements as needed to adequately describe the proposed development of the

*tract* and the measures planned to comply with the requirements of this subpart. Erosion and Sedimentation Control Plan content may vary to meet the needs of specific site requirements. Detailed guidelines for Erosion and Sedimentation Control Plan preparation may be obtained from the *Soil Erosion and Sedimentation Control Administrator* on request.

- F. Erosion and Sedimentation Control Design Manual. Appropriate *erosion* and *sedimentation* practices and measures shall be in accordance to the *Erosion and Sedimentation Control Design Manual* developed by the State or any Erosion and Sedimentation Control Design Manual adopted by Henderson County or any supplemental materials.
- G. Soil and Water Conservation District Comments. The Henderson County Soil and Water Conservation District, created pursuant to *NCGS* Chapter 139, and hereafter “the District” shall review the Erosion and Sedimentation Control Plan and submit any comments and recommendations to the *Soil Erosion and Sedimentation Control Administrator* within 20 days after the District received the Erosion and Sedimentation Control Plan or within any shorter period of time as may be agreed upon by the District and Henderson County. Failure of the District to submit its comments and recommendations within 20 days or within any agreed-upon shorter period of time shall not delay final action on the Erosion and Sedimentation Control Plan.
- H. Timeline for Decisions on Plans. The *Soil Erosion and Sedimentation Control Administrator*, will review each complete Erosion and Sedimentation Control Plan submitted to them and within 30 days of receipt thereof will notify the *person* submitting the Erosion and Sedimentation Control Plan that it has been approved, approved with modifications, ~~approved with performance reservations~~, or disapproved. Failure to approve, approve with modifications, or disapprove a complete Erosion and Sedimentation Control Plan within 30 days of receipt shall be deemed approval. The *Soil Erosion and Sedimentation Control Administrator* will review each revised Erosion and Sedimentation Control Plan submitted to them and within 15 days of receipt thereof will notify the *person* submitting the Erosion and Sedimentation Control Plan that it has been approved, approved with modifications, approved with performance reservations, or disapproved. Failure to approve, approve with modifications, or disapprove a revised Erosion and Sedimentation Control Plan within 15 days of receipt shall be deemed approval.
- I. Approval.
  - a) The *Soil Erosion and Sedimentation Control Administrator* shall only approve an Erosion and Sedimentation Control Plan upon determining that it complies with all applicable State and local regulations for *erosion* and *sedimentation* control. Approval assumes the *applicant’s* compliance with the federal and state water quality laws, regulations and rules. The *Soil Erosion and Sedimentation Control Administrator* shall condition approval of Erosion and Sedimentation Control Plans upon the *applicant’s* compliance with federal and state water quality laws, regulations and rules. The *Soil Erosion and Sedimentation Control Administrator* may establish an expiration date, not to exceed three (3) years, for Erosion and Sedimentation Control Plans approved under this subpart.

b) *When a development project contains an approved erosion control plan for the entire development, a separate erosion control plan shall not be required by Henderson County for development of individual residential lots within that development that disturb less than one acre if the developer and the builder are the same financially responsible person. For review of an erosion control plan for a single-family lot in a common plan of development under this subsection where the developer and builder are different, Henderson County may require the following information:*

- 1. Name, address, telephone number, and email of owner of lot being developed.*
- 2. Street address of lot being developed.*
- 3. Subdivision name.*
- 4. Lot number.*
- 5. Tax parcel number of lot being developed.*
- 6. Total acreage of lot being developed.*
- 7. Total acreage disturbed.*
- 8. Anticipated start and completion date.*
- 9. Person financially responsible.*
- 10. Signature of person financially responsible.*
- 11. Existing platted survey of the lot.*
- 12. A sketch plan showing erosion control measures for the lot being developed, but the sketch shall not be required to be under the seal of a design professional unless there is a design feature requiring such under federal or State law or regulation.*

c) *Except as may be required by federal law, rule, or regulation, a local erosion control program under section I.(b) above shall provide for all of the following:*

- a. That no periodic self-inspections or rain gauge installation is required on individual residential lots where less than one acre is being disturbed on each lot.*
- b. For a land-disturbing activity on more than one residential lot where the total land disturbed exceeds one acre, the person conducting the land-disturbing activity may submit for approval a single erosion control plan for all of the disturbed lots or may submit for review and approval under I.(b) of this section the erosion control measures for each individual lot.*

d) *No erosion and sedimentation control plan submitted under section I.(b) above shall require any of the following:*

- a. *A silt fence or other erosion control measure to be placed in a location where, due to the contour and topography of the development site, that erosion control measure would not substantially and materially retain the sediment generated by the land-disturbing activity within the boundaries of the tract during construction upon and development of the tract.*
- b. *A wire-backed reinforced silt fence where, due to the contour and topography of the development site, that fence would not substantially and materially retain the sediment generated by the land-disturbing activity within the boundaries of the tract during construction upon and development of the tract.*

J. Disapproval for Content. The *Soil Erosion and Sedimentation Control Administrator* may disapprove an Erosion and Sedimentation Control Plan or draft Erosion and Sedimentation Control Plan based on its content. A disapproval based upon an Erosion and Sedimentation Control Plan's content must specifically state in writing the reasons for disapproval.

