

1 15A NCAC 07J .0409 is amended with changes as published in 33:14 NCR 1495-1500:

2
3 **15A NCAC 07J .0409 CIVIL PENALTIES**

4 (a) Purpose and Scope. ~~These Rules provide~~ This rule provides the procedures and standards governing the
5 assessment, remission, settlement and appeal of civil penalties assessed by the Coastal Resources Commission and
6 the Director pursuant to G.S. 113A-126(d).

7 (b) Definitions. The terms used ~~herein~~ in this Rule shall be as defined in G.S. 113A-103 and as follows:

8 (1) "Act" means the Coastal Area Management Act of 1974, G.S. 113A-100 through 134, plus
9 amendments.

10 (2) "Delegate" means the Director or other employees of the Division of Coastal Management, or local
11 permit officers to whom the Commission has delegated authority to act in its stead pursuant to this
12 Rule.

13 (3) "Director" means the Director, Division of Coastal Management.

14 (4) "Respondent" means the person to whom a notice of violation has been issued or against whom a
15 penalty has been assessed.

16 ~~(5) "Person" is defined in the Coastal Area Management Act, G.S. 113A-103(9).~~

17 ~~(e) Civil penalties may be assessed against any person who commits a violation as provided for in G.S.~~
18 ~~113A-126(d)(1) and (2).~~

19 ~~(d) (c) Investigative costs. Pursuant to G.S. 113A-126(d)(4a) the Commission or Director may also assess a~~
20 ~~respondent for~~ In addition to any civil penalty, the costs incurred by the Division for any investigation, inspection,
21 and monitoring associated with assessment the civil ~~penalty.~~ penalty may be assessed pursuant to G.S. 113A-
22 126(d)(4a). Investigative costs shall be in addition to any civil penalty assessed. For a minor development violation,
23 investigative costs shall not exceed one half of the amount of the civil penalty assessed or one thousand dollars
24 (\$1,000), whichever is less. For a major development violation, investigative costs shall not exceed one half of the
25 amount of the civil penalty assessed or two thousand five hundred dollars (\$2,500), whichever is less. The Division
26 shall determine the amount of investigative costs ~~to assess~~ assessed shall be based upon factors including the amount
27 of staff time required for site visits, investigation, enforcement action, interagency coordination, and for monitoring
28 restoration of the site.

29 ~~(e) (d)~~ Notice of Violation. The Commission hereby authorizes employees of the Division of Coastal Management to
30 issue in the name of the Commission notices of violation to any person engaged in an activity which constitutes a
31 violation for which a civil penalty may be assessed. ~~Such notices shall set forth the nature of the alleged violation,~~
32 ~~shall order that the illegal activity be ceased and affected resources be restored in accordance with 15A NCAC 07J~~
33 ~~.0410. [Rule .0410 of this Section.] The notice shall specify the time by which the restoration shall be completed as~~
34 ~~ordered by the Division. The notice shall be delivered personally or by registered [or certified] mail, return receipt~~
35 ~~requested.~~

36 ~~(f)~~ (c) Procedures for Notification of Civil Penalty Assessment.

- (1) The Commission hereby delegates to the Director the authority to assess civil penalties according to the procedures set forth in Paragraph (g) of this Rule.
- (2) ~~The Director shall~~ If restoration of affected resources is not required, the Director ~~[may]~~ shall issue a ~~notice of civil penalty~~ assessment within ~~30~~ 90 days from the date of the Notice of Violation. If restoration of affected resources is required, the Director may issue a ~~[Notice of Assessment]~~ civil penalty assessment within 60 days after the Division determines that restoration of the adversely impacted resources is complete. ~~[complete or due date of restoration completion.]~~ complete or once the date restoration was required has passed without having been completed.
- ~~(3) The notice of assessment shall specify the reason for assessment, how the assessment was calculated, when and where payment shall be made, and shall inform the respondent of the right to appeal the assessment by filing a petition for a contested case hearing with the Office of Administrative Hearings pursuant to G.S. 150B-23. The notice shall be delivered personally or by registered [or certified] mail, return receipt requested.~~
- ~~(g)~~ (f) Amount of Assessment. Procedures for Determining the Amount of Civil Penalty Assessment.
- (1) Civil penalties shall not exceed the maximum amounts established by G.S. 113A-126(d).
- (2) If any respondent willfully continues to violate by action or inaction any rule or order of the Commission after the date specified in a notice of violation, each day the violation continues or is repeated shall be considered a separate violation as provided in G.S. 113A-126(d)(2).
- (3) In determining the amount of the penalty, the Commission or Director shall consider the factors contained in G.S. 113A-126(d)(4).
- (4) (1) Pursuant to Subparagraph ~~(g)(3)~~ of this Rule, ~~[(3) of this Paragraph,]~~ 113A-126(d)(1), penalties for major development violations, including violations of permit conditions, shall be assessed in accordance with the following criteria: as follows:
- (A) Major development ~~which that~~ could have been permitted under the Commission's rules at the time the notice of violation is issued shall be assessed a penalty equal to two times the relevant CAMA permit application fee, ~~fee~~ fee as set forth in .0204 of this Subchapter, plus investigative costs.
- (B) Major development ~~which that~~ could not have been permitted under the Commission's rules at the time the notice of violation is issued shall be assessed an amount equal to the relevant CAMA permit application fee, plus a penalty pursuant to Schedule A of this Rule, plus investigative costs. If a violation affects more than one area of environmental concern (AEC) or coastal resource as listed within Schedule A of this Rule, the penalties for each affected AEC shall be combined. Any structure or part of a structure that is constructed in violation of existing Commission rules shall be removed or modified as necessary to bring the structure into compliance with the Commission's rules.

