

**The Current State of Sediment Pollution Control
Under the North Carolina Sedimentation Pollution Control
Act**

**Submitted to the:
North Carolina Sedimentation Control Commission**

Conservation Council of North Carolina

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Executive Summary

The stated purpose of the North Carolina Sedimentation Pollution Control Act (SPCA) is “to provide for the creation, administration, and enforcement of a program and for the adoption of minimal mandatory standards which will permit development of this State to continue with the least detrimental effects from pollution by sedimentation.”¹ Under the SPCA, the Sedimentation Control Commission (SCC), as part of the North Carolina Department of Environment and Natural Resources (NCDENR), is “charged with duty of developing and administering the sedimentation control program...”² The SCC develops, adopts, and revises the rules and regulations, in accordance with NC. GEN. STAT § 150B, for the control of erosion and sediment resulting from land disturbing activities.³

The Land Quality Section (LQS) of the Division of Land Resources (DLR) within NCDENR currently administers these rules and regulations. LQS is composed of seven regional offices with a central office in Raleigh. Each regional office, under the supervision of the central office, administers the SCC sediment control program for their jurisdictions. Among other duties, LQS is responsible for plan review, and site inspections to ensure compliance with the SPCA and compliance with the land disturber’s approved erosion and sediment control plan. Due to inadequate staff totals LQS site inspections occur approximately once every four months, despite a general consensus that at a minimum, monthly site inspections are necessary to effectively administer North Carolina’s sediment control program.

The SPCA requires DENR to submit an annual report to North Carolina’s Environmental Review Commission (ERC).⁴ According to the 2009 report, approximately 75% of the funding for North Carolina’s sediment control program comes from fee collections. Currently the SPCA caps fees for sedimentation plan review at \$65 per disturbed acre.⁵ In 2009, LQS had only 61 full time equivalent positions to administer the sediment control program across the state.

DENR is also responsible for enforcement of the SPCA, which starts with a plan review. The DLR director may disapprove any plan as long as the decision is supported by criteria specified in the SPCA.⁶ The Secretary of DENR also has the authority to determine civil penalty amounts. Delegated local programs also have the authority to review plans and issue civil penalties.

The SPCA authorizes the SCC to delegate jurisdiction over land disturbing activities to state agencies and local governments.⁷ By delegating jurisdiction, the SCC provides local governments the opportunity to actively control sediment pollution while decreasing

1 N.C. GEN. STAT. § 113A-51 (2010).

2 N.C. GEN. STAT. § 143B-299(a) (2010).

3 N.C. GEN. STAT. § 113A-54(b) (2010).

4 N.C. GEN. STAT. § 113A-67 (2010).

5 N.C. GEN. STAT. § 113A-54.2(a) (2010).

6 N.C. GEN. STAT. § 113A-54.1(c) (2010).

7 N.C. GEN. STAT. § 113A-56 (2010).

LQS's plan approval and inspection workload. Any local government may submit an application to establish an erosion and sedimentation control program for its jurisdiction to the SCC for approval.⁸ If the SCC determines that the standards required by a local government submission are equal to, *or exceed* the standards mandated by the SPCA, then the SCC may delegate the program (emphasis added).⁹

Not only is the SCC authorized to delegate local sediment control programs (local programs), the SCC also has the duty to "assist and encourage local governments in developing erosion and sedimentation control programs..."¹⁰ In the past, this assistance has included distributing state funds for program creation, providing annual training conferences for local programs, and offering support and information through regional offices. LQS' annual ERC reporting requirements include a review of local program effectiveness.¹¹ Currently, LQS conducts formal reviews through central office staff, as well as informal regional reviews to determine local program effectiveness. Self filed monthly reports documenting local program performance also illuminate local program's performance.

Local programs consistently outperform LQS: they average more inspections per site and more inspections per area disturbed. Local government and local program staff's ability to determine unique fees, enforcement strategies, and mandatory standards while addressing familiar local sedimentation pollution issues help explain local program's increased success. Still, local programs are not immune to the impact of decreased development within the current economy, which largely results in decreased fee collection and sometimes abandoned construction sites.