K. Other Disapprovals. The *Soil Erosion and Sedimentation Control Administrator* may disapprove an Erosion and Sedimentation Control Plan or draft Erosion and Sedimentation Control Plans if implementation of the Erosion and Sedimentation Control Plan would result in a *violation* of the rules adopted by the Environmental Management Commission to protect riparian buffers along surface waters. A *local government* may disapprove an Erosion and Sedimentation Control Plan upon finding that an *applicant*, or a *parent*, *subsidiary*, or other *affiliate* of the *applicant*:

- (1) Is conducting or has conducted *land-disturbing activity* without an approved Erosion and Sedimentation Control Plan, or has received notice of *violation* of an Erosion and Sedimentation Control Plan previously approved by the North Carolina Sedimentation Control Commission or a *local government* pursuant to the North Carolina Sedimentation Pollution Control Act of 1973 and has not complied with the notice within the time specified in the notice;
- (2) Has failed to pay a civil penalty assessed pursuant to the North Carolina Sedimentation Pollution Control Act of 1973 or a local ordinance adopted pursuant to the North Carolina Sedimentation Pollution Control Act of 1973 by the time the payment is due;
- (3) Has been convicted of a misdemeanor pursuant to *NCG S §113A-64(b)* or any criminal provision of a local ordinance adopted pursuant to the North Carolina Sedimentation Pollution Control Act of 1973; or
- (4) Has failed to substantially comply with State rules or local ordinances and regulations adopted pursuant to the North Carolina Sedimentation Pollution Control Act of 1973.

For purposes of this subsection, an *applicant's* record may be considered for only the two (2) years prior to the application date.

In the event that an Erosion and Sedimentation Control Plan is disapproved pursuant to this subsection, the *Soil Erosion and Sedimentation Control Administrator* shall notify the Director of the Division of Land Resources of *NCDENR* of such disapproval within ten (10) days. The *Soil Erosion and Sedimentation Control Administrator* shall advise the *applicant* and the Director of the Division of Land Resources of *NCDENR* in writing as to the specific reasons that the Erosion and Sedimentation Control Plan was disapproved.

- L. Notice of Activity Initiation. No *person* may initiate a *land-disturbing activity* before notifying the agency that issued the Erosion and Sedimentation Control Plan approval of the date that *land-disturbing activity* will begin.
- M. Preconstruction Conference. When deemed necessary by the approving authority a preconstruction conference may be required.
- N. Display of Plan Approval. An Erosion and Sedimentation Control Plan approval issued under this subpart shall be prominently displayed until all construction is complete, all permanent *sedimentation* and *erosion* control measures are installed and the site has been stabilized. A copy of the approved plan shall be kept on file at the job site.
- O. Required Revisions. After approving an Erosion and Sedimentation Control Plan, if the *Soil Erosion and Sedimentation Control Administrator* either upon review of such Erosion and Sedimentation Control Plan or on inspection of the job site, determines that a significant risk of *accelerated erosion* or off-site *sedimentation* exists, the *Soil Erosion and Sedimentation Control Administrator* shall require a revised Erosion and Sedimentation Control Plan. Pending the preparation of the revised Erosion and Sedimentation Control Plan, work shall cease or shall continue under conditions outlined by the appropriate authority. If following commencement of a *land-disturbing activity* pursuant to an approved Erosion and Sedimentation Control Plan, the *Soil Erosion and Sedimentation Control Administrator* determines that the Erosion and Sedimentation Control Plan is inadequate to meet the requirements of this subpart, the *Soil Erosion and Sedimentation Control Administrator* may require any revision of the Erosion and Sedimentation Control Plan that is necessary to comply with this subpart.
- P. Amendment to a Plan. Applications for amendment of an Erosion and Sedimentation Control Plan in written and/or graphic form may be made at any time under the same conditions as the original application. Until such time as said amendment is approved by the *Soil Erosion and Sedimentation Control Administrator* the *land-disturbing activity* shall not proceed except in accordance with the Erosion and Sedimentation Control Plan as originally approved.
- Q. Failure to File a Plan. Any *person* engaged in *land-disturbing activity* who fails to file an Erosion and Sedimentation Control Plan in accordance with this subpart, or who conducts a *land-disturbing activity* except in accordance with provisions of an approved Erosion and Sedimentation Control Plan shall be deemed in *violation* of this Chapter.