SCHEDULE A

Major Development Violations

Penalties for Major Development Permit Violations By Size of Violation (sq. ft.)

| AREA OF ENVIRONMENTAL CONCERN AFFECTED | ≤ 100 | 101-500 | 501-1,000 | 1001-3000 | 3001-5000 | 5001-8000 | 8001-11,000 | 11,001-15,000 | 15,001-20,000 | 20,001-25,000 | >25,000 |
|---|-------|---------|-----------|-----------|-----------|-----------|-------------|---------------|---------------|---------------|----------|
| ESTUARINE WATERS OR PUBLIC TRUST AREAS (1) | \$250 | \$375 | \$500 | \$1,500 | \$2,000 | \$3,500 | \$5,000 | \$7,000 | \$9,000 | \$10,000 | \$10,000 |
| Primary Nursery Areas | \$100 | \$225 | \$350 | \$850 | \$1,350 | \$2,850 | \$4,350 | \$3,000 | \$1,000 | n/a | n/a |
| Mudflats and Shell Bottom | \$100 | \$225 | \$350 | \$850 | \$1,350 | \$2,850 | \$4,350 | \$3,000 | \$1,000 | n/a | n/a |
| Submerged Aquatic Vegetation | \$100 | \$225 | \$350 | \$850 | \$1,350 | \$2,850 | \$4,350 | \$3,000 | \$1,000 | n/a | n/a |
| Coastal Wetlands | \$250 | \$375 | \$500 | \$1,500 | \$2,000 | \$3,500 | \$5,000 | \$7,000 | \$9,000 | \$10,000 | \$10,000 |
| Coastal Shorelines | \$250 | \$350 | \$450 | \$850 | \$1,250 | \$2,450 | \$3,650 | \$5,250 | \$7,250 | \$9,250 | \$10,000 |
| Wetlands (2) | \$100 | \$200 | \$300 | \$700 | \$1,100 | \$2,300 | \$3,500 | \$4,750 | \$2,750 | \$750 | n/a |
| ORW- Adjacent Areas | \$100 | \$200 | \$300 | \$700 | \$1,100 | \$2,300 | \$3,500 | \$4,750 | \$2,750 | \$750 | n/a |
| OCEAN HAZARD SYSTEM (3)(4) | \$250 | \$350 | \$450 | \$850 | \$1,250 | \$2,450 | \$3,650 | \$5,250 | \$7,250 | \$9,250 | \$10,000 |
| Primary or Frontal Dune | \$100 | \$200 | \$300 | \$700 | \$1,100 | \$2,300 | \$3,500 | \$4,750 | \$2,750 | \$750 | n/a |
| PUBLIC WATER SUPPLIES (5) | \$250 | \$350 | \$450 | \$850 | \$1,250 | \$2,450 | \$3,650 | \$5,250 | \$7,250 | \$9,250 | \$10,000 |
| NATURAL AND CULTURAL RESOURCE AREAS (6) | \$250 | \$350 | \$450 | \$850 | \$1,250 | \$2,450 | \$3,650 | \$5,250 | \$7,250 | \$9,250 | \$10,000 |

(1) Includes the Atlantic Ocean from the normal high water mark to three miles offshore.

(2) Wetlands that are jurisdictional by the Federal Clean Water Act.

(3) If the AEC physically overlaps another AEC, use the greater penalty schedule.

(4) Includes the Ocean Erodible, ~~High Hazard Flood Area~~, Inlet Hazard Area, and Unvegetated Beach Area.

(5) Includes Small Surface Water Supply, Watershed and Public Water Supply Well Fields.

(6) Includes Coastal Complex Natural Areas, Coastal Areas Sustaining Remnant Species, Unique Geological Formations, Significant Coastal Archaeological Resources, and Significant Coastal Historical Architectural Resources.

- (C) Assessments for violations by public agencies (i.e. towns, counties and state agencies) shall be determined in accordance with Parts ~~(g)(4)(A) and (B) of this Rule~~, 4(A) and (B) of this Paragraph.
- (D) Willful and intentional violations. The penalty assessed ~~under Parts (g)(4)(A) and (B) of this Rule~~ in accordance with Parts (4)(A) and (B) of this Paragraph, shall be doubled for willful and intentional violations except that the doubled penalties assessed under this Subparagraph shall not exceed ten thousand dollars (\$10,000) or be less than two thousand dollars (\$2,000) for each separate violation. ~~A violation shall be considered to be willful and intentional when:~~ For the purposes of 113A-126(d)(2), the following actions shall be considered willful and intentional:
- (i) ~~The~~ the person received written instructions from one of the Commission's delegates that a permit would be required for the development and subsequently undertook development without a permit; ~~or~~
 - (ii) ~~The~~ the person received written instructions from one of the Commission's delegates that the proposed development was not permissible under the Commission's rules, or received denial of a permit application for the proposed activity, and subsequently undertook the development without a permit; ~~or~~
 - (iii) ~~The~~ the person committed previous violations of the Commission's rules; or
 - (iv) ~~The~~ the person refused or failed to restore a damaged area as ordered by one of the Commission's delegates. ~~If necessary, the Commission or Division shall seek a court order to require restoration.~~
- (E) Assessments against contractors. Any ~~contractor or subcontractor or person or group contractor, subcontractor, or person~~ functioning as a contractor shall be subject to a notice of violation and assessment of a civil penalty in accordance with Paragraph (f) of this Rule. Such penalty shall be in addition to that assessed against the landowner. When a penalty is being doubled pursuant to ~~Part (g)(4)(D)~~ Part (D) of this Subparagraph and the element of willfulness is present only on the part of the contractor, the landowner shall be assessed the standard penalty and the contractor shall be assessed the doubled penalty.
- (F) Assessments for Continuing violations.
- (i) Pursuant to G.S. 113A-126(d)(2), each day that the violation continues after the date specified in the notice of violation for the unauthorized activity to cease or restoration to be completed shall be considered a separate violation and shall be assessed an additional penalty.
 - (ii) Refusal or failure to restore a damaged area as ~~ordered~~ as directed in the restoration order shall be considered a continuing violation and shall be assessed an additional penalty. When resources continue to be affected by the violation, the amount of the penalty shall be determined according to ~~Part (g)(4)(B) of this~~

~~Rule.~~ Part (B) of this Subparagraph. The continuing penalty period shall be calculated from the date specified in the restoration order which accompanies the notice of violation for the unauthorized activity to cease or restoration to be completed and run until:

- (I) the Division's order is satisfied, or Division determines that the terms of the restoration order are satisfied;
- (II) the respondent enters into good faith negotiations with the Division, or Division; or
- (III) the respondent contests the Division's order in a judicial proceeding by raising a justiciable issue of law or fact therein, proceeding.

The continuing penalty period shall resume if the respondent terminates negotiations without reaching an agreement with the Division, fails to comply with court ordered restoration, or fails to meet a deadline for restoration that was negotiated with the Division.

