

Regulation and Enforcement

UNDERSTANDING PERMITS

What are the Laws?

In North Carolina, construction projects are regulated by two statutes—the federal **Clean Water Act** (CWA) and the North Carolina **Sedimentation and Pollution Control Act** of 1973 (NC SPCA). These two statutes have distinct but related purposes.

Who Enforces the Law?

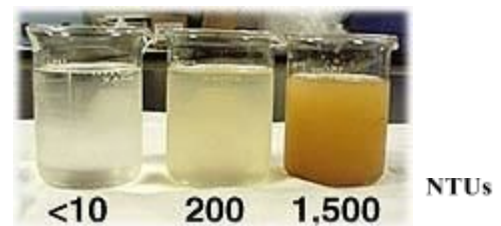
To add to the complexity, two distinct divisions of the North Carolina Department of Environment Quality (DEW) oversee and enforce the requirements of both statutes. The CWA regulates discharges of pollutants into surface waters and is enforced by **NC DEQ Division of Water Resources** (DWR). The SPCA regulates land-disturbing activities that have the potential to deposit sediment in adjacent surface waters and is enforced by **NC DENR Division of Mining and Land Resources** (DMLR). The **Army Corps of Engineers** also plays a role as they permit and regulate any work done within the stream channel. This work includes rerouting the stream, piping streams, bridge piliions, stream restoration, etc. To even further complicate the issue several municipalities have created their own local programs that enforces stormwater and erosion control under NC DEQ regulations. In the French Broad Watershed these programs are: Buncombe County, City of Asheville, Henderson County, and Haywood County. Any erosion control activity that is normally regulated by DMLR would be regulated by these local program. Even if an area has a local program, DWR still has jurisdiction over the areas waterways.

Understanding who enforces what can be confusing. Here is an example to help clarify the relationships: If there is a land disturbing activity such as construction then DMLR or the local program enforces that activity. If there is a pollution violation such as sewage then that violation falls under DWR. Where these agencies overlap for erosion control is when sediment reaches a stream.

How does the Division of Water Resources Interact with Sediment?

DMLR or the appropriate local program can issue a violation for improper erosion control measures, but only DWR can issue a turbidity violation for muddy water. Turbidity measures the amount of suspended solids, or particles of sediment, that are in the water. The more sediment that is present in the water the higher the Nephelometric Turbidity Units (NTU) reading. Turbidity standards for trout streams, a habitat that is greatly affected by too much sediment, is 10 NTUs.

Due to development and increased areas of disturbed land, most streams become cloudy or turbid after a decent rain. If you notice a stream or creek with high levels of turbidity after a rain event you can call DWR to come take a turbidity sample. Unfortunately they might not be able to get to a disturbed site before the sediment drops out of the water, settles on stream bed, or water resumes



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clarity. However, if the problem is severe, a call to DWR should still be made. If the water clears before DWR reaches the stream, they can still issue a violation if there is evidence of sediment deposited in the stream. If you are unclear of whether to call DWR or DMLR, then contact the Regional DENR office (828-296-4500) and explain your problem. If you notice a violation in the City of Asheville, Buncombe County, Henderson County, and Haywood County you can directly contact their local programs (see “Who is Responsible for Enforcement” flow chart at the beginning of this section).

A Brief Overview of the Sedimentation and Pollution Control Act

Regulation of sedimentation control law in North Carolina is through the Sedimentation Pollution Control Act of 1973 (“SPCA”)

The purpose of the SPCA is to prevent sediment from reaching state waters by requiring the installation and maintenance of adequate sediment and erosion control measures during “land-disturbing activities.” However, the SPCA is exempt from regulating the following:



However this does not mean these activities can discharge sediment or pollution from their sites into a stream-. It means if this happens DWR has the regulatory power, not the local program or DMLR.

What are the basic SPCA requirements?

1. To keep sediment from entering waterways.

2. To keep sediment from impacting adjacent landowners.

What are the Requirement of the SPCA?