#### **§42-256. Basic Control Objectives**

An *erosion* and *sedimentation* control Erosion and Sedimentation Control Plan may be disapproved if the Erosion and Sedimentation Control Plan fails to address the following control objectives:

- A. Identify Critical Areas. On-site areas which are subject to severe *erosion*, and off-site areas which are especially vulnerable to damage from *erosion* and/or *sedimentation*, are to be identified and receive special attention.
- B. Limit Time of Exposure. All *land-disturbing activities* are to be planned and conducted to limit exposure to the shortest feasible time.
- C. Limit Exposed Areas. All *land-disturbing activity* is to be planned and conducted to minimize the size of the area to be exposed at any one (1) time.
- D. Control Surface Water. Surface water runoff originating upgrate of exposed areas should be controlled to reduce *erosion* and *sediment* loss during the period of exposure.
- E. Control Sedimentation. All *land-disturbing activity* is to be planned and conducted so as to prevent off-site *sedimentation* damage.
- F. Manage *Stormwater* Runoff. When the increase in the *velocity* of *stormwater runoff* resulting from a *land-disturbing activity* is sufficient to cause *accelerated erosion* of the receiving watercourse, an Erosion and Sedimentation Control Plan is to include measures to control the *velocity* to the point of discharge so as to minimize *accelerated erosion* of the site and increased *sedimentation* of the stream.

#### **§42-257. Design and Performance Standards**

- A. Except as provided in §42-257 (Design and Performance Standards) B(2) of this subpart, *erosion* and *sedimentation* control measures, *structures*, and devices shall be planned, designed, and constructed to provide protection from the calculated maximum peak rate of runoff from the ten (10) year storm. Runoff rates shall be calculated using the procedures in the [USDA United States Department of Agriculture \(USDA\), Soil Natural Resource Conservation Service's "National Engineering Field Handbook" Manual for Conservation Practices](#), or other acceptable calculation procedures.
- B. HQW Zones. In *High Quality Water (HQW) zones* the following design standards shall apply:
  - (1) Limit on Uncovered Area. *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*. Only the portion of the *land-disturbing activity* within a *HQW zone* shall be governed by this section. Larger areas may be *uncovered* within the boundaries of the *tract* with the written approval of the Director [of the Division of Land Resources of NCDENR upon providing engineering justification with a construction sequence that considers phasing, limiting exposure, weekly submitted self-inspection reports, and a more conservative design that the Twenty-Five Year Storm](#).
  - (2) Maximum Peak Rate of Runoff Protection. *Erosion* and *sedimentation* control measures, *structures*, and devices within *HQW zones* shall be planned, designed and constructed to provide protection from the runoff of the *25-year storm* which produces the maximum peak rate of runoff as calculated according to procedures in the [latest edition of the United States Department of Agriculture Soil Natural Resources Conservation Service's "National Engineering Field Handbook" 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.

~~(3) Settling Efficiency. 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 (0.04 millimeter) size soil particle transported into the basin by the runoff of that two (2) 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.~~

(3) Sediment Basin Design. Sediment basins within HQW zones shall be designed and constructed according to the following or association.

- (i) use a surface withdrawal mechanism, except when the basin drainage area is less than 1.0 acre;
- (ii) have a minimum of 1800 cubic feet of storage area per acre of disturbed area;
- (iii) have a minimum surface area of 325 square feet per cfs of the Twenty-Five Year Storm (Q25) peak flow;
- (iv) have a minimum dewatering time of 48 hours;
- (v) incorporate 3 baffles, unless the basin is less than 20 feet in length, in which case 2 baffles shall be sufficient.

*Upon a written request of the applicant, the Director may allow alternative design and control measures in lieu of meeting the conditions required in subparagraphs (3)(ii) through (3)(v) of this sub-section 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 sediment control on the site. Alternative measures may include quicker application of ground cover, use of sediment flocculants, and use of enhanced ground cover practices.*

(4) Grade. Newly constructed open channels in HQW zones shall be designed and constructed with side slopes no steeper than two (2) horizontal to one (1) vertical if a vegetative cover is used for stabilization unless soil conditions permit a steeper slope or where the slopes are stabilized by using mechanical devices, structural devices or other ~~acceptable forms~~ ditch liners *proven as being effective in restraining accelerated erosion*. In any event, the angle for side slopes shall be sufficient to restrain *accelerated erosion*.

~~(5) Ground Cover. 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.~~



**§42-258. Stormwater Outlet Protection**

- A. Intent. Stream banks and channels downstream from any *land-disturbing activity* shall be protected from increased degradation by *accelerated erosion* caused by increased *velocity* of runoff from the *land-disturbing activity*.
- B. Performance Standard. *Persons* shall conduct *land-disturbing activity* so that the post construction *velocity* of the ten (10) year storm runoff in the receiving watercourse to the *discharge point* does not exceed the greater of:
  - (1) the *velocity* established by the Maximum Permissible Velocities Table set out within this subsection; or
  - (2) the *velocity* of the *ten-year storm* runoff in the receiving watercourse prior to development.