(5) (2) Pursuant to Subparagraph (g)(3) of this Rule, [(3) of this Paragraph,] civil 113A-126(d)(2), penalties for minor development violations, including violations of permit conditions, shall be assessed in accordance with the following criteria: as follows:

- (A) Minor development which that could have been permitted under the Commission's rules at the time the notice of violation is issued shall be assessed a penalty equal to two times the relevant CAMA permit application fee, plus investigative costs.
- (B) Minor development which that could not have been permitted under the Commission's rules at the time the notice of violation is issued shall be assessed an amount equal to the relevant CAMA permit application fee, fee as set forth in 7J .0204 of this Subchapter, plus a penalty pursuant to Schedule B of this Rule, plus investigative costs. If a violation affects more than one area of environmental concern (AEC) or coastal resource as listed within Schedule B of this Rule, the penalties for each affected AEC shall be combined. Any structure or part of a structure that is constructed in violation of existing Commission rules shall be removed or modified as necessary to bring the structure into compliance with the Commission's rules.

SCHEDULE B

Penalties for Minor Development Permit Violations By Size of Violation

Size of Violation (sq. ft.)

| AREA OF ENVIRONMENTAL CONCERN AFFECTED | ≤ 100 | 101-500 | 501-1,000 | 1001-3000 | 3001-5000 | 5001-8000 | 8001-11,000 | 11,001-15,000 | 15,001-20,000 | 20,001-25,000 | >25,000 |
|--|-------|---------|-----------|-----------|-----------|-----------|-------------|---------------|---------------|---------------|---------|
|--|-------|---------|-----------|-----------|-----------|-----------|-------------|---------------|---------------|---------------|---------|

| | | | | | | | | | | | |
|--|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|---------|
| Coastal Shorelines | \$225 | \$250 | \$275 | \$325 | \$375 | \$450 | \$525 | \$625 | \$750 | \$875 | \$1,000 |
| ORW- Adjacent Areas | \$125 | \$150 | \$175 | \$225 | \$275 | \$350 | \$425 | \$375 | \$250 | \$125 | n/a |
| OCEAN HAZARD SYSTEM (1)(2) | \$225 | \$250 | \$275 | \$325 | \$375 | \$450 | \$525 | \$625 | \$750 | \$875 | \$1,000 |
| Primary or Frontal Dune | \$125 | \$150 | \$175 | \$225 | \$275 | \$350 | \$425 | \$375 | \$250 | \$125 | n/a |
| PUBLIC WATER SUPPLIES (3) | \$225 | \$250 | \$275 | \$325 | \$375 | \$450 | \$525 | \$625 | \$750 | \$875 | \$1,000 |
| NATURAL AND CULTURAL RESOURCE AREAS (4) | \$225 | \$250 | \$275 | \$325 | \$375 | \$450 | \$525 | \$625 | \$750 | \$875 | \$1,000 |

(1) Includes the Ocean Erodible, ~~High Hazard Flood Area~~, Inlet Hazard Area, and Unvegetated Beach Area.

(2) If the AEC physically overlaps another AEC, use the greater penalty schedule.

(3) Includes Small Surface Water Supply, Watershed and Public Water Supply Well Fields.

(4) Includes Coastal Complex Natural Areas, Coastal Areas Sustaining Remnant Species, Unique Geological Formations, Significant Coastal Archaeological Resources, and Significant Coastal Historical Architectural Resources.

(C) Violations by public agencies (e.g. towns, counties and state agencies) shall be handled by the local permit officer or one of the Commission's delegates within their respective jurisdictions except that in no case shall a local permit officer handle a violation committed by the local government they represent. Penalties shall be assessed in accordance with Parts ~~(g)(5)(A) and (B) of this Rule~~. (A) and (B) of this Subparagraph.

(D) Willful and intentional violations. The penalty assessed under Parts ~~(g)(5)(A) and (B) of this Rule~~ (A) and (B) of this Subparagraph shall be doubled for willful and intentional violations except that the doubled penalties assessed under this Subparagraph shall not exceed one thousand dollars (\$1,000.00) for each separate violation. A violation shall be considered to be willful and intentional when: For the purposes of 113A-126(d)(2), the following actions shall be considered willful and intentional:

- (i) ~~The~~ the person received written instructions from the local permit officer or one of the Commission's delegates that a permit would be required for the development and subsequently undertook development without a permit; ~~or~~
- (ii) ~~The~~ the person received written instructions from the local permit officer or one of the Commission's delegates that the proposed development was not permissible under the Commission's rules, or received denial of a permit application for the

- proposed activity, and subsequently undertook the development without a permit;
or
- (iii) ~~The~~ the person committed previous violations of the Commission's rules; or
 - (iv) ~~The~~ the person refused or failed to restore a damaged area as ordered by the local permit officer or one of the Commission's delegates. ~~If necessary, a court order shall be sought to require restoration.~~
- (E) Assessments against contractors. Any ~~contractor or subcontractor or person or group~~ contractor, subcontractor, or person functioning as a contractor shall be subject to a notice of violation and assessment of a civil penalty in accordance with Paragraph (f) of this Rule. Such penalty shall be in addition to that assessed against the landowner. When a penalty is being doubled pursuant to Part ~~(g)(5)(D)~~ (D) of this Subparagraph and the element of willfulness is present only on the part of the contractor, the landowner shall be assessed the standard penalty and the contractor shall be assessed the doubled penalty.
- (F) Assessments of Continuing violations.
- (i) Pursuant to G.S. 113A-126(d)(2), each day that the violation continues after the date specified in the notice of violation for the unauthorized activity to cease and restoration to be completed shall be considered a separate violation and shall be assessed an additional penalty.
 - (ii) Refusal or failure to restore a damaged area as ~~ordered~~ directed in the restoration order shall be considered a continuing violation and shall be assessed an additional penalty. The amount of the penalty shall be determined according to Part ~~(g)(5)(B) of this Rule.~~ (B) of this Subparagraph. The continuing penalty period shall be calculated from the date specified in the restoration order which accompanies the notice of violation for the unauthorized activity to cease and restoration to be completed and run until:
 - (I) the ~~Commission delegate's order is satisfied, or~~ Division determines that the terms of the restoration order are satisfied;
 - (II) the respondent enters into ~~good faith~~ negotiations with the local permit officer or the ~~Division, or~~ Division; or
 - (III) the respondent contests the local permit officer's or the Division's order in a judicial ~~proceeding by raising a justiciable issue of law or fact therein.~~ proceeding.
- The continuing penalty period shall resume if the respondent terminates negotiations without reaching an agreement with the local permit officer or the Division, fails to comply with court ordered restoration, or fails to meet a deadline for restoration that was negotiated with the local permit officer or the Division.

