

October 1, 2011

MEMORANDUM

TO: ENVIRONMENTAL REVIEW COMMISSION
The Honorable David Rouzer, Chair
The Honorable Mitch Gillespie, Co-Chair
The Honorable Ruth Samuelson, Co-Chair

FROM: Kari Barsness
Director of Legislative and Intergovernmental Affairs

SUBJECT: Annual Sedimentation Program Report

Pursuant to G.S. 113A-67, the department is required to report annually to the Environmental Review Commission on the implementation of the Sedimentation Pollution Control Act of 1973. The attached report satisfies this reporting requirement.

If you have any questions, please me by phone (919)715-4189 or via email at Kari.Barsness@ncdenr.gov.

Cc. Ms. Robin Smith, Assistant Secretary, Environmental Protection
Mr. James Simons, Director, Division of Land Resources
Ms. Kristin Walker, Fiscal Research Division
Ms. Lanier McRee, Fiscal Research Division
Ms. Claire Hester, Fiscal Research Division
Ms. Mariah Matheson, Fiscal Research Division

**Report to the Environmental Review Commission
On the Implementation of the
Sedimentation Pollution Control Act
By the Department of Environment and Natural Resources
Division of Land Resources, Land Quality Section**

October 1, 2011

Executive Summary

The department shall report to the Environmental Review Commission on the implementation of the Sedimentation Pollution Control Act (SPCA) of 1973 on or before 1 October of each year. The Land Quality Section in the Division of Land Resources is responsible for implementing the SPCA. There are also 52 delegated SPCA programs across the state implemented by either county or municipal governments. As a result of the downturn in the economy, the Land Quality Section continued to downsize staffing during the past fiscal year with a reduction-in-force of both fee-based and appropriated positions. For FY 2010-11, the total number of new projects remained about the same as in the prior fiscal year. There were 2,188 permits issued in FY 2010-11. The total number of disturbed acres continued to fall, reaching a 14-year low of 19,200 acres. Since plan review fees are based on the acreage to be disturbed, fee receipts continued to fall as well. Civil penalty assessments also dropped over 50 percent, from 47 in FY 2009-10 to 22 in FY 2010-11.