If condition (1) or (2) of this Paragraph cannot be met, then the receiving watercourse to and including the *discharge point* shall be designed and constructed to withstand the expected *velocity* anywhere the *velocity* exceeds the “prior to development” *velocity* by 10 percent.

*The following is a table for maximum permissible velocity for storm water discharges in feet per second (F.P.S.) and meters per second (M.P.S.):*

<b>Table 8.1. Maximum Permissible Velocities</b>		
<b>Material</b>	<b>Feet Per Second (F.P.S.)</b>	<b>Meters Per Second (M.P.S.)</b>
Fine sand (noncolloidal)	2.5	0.8
Sandy loam (noncolloidal)	2.5	0.8
Silt loam (noncolloidal)	3.0	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.

- C. Acceptable Management Measures. Measures applied alone or in combination to satisfy the intent of this section are acceptable if there are no objectionable secondary consequences. The *Henderson County Soil Erosion and Sedimentation Control Administrator* recognizes that the management of *stormwater runoff* to minimize or

control downstream channel and bank *erosion* is a developing technology. Innovative techniques and ideas will be considered and may be used when shown to have the potential to produce successful results. Some alternatives, while not exhaustive, are to:

- (1) Avoid increases in surface runoff volume and *velocity* by including measures to promote infiltration to compensate for increased runoff from areas rendered impervious;
- (2) Avoid increases in *stormwater* discharge velocities by using vegetated or roughened swales and waterways in place of closed drains and high *velocity* paved sections;
- (3) Provide *energy dissipators* at outlets of *storm drainage facilities* to reduce flow velocities to the point of discharge;
- (4) Protect watercourses subject to *accelerated erosion* by improving cross sections and/or providing *erosion-resistant* lining; and
- (5) Upgrade or replace the receiving device *structure* or watercourse such that it will receive and conduct the flow to a point where it is no longer subject to degradation from the increased rate of flow or increased *velocity*.

D. Exceptions. This rule shall not apply where it can be demonstrated to the [Henderson County Soil Erosion and Sedimentation Control Administrator](#) that *stormwater* discharge velocities will not create an *erosion* problem in the receiving watercourse.

#### **§42-259. Borrow and Waste Areas**

~~*When the person conducting the land-disturbing activity is also the person conducting the borrow or waste disposal activity, areas from which borrow is obtained and which are not regulated by the provisions of the Mining Act of 1971, and waste areas for surplus materials other than landfills regulated by NCDENR's Division of Waste Management shall be considered as part of the land-disturbing activity where the borrow material is being used or from which the waste material originated. When the person conducting the land-disturbing activity is not the person obtaining the borrow and/or disposing of the waste, these areas shall be considered a separate land-disturbing activity.*~~

~~*If the same Person conducts the land-disturbing activity and any related borrow or waste activity, the related borrow or waste activity shall constitute part of the 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 Waste Management. If the land-disturbing activity and any related borrow or waste activity are not conducted by the same Person, they shall be considered by the Approving Authority as separate land-disturbing activities.*~~

#### **§42-260. Access and Haul Roads**

Temporary access and haul *roads*, other than *public roads*, constructed or used in connection with any *land-disturbing activity* shall be considered a part of such activity. ~~*Whenever an access or haul road adjoins a dedicated public or private road, sufficient depth, width, and type of stone, properly compacted, shall be installed as a mud matt to prevent the accumulation of soil and mud on existing roads.*~~

#### **§42-261. Operations in Lakes or Natural Watercourses**

*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.

#### **§42-262. Responsibility for Maintenance**

During the development of a site, the *Person* conducting the *land-disturbing activity* shall install and maintain all temporary and permanent *erosion* and *sedimentation* control measures as required by the approved plan or any provision of this subpart, the ~~*North Carolina Sedimentation Pollution Control Act of 1973, or any order adopted pursuant to this subpart or the North Carolina Sedimentation Pollution Control Act of 1973.*~~ After site development, the landowner or *person* in possession or control of the land shall install and/or maintain all necessary permanent *erosion* and *sediment* control measures, except those measures installed within a *road right-of-way* or *easement* accepted for maintenance by a governmental agency.