1 ~~(h) Hearings and Final Assessment. Final decisions in contested case hearings concerning assessments shall be made~~
2 ~~by the Commission. The final decision shall be based on evidence in the official record of the contested case hearing,~~
3 ~~the administrative law judge's recommended decision, any exceptions filed by the parties and oral arguments. Oral~~
4 ~~arguments shall be limited to the facts in the official record.~~

5 ~~(i) Referral. If any civil penalty as finally assessed is not paid, the Director on behalf of the Commission shall request~~
6 ~~the Attorney General to commence an action to recover the amount of the assessment.~~

7 ~~(j)~~ (g) Reports to the Commission. Action taken by the Director shall be reported to the Commission at the next
8 regularly scheduled Commission meeting. Such reports shall include information on the following:

- 9 (1) respondent(s) against whom penalties have been assessed;
- 10 (2) respondent(s) who have paid a penalty, requested remission, or requested an administrative hearing;
- 11 (3) respondent(s) who have failed to pay; and
- 12 (4) cases referred to the Attorney General for collection.

13 ~~(k)~~ (h) Settlements. The Commission hereby delegates to the Director the authority to enter into a settlement of an
14 appeal of a civil penalty appeal at any time prior to the issuance of a decision in an administrative contested case
15 hearing. Such settlements shall not require the approval of the Commission and shall not be considered a final
16 Commission decision for purposes of G.S. 113A-123. by the administrative law judge in a contested case under G.S.
17 150B-23, and shall not require the approval of the Commission. Any settlement agreement proposed subsequent to
18 the issuance of a decision by the administrative law judge in a contested case under G.S. 150B-23 shall be submitted
19 to the Commission for approval.

20 ~~(l) Any settlement agreement proposed subsequent to a final Commission decision in the contested case shall be~~
21 ~~submitted to the Commission for approval.~~

22
23 *History Note: Authority G.S. 113A-124; 113A-126(d);*
24 *Eff. January 24, 1980;*
25 *ARRC Objection August 18, 1988;*
26 *Amended Eff. January 1, 1989; November 1, 1986; November 1, 1984;*
27 *ARRC Objection Lodged Eff. January 18, 1991;*
28 *Amended Eff. September 1, 2019; February 1, 2008; July 1, 1991; June 1, 1991.*



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

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1711 New Hope Church Rd
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June 20, 2019

Jennifer Everett
Rulemaking Coordinator, EMC
Sent via email only to: Jennifer.Everett@ncdenr.gov

Re: Extension of the Period of Review for 15A NCAC 07J .0409

Dear Ms. Everett:

At its meeting this morning, the Rules Review Commission extended the period of review for the above-captioned rules in accordance with G.S. 150B-21.10. They did so in response to a request from the agency to extend the period in order to allow the agency to address technical changes and submit the revised rules at a later meeting.

Pursuant to G.S. 150B-21.13, when the Commission extends the period of review, it is required to approve or object to rules or call a public hearing on the same within 70 days.

If you have any questions regarding the Commission's actions, please let me know.

Sincerely,

Amber C. May
Commission Counsel

cc: Roy Brownlow
Mike Lopazanski
Angela Willis
Christine Goebel

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Burgos, Alexander N

Subject: FW: 06.19 - CRC Technical Change Request 07j .0409

From: Everett, Jennifer

Sent: Thursday, June 13, 2019 9:13 AM

To: May, Amber Cronk <amber.may@oah.nc.gov>

Cc: Brownlow, Roy <roy.brownlow@ncdenr.gov>; Lopazanski, Mike <mike.lopazanski@ncdenr.gov>; Willis, Angela <angela.willis@ncdenr.gov>; Goebel, Christine A <Christine.Goebel@NCDENR.GOV>

Subject: RE: 06.19 - CRC Technical Change Request 07j .0409

Dear Ms. May,

We are kindly asking to extend the period of review for 15A NCAC 07J .0409 in order for staff to continue addressing the Requests for Technical Changes.

Thank you, please let us know if there is anything else you may need.

Jennifer

Jennifer Everett
DEQ Rulemaking Coordinator
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REQUEST FOR TECHNICAL CHANGE

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07J .0409

DEADLINE FOR RECEIPT: Wednesday, June 12, 2019

PLEASE NOTE: *This request may extend to several pages. Please be sure you have reached the end of the document.*

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends that the following technical changes be made:

Is (a) necessary?

If (a) is necessary, what is meant by "these Rules"? Do you mean "this Rule"? If so, please also change "provide" to "provides"

*In (a), what is your authority to allow the Director to assess penalties? 113A-126(d) says that penalties "may be assessed by the **Commission**." I see that 113A-124(c)(4) allows the Commission to delegate authority to conduct hearings, but I do not see similar language regarding penalties.*

In (b), please change "herein" to "this Rule"

In (b)(2), please note that I have some concerns regarding the authority to delegate penalty responsibilities to the Director.

If you do have authority to delegate pursuant to statute, and you keep (b)(2), delete "in its stead pursuant to this Rule."

Since you have already referred back to the definitions in 113A-103 in (b), line 7, (b)(5) is unnecessary as it repeats information already in 113A-103. Please delete.

Given 113A-126(d)(1) and (2), is (c) necessary? It does not appear to be doing anything other than pointing to statute. Please consider deleting.

If you need (c), by "may", do you mean "shall"? If you mean "may", how will it be determined whether a penalty is assessed? What factors will be used in making this determination?

Given 113A-126(d)(4a), is (d) necessary? I understand that some of this Paragraph may be necessary to provide the factors that will be used in making this determination (lines 24-27), but lines 21-24 ("for a minor development violation... whichever is less") recite statute without providing any additional information or directives. Please delete this language. Also, please note that since 113A-104 establishes CRC within DEQ, it appears

Amber May
Commission Counsel

as though the direction of staff could be internal management which is not subject to rulemaking.

To the extent that (d) is necessary, what is your authority to delegate this assessment to the Director/Division? 113A-123(d)(4a) says that the “**Commission** may also assess a person...” Please review and revise. A suggestion would be something like the following “In addition to a civil penalty, the Commission may assess costs of any investigation, inspection, or monitoring associated with assessment of the civil penalty. The amount of costs assessed shall be based upon factors including the amount of time spent on site visits, investigation, enforcement, interagency coordination, and for the monitoring of the restoration of the site.”

In (e), please note that 113A-126(d)(3) says that “the Commission shall notify a person...”

Alternatively, please delete the first sentence of (e) as it appears to relate to the internal management of notices.