Background

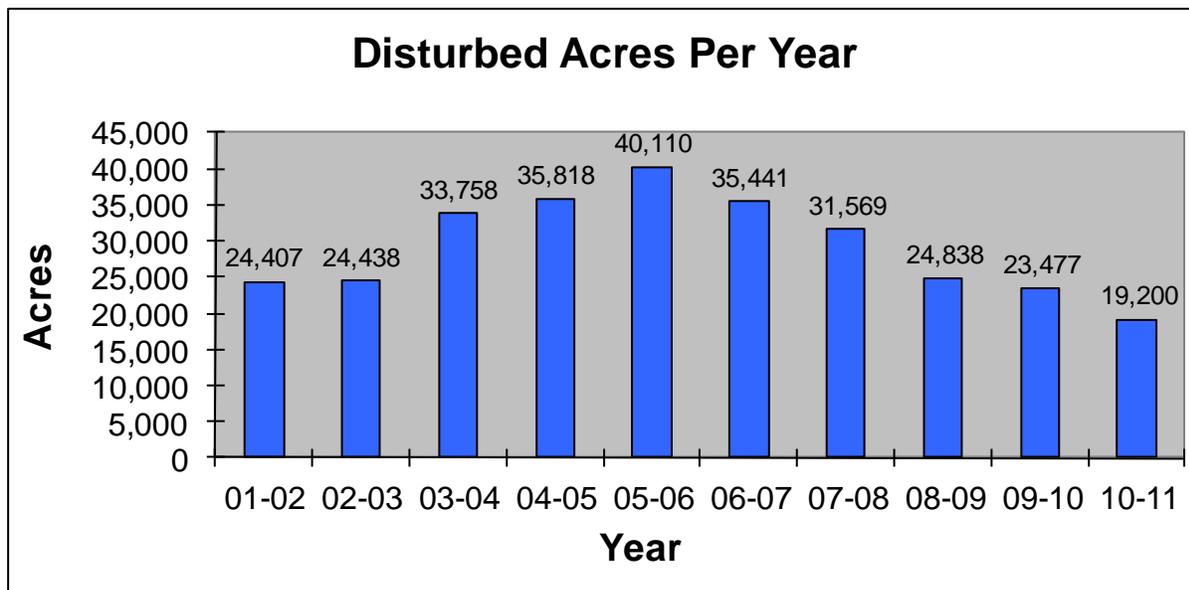
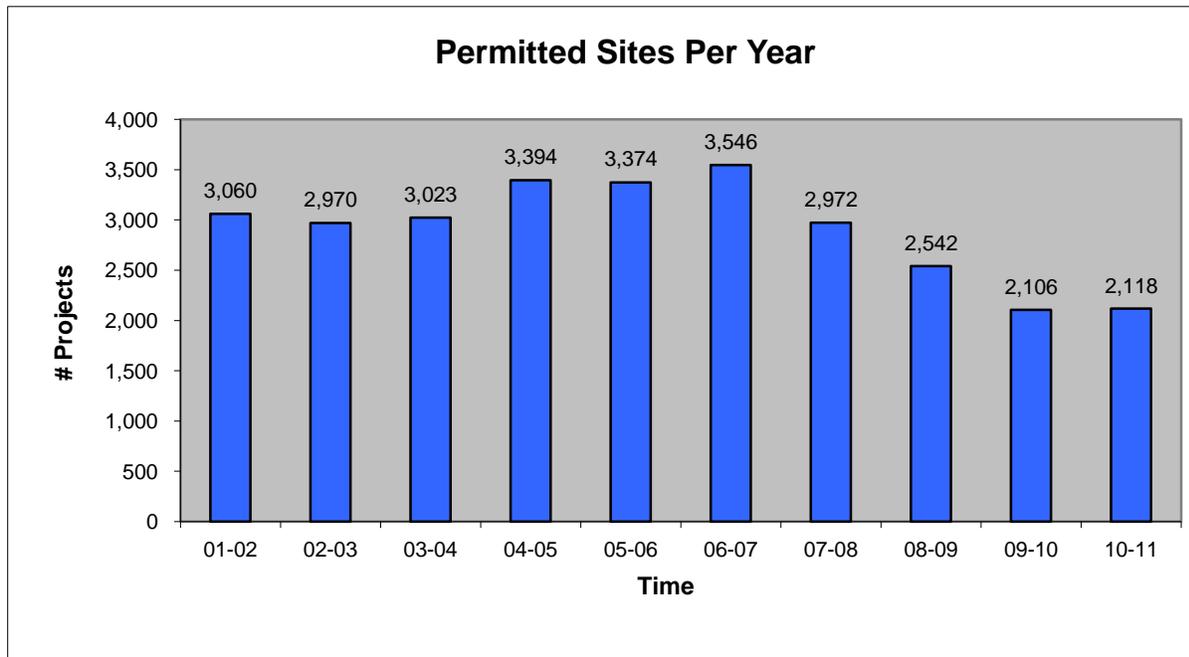
“The sedimentation of streams, lakes and other waters of this State constitute a major pollution problem. Sedimentation occurs from the erosion or depositing of soil and other materials into the waters, principally from construction sites and road maintenance. The continued development of this State will result in an intensification of pollution through sedimentation unless timely and appropriate action is taken. Control of erosion and sedimentation is deemed vital to the public interest and necessary to the public health and welfare, and expenditures of funds for erosion and sedimentation control programs shall be deemed for a public purpose”.

-Preamble to the Sedimentation Pollution Control Act of 1973

The Division of Land Resources, Land Quality Section, in the Department of Environment and Natural Resources administers the SPCA. The Sedimentation Control Commission has also delegated administration of the SPCA to 52 county or municipal governments. These local program delegations do not regulate land-disturbing activities conducted by local, State or United States government or persons with the power of eminent domain (e.g. public utilities), which remain under jurisdiction of the Land Quality Section.

Implementation

The decline in the number of new projects under state jurisdiction has leveled off. New projects steadily declined from 3,546 in the 2006-07 fiscal year to 2,106 in the 2009-10 fiscal year, or a 41 percent reduction over the 4 year period, but the number of new projects remained about the same last year at 2,118. The actual area of land-disturbance covered by erosion and sedimentation control plans approved in 2010-2011 decreased to 19,200 acres, the lowest level in 14 years. These totals do not include erosion and sedimentation control plans approved by local government sedimentation programs or land disturbed by the Department of Transportation.



The number of full time equivalent positions (FTE) in the Land Quality Section for the erosion and sedimentation control program has declined yearly from 61 in FY 2008-09, 52 in FY 2009-10, to 48 in FY 2010-11.

Regional activities for the 2010-11 fiscal year include:

- 2,064 new erosion and sedimentation control plan reviews,
- 1,057 revised erosion and sedimentation control plan reviews,
- 20,152 sedimentation site inspections,
- 363 notices of violation and
- 29 enforcement case referrals.