#### **§42-263. Additional Measures**

Whenever the *Henderson County Soil Erosion and Sedimentation Control Administrator* determines that ~~*significant accelerated erosion and sedimentation is occurring as a result of land-disturbing activity, despite application and maintenance of protective practices, the person conducting the land-disturbing activity will be required to and shall take additional protective action.*~~ *continues despite the installation of protective practices, they shall direct the Person conducting the land-disturbing activity to take additional protective action necessary to achieve compliance with the conditions specified in the Act or its rules.*

#### ~~**§42-264. Existing Uncovered Areas**~~

- ~~A. All uncovered areas existing on the effective date of this subpart which resulted from land-disturbing activity, exceed one (1) acre, are subject to continued accelerated erosion, and are causing off-site damage from sedimentation, shall be provided with a ground cover or other protective measures, structures, or devices sufficient to restrain accelerated erosion and control off-site sedimentation.~~
- ~~B. The Soil Erosion and Sedimentation Control Administrator shall serve upon the landowner or other person in possession or control of the land a written notice to comply with the North Carolina Sedimentation Pollution Control Act of 1973, this subpart, a rule or order adopted or issued pursuant to the North Carolina Sedimentation Pollution Control Act of 1973 by the North Carolina Sedimentation Control Commission or by the Soil Erosion and Sedimentation Control Administrator. The notice to comply shall be sent by registered or certified mail, return receipt requested, or other means provided in GS 1A-1, Rule 4. The notice will set forth the measures needed to comply and will state the time within which such measures must be completed. In determining the measures required and the time allowed for compliance, the authority serving notice shall take into consideration the economic feasibility, technology, and quantity of work required, and shall set reasonable and attainable time limits of compliance.~~
- ~~C. The Soil Erosion and Sedimentation Control Administrator reserves the right to require preparation and approval of an Erosion and Sedimentation Control Plan in any instance where extensive control measures are required.~~

~~D. This rule shall not require ground cover on cleared land forming the future basin of a planned reservoir.~~

#### §42-265. Fees

- A. Henderson County may establish a fee schedule for the review and approval of ~~Erosion and Sedimentation Control~~ Plans.
- B. In establishing the fee schedule, the County shall consider the administrative and personnel costs incurred for reviewing the Erosion and Sedimentation Control Plans and for related compliance activities.
- C. *The fee shall be calculated on the basis of either the number of acres disturbed or in the case of a single-family lot in a residential development or common plan of development that is less than one acre set at no more than one hundred dollars (\$100.00) per lot developed.*

#### §42-266. Plan Appeals

- A. Except as provided in §42-266 (Plan Appeals) B of this subpart, the *appeal* of a disapproval or approval with modifications of an ~~Erosion and Sedimentation Control~~ Plan shall be governed by the following provisions:
  - (1) The disapproval or modification of any proposed ~~Erosion and Sedimentation Control~~ Plan by the *Henderson County Soil Erosion and Sedimentation Control Administrator* shall entitle the *Pperson* submitting the ~~Erosion and Sedimentation Control~~ Plan to a public hearing if such *Pperson* submits written demand for a hearing within 15 days after receipt of written notice of disapproval or modifications.
  - (2) A hearing held pursuant to this section shall be conducted by the Henderson County Zoning Board of Adjustment (ZBA) within 60 days after the date of the *appeal* or request for a hearing.
  - (3) The ZBA will render its final decision on any *appeal* within 45 days of the completion of the hearing.
  - (4) If the ZBA upholds the disapproval or modification of a proposed ~~Erosion and Sedimentation Control~~ Plan following the hearing, the *person* submitting the ~~Erosion and Sedimentation Control~~ Plan shall then be entitled to *appeal* the County's decision to the ~~Competent Court of Jurisdiction~~ Commission as provided in G.S. 113A-61(c) and 15A NCAC 4B.0118(d).
- B. In the event that an ~~Erosion and Sedimentation Control~~ Plan is disapproved pursuant to §42-255 (Erosion and Sedimentation Control Plans) J of this subpart, the *applicant* may *appeal* the *Henderson County Board of Adjustment's* disapproval of the ~~Erosion and Sedimentation Control~~ Plan directly to the ~~North Carolina Sediment Control~~ Commission.

#### §42-267. Inspections and Investigations

- A. Inspection. Agents, officials, or other qualified *persons* authorized by the *Henderson County Soil Erosion and Sedimentation Control Administrator* will periodically inspect *land-disturbing activities* to ensure compliance with the ~~North Carolina Sedimentation~~

~~Pollution Control Act of 1973~~, this subpart, or rules or orders adopted or issued pursuant to this subpart, and to determine whether the measures required in the ~~Erosion and Sedimentation Control Plan or Permit~~ are effective in controlling erosion and sedimentation resulting from land-disturbing activity. Notice of the right to inspect shall be included in the certificate of approval of each ~~Erosion and Sedimentation Control Plan~~.