In (e), regarding the requirements of the notice, I note that 113A-126(d)(3) appears to provide the requirements of the notice, such that lines 30-33 are unnecessary.

Also in (e), lines 33-34, (“The notice shall be delivered by registered or certified mail, return receipt requested”) appears to be unnecessary as 113A-122(d) says “all notices... shall be given by registered or certified mail...” I note that 113A-122(d) allows any notice of the Commission to also be provided “in accordance with the provisions of law covering civil actions in the superior courts of this State.”

In (e), do you mean something like “The Commission shall provide notice of violation to any person against whom a civil penalty has been assessed. Upon notification, the illegal activity shall be ceased and affected resources shall be restored in accordance with Rule .0410 of this Section.”

In (e) how is the Division to determine “the time by which the restoration shall be completed”? Rule .0410 does not set forth this information. Please consider deleting “as ordered by the Division” as again, this looks like internal management and the authority rests with the Commission.

Please make (f) and (g) complete sentences to provide some introductions and information to the association Subparagraphs.

What is your authority to delegate assessments to the Director in (f)(1)? 113A-126(d) gives this authority to the Commission. Alternatively, is (f)(1) necessary?

In (f)(2), is there a cross-reference for the notice of assessment?

In (f)(2), lines 1 and 3, by “may issue”, do you mean “shall issue”? I think the intent is “shall.” Please review. If you do in fact mean “may”, what factors will be used in making this determination?

Given 113A-126(d)(3) and 113A-122(d), is (f)(3) necessary? It essentially appears to recite statute.

Amber May
Commission Counsel

Given 113A-126(d)(1), is (g)(1) necessary?

Given 113A-126(d)(2), is (g)(2) necessary?

Given 113A-126(d)(4), is (g)(3) necessary?

Given the above, please delete (g)(1) through (3).

In (g)(4), please change "Pursuant to Subparagraph (3) of this Paragraph," to "Pursuant to 113A-126(d)(1), penalties for major development violations, including violations of permit conditions, shall be assessed as follows:"

In (g)(4), as noted in the previous suggestion, please change "in accordance with the following criteria" to "as follows" As written, it appears as though (g)(4)(A) through (F) are going to set forth factors, but the factors are set forth in statute, so I don't think that the intent here.

In (g)(4)(A) and (B), change "which" to "that" in "which could"

In (g)(4)(A), what is the permit application fee? Is there a cross-reference available? Here, do you mean something like "the CAMA permit application fee as set forth in .0204 of this Subchapter"?

Just to be clear, if the penalty calculated in accordance with the formula set forth in (g)(4)(B) exceeds the statutory maximum, you all only assess the statutory maximum?

In (g)(4), please provide some sort of introductory language to the table. Perhaps add it as a separate Paragraph or Subparagraph and say "Schedule A, penalties for major development violations shall be determined by the size of the violation in square feet as follows" As written, the table appears to come out of nowhere and it's unclear how it fits in the Rule. Please note that this may require you to renumber your other Subparagraphs.

In (g)(4)(C), please verify the cross-reference to Parts (4)(A) and (B) in light of any changes you make as a result of these technical change requests.

Given 113A-126(d)(2), the majority of (g)(4)(D) appears to be unnecessary as it simply recites statute. Is the intent here to say what will constitute willful and intentional violations? If so, please consider revising this to say something like " For purposes of 113A-126(d)(2), the following actions shall be considered willful and intentional:"

In (g)(4)(D), please verify the cross-reference to Parts (4)(A) and (B) in light of any changes you make as a result of these technical change requests. Also, to the extent that this is necessary, please provide the statutory citation of 113A-126(d)(2), as opposed to the cross-reference within the Rule.

Please delete the "or" at the end of (g)(4)(D)(i) and (ii). Please also begin (g)(4)(D)(i) through (iv) with lower case letters.

What is the intent of (g)(4)(D)(iii)? Specifically, what is meant by "previous violations"? Do they have to be the same violations or is the intent here that it be any violation (no matter how minor or unrelated)?

Amber May
Commission Counsel

Given 113A-126(a), the second sentence of (g)(4)(D)(iv) appears to be unnecessary. Please delete "If necessary, the Commission or Division shall seek a court order to require restoration." Further 113A-126(a) and (b) appear to give this authority to the Secretary or local official, not the Commission.

In (g)(4)(E), what is your authority to issue penalties against both the contractor and landowner? Are you relying upon 113A-126 and the Commission's authority to issue penalties against "persons"? Would you end up issuing penalties against two different "persons" for the same violation?

Assuming that you do have authority, is all of (g)(4)(E) necessary? In (e), you allow violations to be issued to "any person engaged in a violation which constitutes a violation for which a civil penalty may be assessed." Wouldn't that include contractors? I understand the need for lines 21-24, but I'm not sure that lines 18-21 are necessary.

In (g)(4)(E), delete "or" in between "contractor" and "subcontractor" and add commas before and after "subcontractor", so that it reads "Any contractor, subcontractor, or person or functioning as a contractor..."

In (g)(4)(E), what does it mean to be "functioning as a contractor"?

In (g)(4)(F), please make this a complete sentence and provide some introduction to the Parts.

Given 113A-126(d)(2), is (g)(4)(F)(i) necessary? It appears to simply recite statute.

What is the overall intent of (g)(4)(F)(ii)? I'm not sure that I understand what is going on here. What is the "additional penalty"? Is the intent to get to 113A-126(2) and define what days will be counted as "separate days"?

In (g)(4)(F)(ii), as ordered by whom? Do you mean the notice of the Commission as referred elsewhere in this Rule? Do you mean the Court in accordance with 113A-126(a)? If it is the Court, what is your authority? 113A-126(c) appears to leave this to the Court's discretion. Please review and revise.

Please end (g)(4)(F)(ii)(I) and (II) with semi-colons, instead of commas, and delete the "or" at the end of (g)(4)(F)(ii)(I).

In (g)(4)(F)(ii)(I), given my authority concerns elsewhere, is this the Division's order, or the Commission's order? Also, what is meant by "satisfied"? Does this just mean that it meets the conditions set forth in the order (or notice, whatever is meant)? If so, please say that.

In (g)(4)(F)(ii)(II), delete or define "good faith"

In (g)(4)(F)(ii)(III), what is meant by "a justiciable issue of law or fact therein." I have concerns with this language. Here, do you mean something like "the respondent contests the order in accordance with 113A-123 and 150B-23"?