Although local programs, when viewed as a whole, continue to perform significantly better than LQS, local program staff are concerned that they will lose their program and jobs. Although local program fees were historically more than adequate to fund significant, if not all, local program expenses, the decrease in development has eliminated significant local program funds. Also, recent legislation (H683) extended the period of time before for erosion permit expiration. Thus, some local programs are also losing expected revenue from re-permitting fees while expending resources inspecting these sites.

To fulfill SPCA mandates the SCC must address issues facing LQS and local programs. The SCC is responsible to keep the mud out of North Carolina's waters without discouraging or impeding development. Although the most visible issue is lack of LQS resources and staff, the SCC should also develop policies and strategies necessary to continue encouraging local program delegation, while supporting currently delegated programs. Failure to do so could result in local programs giving up their programs, further stretching LQS's funds and staff.

8 N.C. GEN. STAT. § 113A-60(a) (2010).

9 N.C. GEN. STAT. § 113A-60(b) (2010).

10 N.C. GEN. STAT. § 113A-54(d)(1) (2010).

11 N.C. GEN. STAT. § 113A-67 (2010).

The Conservation Council of North Carolina (the Council) started amassing and analyzing data on Sedimentation Pollution Control in North Carolina in 2007. Specifically, the Council gathered enforcement and inspection data from both local sedimentation control programs (local programs) as well as the seven LQS regional offices. The Council also collected and tabled ordinance requirements, fee schedules, and staffing data from local programs. Finally, the Council interviewed local program directors and staff to determine their recommendations, complaints, and general opinions regarding the state of sedimentation control in their jurisdictions and statewide.

The goals of this report are to:

- Present and evaluate enforcement and inspection data collected from LQS and local programs.
- Present and evaluate local ordinance mandatory standards, fee schedules and staffing data.
- Present some of the common issues faced, and views held, by local program directors and staff.
- Highlight areas where current sedimentation control statutes, rules and policy appear most lacking.
- Recommend policy, rule, and statutory changes, determined using the data the Council collected, which should enhance sedimentation control efforts in North Carolina.

The Council's analysis of enforcement and inspection data, local program ordinances, local program fees, local program qualifications, and interviews with local program staff, supports the following conclusions:

- LQS's \$65 per acre erosion and sediment plan submission fee is more than \$200 below the average fee charged by local programs.
- Local programs conduct more annual inspections per active site.
- A lack of sufficient resources, both funding and staff, prevents LQS from adequately administering a statewide erosion control program.
- Local programs need increased, and better, communication with LQS.
- During the past two years, an increasing number of local programs have reverted to LQS jurisdiction, and local program staff are concerned that more programs may follow.
- Some local programs address the possibility of abandoned sites with performance securities. LQS does not currently require securities, or provide local programs guidance on the possible benefits of securities.
- LQS does not adequately collect and present information relevant to, and needed by, local programs. This information includes changes to, and new interpretations of rules, policies, and the SPCA. LQS also does not provide local programs with sufficient access to other local ordinances, enforcement strategies, and land disturber's compliance history.
- LQS has provided information regarding local programs' civil penalty appeals processes. Most local ordinances do not reflect the new information, and most

local program staff are unsure of the current mandatory Office of Administrative Hearing appeals process.

- LQS does not have a single internet location for local programs to view relevant information.
- All local programs do not consistently file monthly activity reports. Some programs file late reports or none at all.
- LQS does not require documentation, in monthly reports, of all inspection reports. LQS has not provided a uniform mechanism for local programs to efficiently and easily upload monthly reports. Current LQS documentation requirements do not address all information required by the EPA.
- LQS program inspections do not occur annually despite the SPCA requirement for annual reporting on local programs. The annual review frequency has improved significantly over the last two years, but the reviews still only occur approximately once every two years.
- Local program staff qualifications vary. There is no current statewide minimum qualification requirement.
- LQS program inspections rarely include ordinance review. Currently 17, or 35% of, local program ordinances contain standards which violate the SPCA.
- Local programs appreciate and enjoy the annual LQS training, but many complain that information is often repetitive and there is no regional focus. Regardless of program size, local programs may only send two representatives to the annual conference.
- Despite the SPCA mandate for the SCC to encourage local programs, there are no funds available to encourage delegation and LQS has yet to implement any strategy to encourage increased delegation.
- Newly delegated local programs viewed the program delegation process negatively, complaining that LQS provided insufficient guidance and training on staff and equipment necessary to assume immediate responsibility for LQS active sites.