- B. Willful Resistance, Delay or Obstruction. No person shall willfully resist, delay, or obstruct an authorized representative, employee, or agent of the County, while that person is inspecting or attempting to inspect a land-disturbing activity under this section.
- C. Notice of Violation. If the ~~Henderson County Soil Erosion and Sedimentation Control Administrator~~ determines that a ~~Person~~ engaged in land-disturbing activity has failed to comply with the ~~North Carolina Sedimentation Pollution Control Act of 1973~~, this subpart, or rules, or orders adopted or issued pursuant to this subpart, a notice of violation shall be served upon that ~~Person~~. The notice may be served by any means authorized under NCGS 1A-1, Rule 4 upon the person conducting the land-disturbing activity and, if different from that party, the property owner. The notice shall specify a date, by which the person must comply with the ~~North Carolina Sedimentation Pollution Control Act of 1973~~, or this subpart, or rules, or orders adopted pursuant to this subpart, and inform the ~~Person~~ of the actions that need to be taken to comply with the ~~North Carolina Sedimentation Pollution Control Act of 1973~~, this subpart, or rules or orders adopted pursuant to this subpart. Any ~~Person~~ who fails to comply within the time specified is subject to additional civil and criminal penalties for a continuing violation as provided in NCGS §113A-64 and this subpart. ~~If the Person engaged in the land-disturbing activity has not received a previous notice of violation under this section, the (city)(town)(county) shall offer assistance in developing corrective measures. Assistance may be provided by referral to a technical assistance program on behalf of the Approving Authority, referral to a cooperative extension program, or by the provision of written materials such as Department guidance documents. The notice of violation may be served in the manner prescribed for service of process by G.S. 1A-1, Rule 4, and shall include information on how to obtain assistance in developing corrective measures.~~
- ~~D. Revocation of Permits. The notice shall set forth the actions necessary to achieve compliance with the plan or this section, specify a reasonable time period within which such measures must be completed, and warn that failure to correct the violation within the time period will result in one or more of the following:~~
- ~~(3) Revocation of the land-disturbing permit, all building permits, and any other permits issued by the County;~~
  - ~~(4) The issuance of a stop work order;~~
  - ~~(5) The assessment of civil penalties; or~~
  - ~~(6) Other enforcement action.~~

~~If work has not begun within six (6) months following the issuance date, the land-disturbing permit shall be deemed expired. Renewal of the land-disturbing permit will require submittal of a new application and associated plan review fees. No grading work is to be performed until the new permit is issued.~~

- D. Investigation. The *Henderson County Soil Erosion and Sedimentation Control Administrator* shall have the power to conduct such investigation as it may reasonably deem necessary to carry out its duties as prescribed in this subpart, and *who presents appropriate credentials* for this purpose to enter at reasonable times ~~upon~~ any property, public or private, for the purpose of investigating and inspecting the sites of any *land-disturbing activity*.
- E. Statements and Reports. The *Henderson County Soil Erosion and Sedimentation Control Administrator* shall also have the power to require written statements, or filing of reports under oath, with respect to pertinent questions relating to *land-disturbing activity*.

## §42-268. Penalties

### A. Civil Penalties

- (1) Civil Penalty for a Violation. Any *Pperson* who violates any of the provisions of this subpart, or rule or order adopted or issued pursuant to this subpart, 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 *Erosion and Sedimentation Control* Plan ~~or Permit~~, is subject to a civil penalty. The maximum civil penalty amount that the *Henderson County Soil Erosion and Sedimentation Control Administrator* may assess per *violation* is 5,000 dollars. 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 *Pperson* has not been assessed any civil penalty under this subsection for any previous violation, and that *Pperson* 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) *Damage or Destruction of a silt fence occurring during land-disturbance activities or construction on a development project shall not be assessed a civil penalty provided that the silt fence is repaired or replaced within the compliance period/deadline noted in the inspection report or notice of violation. This will ensure violators have an opportunity to correct these violations. G.S. §113A-61.1(d) does not apply to off-site sediment that occurs due to the silt fence not being in place, but merely damage to the silt fence itself.*
- (3) Civil Penalty Assessment Factors. The *Henderson County Soil Erosion and Sedimentation Control Administrator* shall determine the amount of the civil penalty based upon the following factors:
- 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 subpart.

Notice of Civil Penalty Assessment. The *Henderson County Soil Erosion and Sedimentation Control Administrator* shall provide notice of the civil penalty amount and basis for assessment to the *Pperson* assessed. The notice of assessment shall be served by any means authorized under *NCCGS G.S. 1A-1, Rule 4,* ~~and A notice of assessment by the Henderson County Soil Erosion and Sedimentation Control Administrator shall direct the violator to either pay the assessment, or contest the assessment, within 30 days by filing a petition for hearing with the Henderson County Zoning Board of Adjustment, or file a request with the Henderson County Board of Commissioners for remission of the assessment within 30 days of after receipt of the notice of assessment, by written demand for a hearing or file a request with the Sedimentation Control Commission for remission of the assessment within 60 days of receipt of the notice.~~ A remission request must be accompanied by a waiver of the right to a contested case hearing pursuant to Chapter 150B of the North Carolina General Statutes and a stipulation of the facts on which the assessment was based.