In (g)(5), I don't understand the cross-reference to Subparagraph (3). Here, do you mean "In accordance with 113A-126(d)"?

Amber May
Commission Counsel

In (g)(5), please change “Pursuant to Subparagraph (3) of this Paragraph,” to “Pursuant to 113A-126(d)(1), penalties for minor development violations, including violations of permit conditions, shall be assessed as follows:”

In (g)(5), as noted in the previous suggestion, please change “in accordance with the following criteria” to “as follows” As written, it appears as though (g)(5)(A) through (F) are going to set forth factors, but the factors are set forth in statute, so I don’t think that the intent here.

In (g)(5)(A) and (B), change “which” to “that” in “which could”

In (g)(5)(A), what is the permit application fee? Is there a cross-reference available? Here, do you mean something like “the CAMA permit application fee as set forth in .0204 of this Subchapter”?

Just to be clear, if the penalty calculated in accordance with the formula set forth in (g)(5)(B) exceeds the statutory maximum, you all only asses the statutory maximum?

In (g)(5), please provide some sort of introductory language to the table. Perhaps add it as a separate Paragraph or Subparagraph and say “Schedule A, penalties for major development violations shall be determined by the size of the violation in square feet as follows” As written, the table appears to come out of nowhere and it’s unclear how it fits in the Rule. Please note that this may require you to renumber your other Subparagraphs.

In (g)(5)(C), please verify the cross-reference to Parts (4)(A) and (B) in light of any changes you make as a result of these technical change requests.

Given 113A-126(d)(2), the majority of (g)(5)(D) appears to be unnecessary as it simply recites statute. Is the intent here to say what will constitute willful and intentional violations? If so, please consider revising this to say something like “ For purposes of 113A-126(d)(2), the following actions shall be considered willful and intentional.”

In (g)(5)(D), please verify the cross-reference to Parts (4)(A) and (B) in light of any changes you make as a result of these technical change requests. Also, to the extent that this is necessary, please provide the statutory citation of 113A-126(d)(2), as opposed to the cross-reference within the Rule.

Please delete the “or” at the end of (g)(5)(D)(i) and (ii). Please also begin (g)(5)(D)(i) through (iv) with lower case letters.

What is the intent of (g)(5)(D)(iii)? Specifically, what is meant by “previous violations”? Do they have to be the same violations or is the intent here that it be any violation (no matter how minor or unrelated)?

In (g)(5)(E), what is your authority to issue penalties against both the contractor and landowner? Are you relying upon 113A-126 and the Commission’s authority to issue penalties against “persons”? Would you end up issuing penalties against two different “persons” for the same violation?

Assuming that you do have authority, is all of (g)(5)(E) necessary? In (e), you allow violations to be issued to “any person engaged in a violation which constitutes a violation for which a civil penalty may be assessed.” Wouldn’t that include contractors? Please see my notes for (g)(4)(E).

In (g)(5)(E), delete “or” in between “contractor” and “subcontractor and add commas before and after “subcontractor”, so that it reads “Any contractor, subcontractor, or person or functioning as a contractor...”

In (g)(5)(E), what does it mean to be “functioning as a contractor”?

Given 113A-126(a), the second sentence of (g)(5)(D)(iv) appears to be unnecessary. Please delete “If necessary, the Commission or Division shall seek a court order to require restoration.” Further 113A-126(a) and (b) appear to give this authority to the Secretary or local official, not the Commission.

In (g)(5)(F), please make this a complete sentence and provide some introduction to the Parts.

Given 113A-126(d)(2), is (g)(5)(F)(i) necessary? It appears to simply recite statute.

What is the overall intent of (g)(5)(F)(ii)? I’m not sure that I understand what is going on here. What is the “additional penalty”? Is the intent to get to 113A-126(2) and define what days will be counted as “separate days”?

In (g)(5)(F)(ii), as ordered by whom? Do you mean the notice of the Commission as referred elsewhere in this Rule? Do you mean the Court in accordance with 113A-126(a)? If it is the Court, what is your authority? 113A-126(c) appears to leave this to the Court’s discretion. Please review and revise.

Please end (g)(5)(F)(ii)(I) and (II) with semi-colons, instead of commas, and delete the “or” at the end of (g)(5)(F)(ii)(I).

In (g)(5)(F)(ii)(I), given my authority concerns elsewhere, is this the delegate’s order, or the Commission’s order? Also, what is meant by “satisfied”? Does this just mean that it meets the conditions set forth in the order (or notice, whatever is meant)? If so, please say that.

In (g)(5)(F)(ii)(II), delete or define “good faith”

In (g)(5)(F)(ii)(III), what is meant by “a justiciable issue of law or fact therein.” I have concerns with this language. Here, do you mean something like “the respondent contests the order in accordance with 113A-123 and 150B-23”?

What is the overall intent of (h)? Please review and revise this Paragraph in light of Article 3 of 150B and the changes that have been made regarding the finality of decisions of an ALJ. Please note that this may be applicable to other Paragraphs in this Rule. If you all do have authority and are not subject to Article 3 of 150B, please provide your specific authority for that exemption.

Given 113A-126(d)(3), is (i) necessary? It appears to simply recite statute.

*If (i) is necessary, what is your authority to delegate this responsibility to the Director? 113A-126(d)(3) says that the **"Commission shall refer..."***

Given the above comments and the ability to delegate civil penalty assessments to the Director, what is your authority for (j)?

If you do have authority for (j), what is meant by the "next meeting"? Is this the next regularly scheduled meeting following the action taken?

In (k), what is meant by "an administrative contested case hearing"? Is this pursuant to 113A-126(3) after a person files a contested case under 150B-23? Please review and clarify.

In (k), what is your authority to say that "such settlements... shall not be considered a final Commission decision for purposes of G.S. 113A-123"? While I understand that this may be legally accurate, it appears to be a legal conclusion for which you don't have authority to determine.

What is the intent of (l)? Practically speaking, would there be a settlement agreement after the Commission makes a final decision? Is this once a case reaches the level of an ALJ? Again, please review this in light of Article 3 of 150B.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

1 15A NCAC 07J .0409 is amended **with changes** as published in 33:14 NCR 1495-1500:

2
3 **15A NCAC 07J .0409 CIVIL PENALTIES**

4 (a) Purpose and Scope. These Rules provide the procedures and standards governing the assessment, remission,
5 settlement and appeal of civil penalties assessed by the Coastal Resources Commission and the Director pursuant to
6 G.S. 113A-126(d).