1. Requires erosion control measures to prevent off-site sediment
2. Some type of buffer to prevent sediment from entering a stream. That buffer can be a silt fence at the edge of the stream.
3. Stabilize slopes within 21 calendar days of completion of any phase of grading

Buffers: All land-disturbing activities conducted in proximity to a lake or natural watercourse must be separated from the water by a stream buffer zone “of sufficient width to confine visible siltation within twenty-five percent of the buffer zone nearest the land-disturbing activity.” N.C. Gen. Stat. § 113A-57(1). The length and width of the buffer will vary depending on the combination of best management practises utilized. This is often interpreted as no buffer is required as long as a BMP, such as a silt fence is installed.

Classified trout waters shall have a buffer zone of this width or of twenty-five feet, whichever is greater.. Additionally, the Commission may only approve plans which include development along trout waters “when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal.”

Some watershed such as the Neuse and Tar Pamlico have standard 50 ft. buffers, but no such rule exists on a watershed-wide scale in the French Broad Watershed.

Local Buffer Rules:

Trout Waters - 25ft undisturbed. [This link](#) will show stream classifications for trout and other waters

(<https://deq.nc.gov/about/divisions/water-resources/planning/classification-standards/classifications>)

Water Supply Watershed - 100ft undisturbed buffer for high density development and 30ft undisturbed for low density development.

Asheville - 30 ft undisturbed.

Buncombe - 25ft undisturbed during construction and 30ft setback post construction.

Henderson County (not including Mills River) - 30 ft setback. This means that you can't have any impervious surface in this area, but it does not preclude disturbance of the buffer.

*Most of these buffer rules have exceptions. The most common exception is the ability to disturb the buffer up to 10% of the length, so if you have a 100ft buffer you could disturb 10ft.

Vegetated Slopes: “[T]he 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.” N.C. Gen. Stat. § 113A-57(2). Vegetation must be established within twenty-one calendar days of completion of any phase of grading. All exposed slopes must

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be provided with temporary or permanent ground cover sufficient to restrain erosion. The loop hole is that contractors can just move dirt and the 21 days starts over. Asheville has a 14 day time period for establishing groundcover.

Sediment must be contained: The person conducting the activity must install erosion and sedimentation control devices sufficient to retain on-site the sediment generated during construction, and must plant or otherwise provide a permanent ground cover within a specified time following completion of construction. N.C. Gen. Stat. § 113A-57(3).

Erosion and Sediment Plan Filed: It is unlawful to disturb more than one acre unless, thirty or more days prior to the disturbance, the person conducting the activity files an erosion and sedimentation control plan with the agency having jurisdiction, which must also approve the plan before construction.

Design Storm: The regulations also stipulate that control measures should be designed and constructed to provide protection from the runoff produced by a “ten year storm.” 15A N.C.A.C. 04B .0108. A “ten year storm” is defined as a rainfall of an intensity expected to be equaled or exceeded, on the average, once in ten years, and of a duration which will produce the maximum peak rate of runoff. 15A N.C.A.C. 04A .0105(20).

Additional Measures for HQWQ: Additional restrictions apply to control measures within High Quality Water (HQW) zones. 15A N.C.A.C. 04B .0124. These measures must provide protection from the runoff of a “twenty-five year storm.” 15A N.C.A.C. 04B .0124(b). Furthermore, they add more stringent restrictions to sediment basins in HQW zones (15A N.C.A.C. 04B .0125(c)), channel slopes (15A N.C.A.C. 04B .0125(d)), and ground cover (15A N.C.A.C. 04B .0125(e)).

How is the SPCA enforced?

The SPCA can be enforced in several different ways:

Civil Enforcement:

Enforcement of the SPCA begins with on-site inspections by state or local inspectors. If an approving authority determines that the developer has failed to comply with the SPCA, it shall immediately serve that person a notice of violation (“NOV”). The NOV must specify the date by which the person must come into compliance and describe the necessary steps to achieve this goal. Failure to comply within the time specified subjects the person to civil and criminal penalties for a continuing violation. N.C. Gen. Stat. § 113A-61.1(c).

Any person who violates the SPCA can be subject to a civil penalty. The maximum civil penalty for a violation is \$5,000. The amount of the penalty should be based on the degree and extent of the harm, the cost of rectifying the damage, the amount of money the violator saved by noncompliance, whether the violation was willful, and the prior record of the violator in complying or

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failing to comply with the SPCA. Civil penalties are assessed from the date of the violation, and each day of the violation constitutes a separate violation. N.C. Gen. Stat. § 113A-64 (a)(1).