The Land Quality Section collaborates closely with the Division of Water Quality's Stormwater Management Program in permitting, inspection and enforcement activities. The Land Quality Section encloses a copy of the federal Clean Water Act stormwater general permit for construction activities with each erosion and sedimentation control plan approval, and provides the Division of Water Quality with a copy of the financial responsibility/ownership form that accompanies each plan submittal. When sedimentation inspection reports document potential violations of the stormwater general permit for construction activities, a copy is furnished to the Division of Water Quality. Any enforcement activities are coordinated between the agencies.

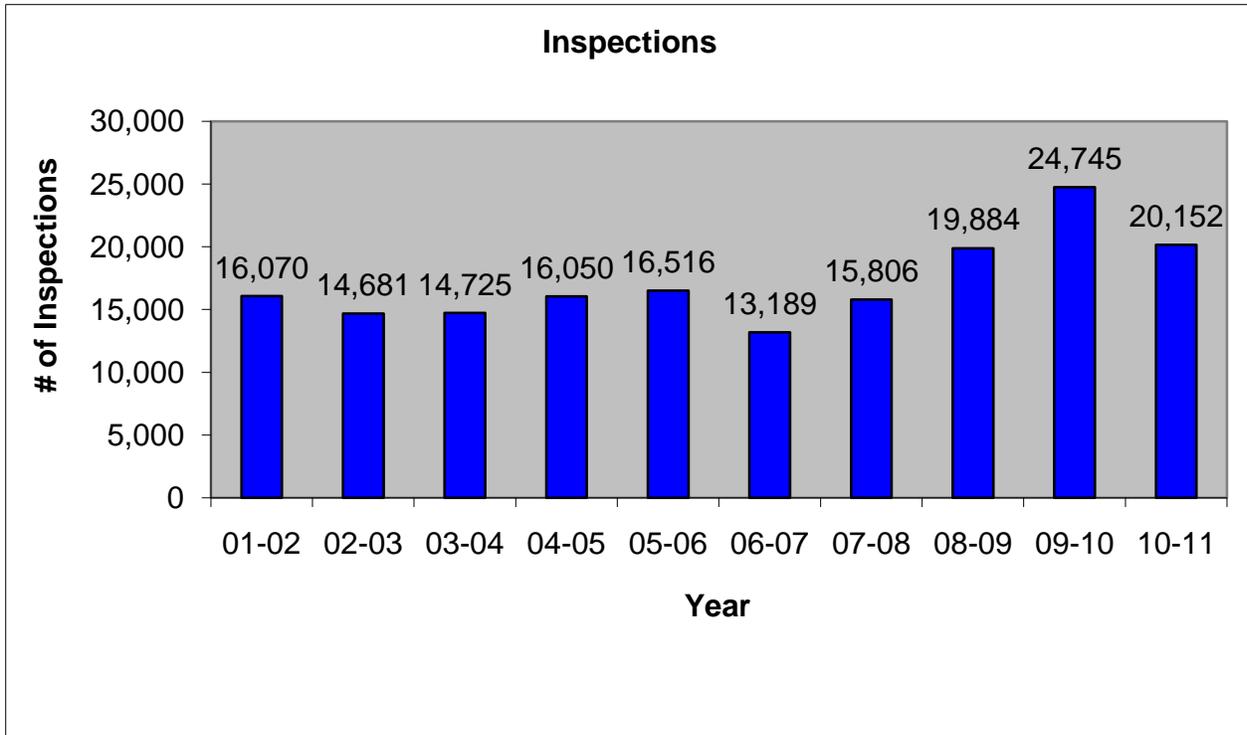
Plan Approval

The SPCA requires review of a proposed erosion and sedimentation control plan within 30 days for a new plan submittal and within 15 days for a revised plan. As mentioned above, disturbed acreage in North Carolina remained at a lower level. The number of new erosion and sedimentation control plans was 2,118, about the same as last year.

The Express Permitting Program for erosion and sedimentation control plans provides for plan review within three to five days. During the 2010-11 fiscal year, 475 Express Permit reviews were conducted. This represented a modest increase over the 437 express reviews done in the previous year. The Fayetteville region had the most express reviews, reflecting the numerous Department of Defense projects submitted for express review.

Inspections

Inspectors from the seven regional offices inspect land-disturbing activities and complete sedimentation inspection reports. The reports document field observations and compliance or non-compliance with the SPCA. The infrequency of inspections remains a chronic problem that limits the effectiveness of the sedimentation program. Regional staff conducted 20,152 inspections last year, a decline from the previous year, but comparable to the level in 2008-2009. The reduction in the number of inspections can be directly attributed to the reduction in force of seven inspector positions in September 2010.