7 (b) Definitions. The terms used herein shall be as defined in G.S. 113A-103 and as follows:

8 (1) "Act" means the Coastal Area Management Act of 1974, G.S. 113A-100 through 134, plus
9 amendments.

10 (2) "Delegate" means the Director or other employees of the Division of Coastal Management, or local
11 permit officers to whom the Commission has delegated authority to act in its stead pursuant to this
12 Rule.

13 (3) "Director" means the Director, Division of Coastal Management.

14 (4) "Respondent" means the person to whom a notice of violation has been issued or against whom a
15 penalty has been assessed.

16 (5) "Person" is defined in the Coastal Area Management Act, G.S. 113A-103(9).

17 (c) Civil penalties may be assessed against any person who commits a violation as provided for in G.S.
18 113A-126(d)(1) and (2).

19 (d) Investigative costs. Pursuant to G.S. 113A-126(d)(4a) the Commission or Director may also assess a respondent
20 for the costs incurred by the Division for investigation, inspection, and monitoring associated with assessment the
21 civil penalty. Investigative costs shall be in addition to any civil penalty assessed. For a minor development violation,
22 investigative costs shall not exceed one-half of the amount of the civil penalty assessed or one thousand dollars
23 (\$1,000), whichever is less. For a major development violation, investigative costs shall not exceed one-half of the
24 amount of the civil penalty assessed or two thousand five hundred dollars (\$2,500), whichever is less. The Division
25 shall determine the amount of investigative costs to assess based upon factors including the amount of staff time
26 required for site visits, investigation, enforcement action, interagency coordination, and for monitoring restoration of
27 the site.

28 (e) Notice of Violation. The Commission hereby authorizes employees of the Division of Coastal Management to
29 issue in the name of the Commission notices of violation to any person engaged in an activity which constitutes a
30 violation for which a civil penalty may be assessed. Such notices shall set forth the nature of the alleged violation,
31 shall order that the illegal activity be ceased and affected resources be restored in accordance with ~~15A NCAC 07J~~
32 ~~.0410.~~ Rule .0410 of this Section. The notice shall specify the time by which the restoration shall be completed as
33 ordered by the Division. The notice shall be delivered ~~personally or~~ by registered or certified mail, return receipt
34 requested.

35 (f) Civil Penalty Assessment.

36 (1) The Commission hereby delegates to the Director the authority to assess civil penalties according
37 to the procedures set forth in Paragraph (g) of this Rule.

1 (2) ~~The Director shall~~ If restoration of affected resources is not required, the Director may issue a notice
2 of assessment within ~~30~~ 90 days from the date of the Notice of Violation. If restoration of affected
3 resources is required, the Director may issue a Notice of Assessment within 60 days after the
4 Division determines that restoration of the adversely impacted resources is ~~complete~~. complete or
5 due date of restoration completion.

6 (3) The notice of assessment shall specify the reason for assessment, how the assessment was
7 calculated, when and where payment shall be made, and shall inform the respondent of the right to
8 appeal the assessment by filing a petition for a contested case hearing with the Office of
9 Administrative Hearings pursuant to G.S. 150B-23. The notice shall be delivered ~~personally or~~ by
10 registered or certified mail, return receipt requested.

11 (g) Amount of Assessment.

12 (1) Civil penalties shall not exceed the maximum amounts established by G.S. 113A-126(d).

13 (2) If any respondent willfully continues to violate by action or inaction any rule or order of the
14 Commission after the date specified in a notice of violation, each day the violation continues or is
15 repeated shall be considered a separate violation as provided in G.S. 113A-126(d)(2).

16 (3) In determining the amount of the penalty, the Commission or Director shall consider the factors
17 contained in G.S. 113A-126(d)(4).

18 (4) Pursuant to Subparagraph ~~(g)(3) of this Rule, (3) of this Paragraph,~~ penalties for major development
19 violations, including violations of permit conditions, shall be assessed in accordance with the
20 following criteria.

21 (A) Major development which could have been permitted under the Commission's rules at the
22 time the notice of violation is issued shall be assessed a penalty equal to two times the
23 relevant CAMA permit application fee, plus investigative costs.

24 (B) Major development which could not have been permitted under the Commission's rules at
25 the time the notice of violation is issued shall be assessed an amount equal to the relevant
26 CAMA permit application fee, plus a penalty pursuant to Schedule A of this Rule, plus
27 investigative costs. If a violation affects more than one area of environmental concern
28 (AEC) or coastal resource as listed within Schedule A of this Rule, the penalties for each
29 affected AEC shall be combined. Any structure or part of a structure that is constructed in
30 violation of existing Commission rules shall be removed or modified as necessary to bring
31 the structure into compliance with the Commission's rules.

32
33 SCHEDULE A

34 Major Development Violations

35
36 Size of Violation (sq. ft.)

| AREA OF ENVIRONMENTAL CONCERN AFFECTED | ≤ 100 | 101-500 | 501-1,000 | 1001-3000 | 3001-5000 | 5001-8000 | 8001-11,000 | 11,001-15,000 | 15,001-20,000 | 20,001-25,000 | >25,000 |
|---|-------|---------|-----------|-----------|-----------|-----------|-------------|---------------|---------------|---------------|----------|
| ESTUARINE WATERS OR PUBLIC TRUST AREAS (1) | \$250 | \$375 | \$500 | \$1,500 | \$2,000 | \$3,500 | \$5,000 | \$7,000 | \$9,000 | \$10,000 | \$10,000 |
| Primary Nursery Areas | \$100 | \$225 | \$350 | \$850 | \$1,350 | \$2,850 | \$4,350 | \$3,000 | \$1,000 | n/a | n/a |
| Mudflats and Shell Bottom | \$100 | \$225 | \$350 | \$850 | \$1,350 | \$2,850 | \$4,350 | \$3,000 | \$1,000 | n/a | n/a |
| Submerged Aquatic Vegetation | \$100 | \$225 | \$350 | \$850 | \$1,350 | \$2,850 | \$4,350 | \$3,000 | \$1,000 | n/a | n/a |
| | | | | | | | | | | | |
| Coastal Wetlands | \$250 | \$375 | \$500 | \$1,500 | \$2,000 | \$3,500 | \$5,000 | \$7,000 | \$9,000 | \$10,000 | \$10,000 |
| | | | | | | | | | | | |
| Coastal Shorelines | \$250 | \$350 | \$450 | \$850 | \$1,250 | \$2,450 | \$3,650 | \$5,250 | \$7,250 | \$9,250 | \$10,000 |
| Wetlands (2) | \$100 | \$200 | \$300 | \$700 | \$1,100 | \$2,300 | \$3,500 | \$4,750 | \$2,750 | \$750 | n/a |
| ORW- Adjacent Areas | \$100 | \$200 | \$300 | \$700 | \$1,100 | \$2,300 | \$3,500 | \$4,750 | \$2,750 | \$750 | n/a |
| | | | | | | | | | | | |
| OCEAN HAZARD SYSTEM (3)(4) | \$250 | \$350 | \$450 | \$850 | \$1,250 | \$2,450 | \$3,650 | \$5,250 | \$7,250 | \$9,250 | \$10,000 |
| Primary or Frontal Dune | \$100 | \$200 | \$300 | \$700 | \$1,100 | \$2,300 | \$3,500 | \$4,750 | \$2,750 | \$750 | n/a |
| | | | | | | | | | | | |
| PUBLIC WATER SUPPLIES (5) | \$250 | \$350 | \$450 | \$850 | \$1,250 | \$2,450 | \$3,650 | \$5,250 | \$7,250 | \$9,250 | \$10,000 |
| | | | | | | | | | | | |
| NATURAL AND CULTURAL RESOURCE AREAS (6) | \$250 | \$350 | \$450 | \$850 | \$1,250 | \$2,450 | \$3,650 | \$5,250 | \$7,250 | \$9,250 | \$10,000 |