To address issues highlighted by the above conclusions, as well as encourage increased compliance with SPCA requirements and policy goals, the Council proposes the following recommendations:

- We recommend that LQS regional offices continue to conduct informal annual reviews to ensure that information is available for the annual ERC report. Regional staff should be trained and the informal review should be properly documented.
- We recommend that informal regional, and formal central, LQS reviews include ordinance review. While full ordinance review is ideal, a review of mandatory standards and minimum language should facilitate better compliance with the SPCA while expending nominal LQS resources and time.
- We recommend that LQS formal reviews occur at least once every two years.
- We recommend that local program monthly reports to LQS include inspection reports with full documentation of non-compliance. The reports should require uniform filing and specific parameters which must be documented.

- We recommend that LQS create a private web portal for local programs. This portal should provide access to educational information, local ordinances, land disturber compliance history, changes to the SPCA, rules, and policy, as well as a discussion forum for local programs. Local program monthly reports should be uploaded through this portal so all local program requirements and information are in one easily accessible location.
- We recommend that LQS incorporate civil penalty appeals into annual local program reviews. LQS should evaluate each local appeals process and provide guidance when the process is lacking. Evaluations should focus on whether local program ordinances currently include an acceptable appeals process. LQS reports to the SCC on local program reviews should include the evaluation of local programs' civil penalty appeals processes.
- We recommend that updates to the appeals process, as well as contact information for assistance, are posted in the information section of the private web portal.
- We recommend that LQS contact local legal counsel, as well as local program staff, to ensure awareness amongst individuals responsible for addressing the civil appeals process is consistent..
- We recommend that the SCC release a resolution encouraging increased LQS plan review and permitting fees to provide LQS with adequate staffing resources.
- We recommend that the TAC re-evaluate the 1997 Plan of Action to determine sufficient staff and resources needed to conduct monthly inspections and the appropriate fee adjustment required to meet that staffing level.
- We recommend that the SCC request an SPCA amendment which would transfer fee determination to the SCC.
- We recommend that the SCC evaluate instituting a general fee with incentives awarded to developers with positive development and compliance histories.
- We recommend that the SCC draft a policy statement encouraging LQS to provide adequate information to encourage municipalities to seek local program delegation. LQS has more sites than current staff can handle. Strategies to encourage increased local program delegation through information dissemination could decrease LQS's workload.
- We recommend that the SCC draft a policy statement encouraging LQS to contact and inform public interest organizations on program delegation to foster grassroots support for increased delegation.
- We recommend that the DENR website contain updated information on the delegation process. This information should include: the benefits and possible incentives of delegation; extensive information laying out the specifics of the delegation process, including information needed to achieve delegation, the actual transition from LQS to local jurisdiction, and local program reporting responsibilities post delegation. Newly delegated local programs frequently are unaware of their responsibilities regarding current active sites, and often receive little guidance on the equipment and staff necessary to implement a program in their jurisdiction. Delegation information should be updated on LQS's website to ensure a smooth delegation process while encouraging informed local decisions.
- We recommend that the SCC and education committee address local program complaints regarding the annual training conference. The committee should

determine the feasibility and benefit of breakout sessions, regional discussion forums, as well as down time for networking and communication.

- We recommend increased training on civil penalty appeals process during the annual conference.
- We recommend that the education committee determine a better method for limiting attendance that reflects local program staff size; although each program should receive at least one spot at the conference, the committee should determine the benefit of taking additional seats from some of the smaller programs to ensure adequate representation and benefit to programs with larger staff. Additionally, we recommend considering distributing additional conference spaces based on program size or an incentive system based on program performance, rather than a 'first come first served' basis.
- We propose a SCC policy statement encouraging LQS regional office staff to attend and facilitate regional discussion and information sessions.
- We recommend that the TAC research performance securities to determine the form, use and amounts which would most likely protect local programs and provide a mechanism to address abandoned sites.
- We propose that the SCC further analyze securities with the goal of recommending securities for LQS sites in the 2011 ERC report.
- We recommend that local program review include ordinance review since many local ordinances are currently less restrictive than the SPCA.
- Currently local programs and self inspectors have no mandatory minimum qualifications. We recommend that a uniform qualification requirement be established to fairly ensure that staff meet a minimum level of ability to implement and enforce erosion control.