Enforcement

The Division of Land Resources documents compliance or non-compliance with the SPCA through sedimentation inspection reports. Most violations are resolved by providing an inspection report to the responsible party and requesting correction of the deficiencies. Of the 20,152 inspections conducted during the 2010-2011 Fiscal Year, 363 (1.8%) resulted in a Notice of Violation (NOV). The NOV's led to 29 requests from the regional offices for additional enforcement action (8.0% of NOV's issued or less than 1% of the inspections). Twenty-two civil penalties were assessed, including ten initial penalties of \$5,000 or less. This represents a decline from the previous year's total of 47 civil penalty assessments.

The Attorney General's Office continues to work in state courts and federal bankruptcy court to resolve soil erosion, stream sedimentation and landslides at abandoned residential developments resulting from bankruptcy and foreclosure.

Local Programs

The Sedimentation Control Commission encourages local governments to administer a delegated erosion and sedimentation control program by providing a model ordinance and technical assistance. Once a program is delegated to a local government, the Land Quality Section provides periodic oversight to ensure that the local programs are meeting the standards for the State program. State personnel informally assist and advise the local staff on problematic sites. A review of each local program is scheduled at least every two years. Land Quality and the Attorney General's Office review the city or county ordinance to ensure that it is as stringent as state law and rules. The Land

Quality regional engineer and sediment specialist and/or their assistants meet with the local program staff during the review. A detailed report is provided back to the local government, noting strengths, deficiencies and corrective actions. A summary report is presented to the Sedimentation Control Commission at its quarterly meetings. The Commission then takes action to continue the delegation, place the program on probation, or give a 30 day notice that the Commission will assume administration and enforcement of the program.

The position of assistant sedimentation specialist has been vacant since March, 2011. This position is primarily responsible for the review of local programs. Consequently, the total number of program reviews conducted during the past fiscal year decreased from 24 to 20. Two local program reviews found deficiencies that warranted follow-up reviews to ensure corrective actions had been taken. There was no change in the number of local programs.

Training

The Division of Land Resources held four two-day workshops this past year for design professionals, with a total attendance of 268. Fifty local governments participated in the annual workshop for local government erosion and sedimentation control personnel with a total attendance of 107.

Legislative Changes to the SPCA

Section 3 of S.L. 2011-395 amended the SPCA. The change states that if the applicant for a sedimentation control plan is not the owner of the land and the land disturbing activity involves the construction of utility lines for the provision of water, sewer, gas, telecommunications, or electrical services, the plan may be submitted without written consent so long as the landowner was previously notified of the project.

This amendment should help large public and municipal utilities start the permitting process as right-of-way acquisition continues. There may be a need to limit the applicability of subsection (a1) to entities with the power of eminent domain, if private parties attempt to lay utilities across property without obtaining ownership or easements.

Regulatory Issues

Local Program Authority

The SPCA should be amended to clarify the authorization of local governments to continue to use their existing appeals procedures for civil penalty assessments. Current legal opinion is that the SPCA requires that all appeals must be handled by the Office of Administrative Hearings. However, G.S. 150B-2 (1a) states that "A local unit of government is not an agency," as defined in the Administrative Procedures Act. In 2008, House Bill 2506 sought to clarify the appeals procedures for local sedimentation programs, but did not advance. Reintroduction and adoption of a bill to clarify the appeals procedure for local governments is recommended.

Performance Bonds

There continues to be a problem with bankrupt and abandoned projects being left unstabilized and eroding on to adjacent properties and into waters of the State. When this occurs there is no money to provide adequate ground cover to stop the erosion, which in some cases cause severe damage to adjacent property or waters of the State. Nine local governments have erosion and sedimentation control ordinances that require the posting of a bond for land-disturbing activity. Local governments with bond requirements for development have been able to stabilize abandoned developments. Forfeited reclamation bonds and securities have allowed them to establish adequate groundcover on abandoned developments. It is recommended that the Sedimentation Control Commission should be given statutory authority to adopt rules for bonding of land-disturbing activity. Initially, a bond should be required on projects involving 20 acres or more of land-disturbing activity. The potential environmental damage from an abandoned site increases with the size of the area left bare and eroding. The bonding would target larger projects that have the most potential for sediment loss and not place a financial burden on small projects. The amount of the bond should be based on the disturbed acreage and the cost of stabilizing the site with permanent ground cover. The authority for the Commission to require a bond on smaller projects in sensitive watersheds, where sediment could substantially damage the water resource should also be considered. Currently mining activities are bonded in North Carolina. Reclamation costs for abandoned development are comparable to those for a soil mine, which requires a bond of \$2,000 per acre for grading and establishment of permanent ground cover.