DEQ may issue stop-work orders when the violation is believed to be knowing and willful, and either (1) off-site sediment has “severely degraded” a use in a lake or natural watercourse or that such degradation is imminent, (2) off-site sediment has caused “severe damage” to adjacent land or that such damage is imminent, or (3) the land-disturbing activity is being conducted without an approved plan. N.C. Gen. Stat. § 113A-65.1(a).

Criminal Enforcement:

The SPCA explicitly authorizes criminal penalties for any person who “knowingly or willingly” violates the SPCA and its rules. Criminal prosecution is rare and is generally only for severe violations.

Citizen Suits:

The SPCA also contains a citizen suit provision under which “any person” injured by a violation of the SPCA or a pursuant local or state law may bring a civil action against the alleged violator. Citizens may seek injunctive relief, an enforcement order, damages, and in some instances attorney and expert witness fees.

Other Potential Permits: Section 404 of the Clean Water Act

In addition to the North Carolina General Permit and SPCA, land-disturbing activities may have to comply with Section 404 of the Clean Water Act. Section 404 prohibits the discharge of dredged or fill material into waters of the United States without a permit from the U.S. Army Corps of Engineers or in violation of a permit from the Corps of Engineers. 33 U.S.C. § 1344; 33 C.F.R. § 323(e)(1); 40 C.F.R. § 232.2. The continued presence of illegally discharged fill materials in the waters of the U.S. constitutes continuing violations of the Clean Water Act.

A discharger of fill material into waters of the U.S. can either obtain an individual Section 404 permit, or comply with the terms of an applicable Nationwide Permit (NWP), which is a type of “general” permit. An activity is authorized by a NWP only when all terms and conditions of the NWP are satisfied. 33 C.F.R. § 330.4(a). The NWP were renewed in 2007 and will be effective until 2012. A brief overview of the NWP applicable to residential development follows.

Nationwide Permit 23 (NWP 23): Residential Developments

Applicability: The permit applies to Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision.

This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

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Requirements: The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Subdivisions: For residential subdivisions, the aggregate total loss of waters of United States authorized by this NWP cannot exceed 1/2 acre. This includes any loss of waters of the United States associated with development of individual subdivision lots.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity.

Water Quality Classifications

More sensitive waters, such as trout streams, High Quality Waters, and Water Supply Waters may have a different classification and more stringent water quality standards. A list of these classification and the any pertinent regulations are listed below.

PRIMARY FRESHWATER AND SALTWATER CLASSIFICATIONS

<u>Class</u>	<u>Best Uses</u>
C	Aquatic life propagation/protection and secondary recreation.
B	Primary recreation and Class C uses.
WS	<i>Water Supply watershed.</i> There are five WS classes ranging from WS-I through WS-V. WS classifications are assigned to watersheds based on land use characteristics of the area. Each water supply classification has a set of management strategies to protect the surface water supply. WS-I provides the highest level of protection and WS-IV provides the least protection. A Critical Area (CA) designation is also listed for watershed areas within a half-mile and draining to the water supply intake or reservoir where an intake is located.

SUPPLEMENTAL CLASSIFICATIONS

<u>Class</u>	<u>Best Uses</u>
Sw	<i>Swamp Waters:</i> Recognizes waters that will naturally be more acidic (have lower pH values) and have lower levels of dissolved oxygen.
HQW	<i>High Quality Waters:</i> Waters possessing special qualities including excellent water quality, Native or Special Native Trout Waters, Critical Habitat areas, or WS-I and WS-II water supplies.
ORW	<i>Outstanding Resource Waters:</i> Unique and special surface waters that are unimpacted by pollution and have some outstanding resource values.

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- NSW** *Nutrient Sensitive Waters:* Areas with water quality problems associated with excessive plant growth resulting from nutrient enrichment.
- Tr** *Trout Waters:* Provides protection to freshwaters for natural trout propagation and survival of stocked trout.
- 25 feet of buffer
 - 10 NTU limit for turbidity

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