- ~~(4) Hearing. A hearing on a civil penalty shall be conducted by the ZBA within 30 days after the date of the written demand for the hearing.~~
- ~~(5) (4) Final Decision. The Board of Adjustment shall render its final decision on contested assessments on the civil penalty within 45 days of the receipt of the appeal. The final decision on contested assessments shall be made by the Henderson County Zoning Board of Adjustment within 45 days of receipt of the assessment.~~
- (5) Appeal of Final Decision. Appeal from the final decision of the *Henderson County Board of Adjustment* shall be to the *Competent Court of Jurisdiction Superior Court of the county, where the violation occurred. Such appeals must be made within 30 days of the final decision of the Henderson County Zoning Board of Adjustment.*
- (6) *Remission of Civil Penalties. A request for remission of a civil penalty imposed under G.S. 113A-64 may be filed with the Henderson County Board of Commissioners within 30 days of receipt of the notice of assessment. A remission request must be accompanied by a waiver of the right to a contested case hearing pursuant to Chapter 150B of the General Statutes and a stipulation of the facts on which the assessment was based. The following factors shall be considered in determining whether a civil penalty remission request will be approved:*
  - (i) Whether one or more of the civil penalty assessment factors in G.S. 113A-64(a)(3) were wrongly applied to the detriment of the petitioner.*
  - (ii) Whether the petitioner promptly abated continuing environmental damage resulting from the violation.*
  - (iii) Whether the violation was inadvertent or a result of an accident.*
  - (iv) Whether the petitioner had been assessed civil penalties for any previous violations.*

(v) *Whether payment of the civil penalty will prevent payment for necessary remedial actions or would otherwise create a significant financial hardship.*

(vi) *The assessed property tax valuation of the petitioner's property upon which the violation occurred, excluding the value of any structures located on the property.*

(7) Collection. If payment is not received within ~~60~~ 30 days after it is due, Henderson County may institute a civil action to recover the amount of the assessment. The civil action may be brought in the Superior Court of the county where the *violation* occurred, or the violator's residence or where the violator's principal place of business is located. Such civil actions must be filed within three (3) 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.

(8) Credit of Civil Penalties. Civil penalties collected pursuant to this subpart shall be credited to the Civil Penalty and Forfeiture Fund. Penalties collected by Henderson County may be diminished only by the actual costs of collection. The collection cost percentage to be used shall be established and approved by the North Carolina Office of State Budget and Management on an annual basis, based upon the computation of actual collection costs by *Henderson County for the prior fiscal year. each county for the prior fiscal year.*

[In any event, the cost percentage shall not exceed twenty percent (20%) of penalties collected.]

B. Criminal Penalties. Any *Person* who knowingly or willfully violates any provision of this subpart, or rule or order adopted or issued *by the Commission or a local government, pursuant to this subpart,* 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 Erosion and Sedimentation Control Plan, shall be guilty of a Class 2 misdemeanor which may include a fine not to exceed 5,000 dollars as provided in *NCGS §113A-64.*

#### **§42-269. Injunctive Relief**

A. Violation of Local Program. Whenever Henderson County has reasonable cause to believe that any *person* is violating or threatening to violate any subpart, rule, regulation or order adopted or issued by Henderson County, or any term, condition, or provision of an approved Erosion and Sedimentation Control Plan, it may, either before or after the institution of any other action or proceeding authorized by this subpart, institute a civil action in the name of the County, for injunctive relief to restrain the *violation* or threatened *violation*. The action shall be brought in the superior court of the county in which the *violation* is occurring or is threatened.

B. Abatement of Violation. Upon *determination* by a court that an alleged *violation* is occurring or is threatened, the court shall enter any order or judgment that is necessary to



abate the *violation*, to ensure that restoration is performed, or to prevent the threatened *violation*. The institution of an action for injunctive relief under this section shall not relieve any party to the proceedings from any civil or criminal penalty prescribed for *violations* of this subpart.

**§42-270. Restoration After Non-Compliance**

The *Henderson County Soil Erosion and Sedimentation Control Administrator* may require a *Person* who engaged in a *land-disturbing activity* and failed to retain *sediment* generated by the activity, as required by *NCGS G.S. §113A-57 (3)*, to restore the waters and land affected by the failure so as to minimize the detrimental effects of the resulting pollution by *sedimentation*. This authority is in addition to any other civil or criminal penalty or injunctive relief authorized under this subpart.

**§42-271. Severability**

If any section or sections of this subpart is/are held to be invalid or unenforceable, all other sections shall nevertheless continue in full force and effect.

**§42-272. Effective Date**

This subpart becomes effective on October 1, 2007.

- §42-273. Reserved
- §42-274. Reserved
- §42-275. Reserved
- §42-276. Reserved
- §42-277. Reserved
- §42-278. Reserved
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- §42-287. Reserved
- §42-288. Reserved
- §42-289. Reserved
- §42-290. Reserved
- §42-291. Reserved
- §42-292. Reserved

DRAFT AMENDMENTS (TX-2022-03)

ARTICLE XIV

DEFINITIONS

§42-391. Definitions

Act. *(Soil Erosion and Sedimentation Control) the North Carolina Sedimentation Pollution Control Act of 1973 and all rules and orders adopted pursuant to it.*

**Adequate Erosion Control Measure, Structure, or Device.** One which controls the soil material within the land area under responsible control of the ~~P~~erson conducting the *land-disturbing activity*.

Approving Authority. *(Soil Erosion and Sedimentation Control) 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.*

**Being Conducted.** A *land-disturbing activity* has been initiated and ~~permanent stabilization of the site has not been completed~~ *not deemed complete by the Approving Authority.*

**Borrow.** Fill material which is required for on-site construction ~~and~~ *that* is obtained from other locations.

Commission. *(Soil Erosion and Sedimentation Control) The North Carolina Sediment Control.*

Department. *(Soil Erosion and Sedimentation Control) The North Carolina Department of Environmental Quality.*

Director. *(Soil Erosion and Sedimentation Control) The Director of the Division of Energy Mineral and Land Resources of the Department of Environmental Quality.*

**Discharge Point or Point of Discharge.** *(Soil Erosion and Sedimentation Control). ~~That point at which stormwater runoff leaves a tract of land~~ means that point where runoff leaves a tract of land where a land-disturbing activity has occurred or enters a lake or natural watercourse.*

District. *(Soil Erosion and Sedimentation Control) means the Henderson County Soil and Water Conservation District created pursuant to Chapter 139, North Carolina General Statutes.*

**High Quality Waters.** Those classified as such in 15A NCAC 2B.0101(e) (5) ~~—General Procedures, 0224, which is hereby incorporated herein by reference to include further amendments.~~ *Including subsequent amendments and additions.*

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

**Local Government (Soil Erosion and Sedimentation Control).** Any county, incorporated village, town or city, or any combination of counties, incorporated villages, towns, and cities, acting through a joint program pursuant to the provisions of the ~~North Carolina Sedimentation Pollution Control Act of 1973~~ and all rules and orders adopted pursuant thereto.

**Person Conducting Land-Disturbing Activity.** Any person who may be held responsible for violation unless expressly provided otherwise by this Chapter, ~~the North Carolina Sedimentation Control Act of 1973~~, or any order adopted pursuant to this Chapter or ~~the North Carolina Sedimentation Control Act of 1973~~.

**Person Who Violates or Violator Responsible for the Violation.** ~~The (1) developer or other person who has or holds himself out as having financial or operation control over the land-disturbing activity; or (2) landowner or person in possession or control of the land that has directly or indirectly allowed the land-disturbing activity, or benefited from it or failed to comply with a duty imposed by any provision of this Chapter, the North Carolina Sedimentation Control Act of 1973, or any order adopted pursuant to this Chapter or the North Carolina Sedimentation Control Act of 1973. As used in G.S. 113A-64, means: “any landowner or 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.~~

**Plan.** (Soil Erosion and Sedimentation Control) An erosion and sedimentation control plan.

**Stormwater Runoff.** ~~The surface flow of water resulting from precipitation in any form and occurring immediately after rainfall or melting. The runoff of water resulting from precipitation in any form.~~

**Ten-Year Storm.** ~~The stormwater runoff resulting from precipitation of an intensity expected to be equaled or exceeded, on the average, once in ten (10) years, and of a duration which will produce the maximum peak rate of runoff for the watershed of interest under average antecedent wetness conditions—a rainfall of an intensity that, based on historical data, is predicted by a method acceptable to the Approving Authority to be equaled or exceeded, on the average, once in ten years, and of a duration that will produce the maximum peak rate of runoff for the watershed of interest under average antecedent wetness conditions.~~

**Twenty-Five Year Storm.** The stormwater runoff resulting from precipitation of an intensity that, based on historical data, is predicted by a method acceptable to the Approving Authority ~~expected~~ to be equaled or exceeded on the average, once in 25 years, and of a duration which will produce the maximum peak rate of runoff for the watershed of interest under average antecedent wetness conditions.

**Velocity.** ~~The average velocity of flow through the cross section of the main channel at the peak flow of the storm of interest. 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. Overload flows are not to be included for the purpose of computing velocity of flow. The speed of flow through a cross section perpendicular to the direction of the main channel at the peak flow of the storm of interest but not exceeding bank full flows.~~