- 1 (1) Includes the Atlantic Ocean from the normal high water mark to three miles offshore.
- 2 (2) Wetlands that are jurisdictional by the Federal Clean Water Act.
- 3 (3) If the AEC physically overlaps another AEC, use the greater penalty schedule.
- 4 (4) Includes the Ocean Erodible, ~~High Hazard Flood Area~~, Inlet Hazard Area, and Unvegetated Beach
- 5 Area.
- 6 (5) Includes Small Surface Water Supply, Watershed and Public Water Supply Well Fields.
- 7 (6) Includes Coastal Complex Natural Areas, Coastal Areas Sustaining Remnant Species, Unique
- 8 Geological Formations, Significant Coastal Archaeological Resources, and Significant Coastal
- 9 Historical Architectural Resources.
- 10 (C) Assessments for violations by public agencies (i.e. towns, counties and state agencies) shall
- 11 be determined in accordance with Parts ~~(g)(4)(A) and (B) of this Rule~~, 4(A) and (B) of this
- 12 Paragraph.

- 1 (D) Willful and intentional violations. The penalty assessed ~~under Parts (g)(4)(A) and (B) of~~
2 ~~this Rule~~ in accordance with Parts (4)(A) and (B) of this Paragraph. shall be doubled for
3 willful and intentional violations except that the doubled penalties assessed under this
4 Subparagraph shall not exceed ten thousand dollars (\$10,000) or be less than two thousand
5 dollars (\$2,000) for each separate violation. A violation shall be considered to be willful
6 and intentional when:
- 7 (i) The person received written instructions from one of the Commission's delegates
8 that a permit would be required for the development and subsequently undertook
9 development without a permit; or
- 10 (ii) The person received written instructions from one of the Commission's delegates
11 that the proposed development was not permissible under the Commission's rules,
12 or received denial of a permit application for the proposed activity, and
13 subsequently undertook the development without a permit; or
- 14 (iii) The person committed previous violations of the Commission's rules; or
- 15 (iv) The person refused or failed to restore a damaged area as ordered by one of the
16 Commission's delegates. If necessary, the Commission or Division shall seek a
17 court order to require restoration.
- 18 (E) Assessments against contractors. Any contractor or subcontractor or person or group
19 functioning as a contractor shall be subject to a notice of violation and assessment of a civil
20 penalty in accordance with Paragraph (f) of this Rule. Such penalty shall be in addition to
21 that assessed against the landowner. When a penalty is being doubled pursuant to ~~Part~~
22 ~~(g)(4)(D)~~ Part (D) of this Subparagraph and the element of willfulness is present only on
23 the part of the contractor, the landowner shall be assessed the standard penalty and the
24 contractor shall be assessed the doubled penalty.
- 25 (F) Continuing violations.
- 26 (i) Pursuant to G.S. 113A-126(d)(2), each day that the violation continues after the
27 date specified in the notice of violation for the unauthorized activity to cease or
28 restoration to be completed shall be considered a separate violation and shall be
29 assessed an additional penalty.
- 30 (ii) Refusal or failure to restore a damaged area as ordered shall be considered a
31 continuing violation and shall be assessed an additional penalty. When resources
32 continue to be affected by the violation, the amount of the penalty shall be
33 determined according to ~~Part (g)(4)(B) of this Rule.~~ Part (B) of this Subparagraph.
34 The continuing penalty period shall be calculated from the date specified in the
35 notice of violation for the unauthorized activity to cease or restoration to be
36 completed and run until:
- 37 (I) the Division's order is satisfied, or

- (II) the respondent enters into good faith negotiations with the Division, or
- (III) the respondent contests the Division's order in a judicial proceeding by raising a justiciable issue of law or fact therein.

The continuing penalty period shall resume if the respondent terminates negotiations without reaching an agreement with the Division, fails to comply with court ordered restoration, or fails to meet a deadline for restoration that was negotiated with the Division.

- (5) Pursuant to Subparagraph ~~(g)(3) of this Rule~~, (3) of this Paragraph, civil penalties for minor development violations, including violations of permit conditions, shall be assessed in accordance with the following criteria:

- (A) Minor development which could have been permitted under the Commission's rules at the time the notice of violation is issued shall be assessed a penalty equal to two times the relevant CAMA permit application fee, plus investigative costs.
- (B) Minor development which could not have been permitted under the Commission's rules at the time the notice of violation is issued shall be assessed an amount equal to the relevant CAMA permit application fee, plus a penalty pursuant to Schedule B of this Rule, plus investigative costs. If a violation affects more than one area of environmental concern (AEC) or coastal resource as listed within Schedule B of this Rule, the penalties for each affected AEC shall be combined. Any structure or part of a structure that is constructed in violation of existing Commission rules shall be removed or modified as necessary to bring the structure into compliance with the Commission's rules.

SCHEDULE B

Minor Development Violations

Size of Violation (sq. ft.)

| AREA OF ENVIRONMENTAL CONCERN AFFECTED | ≤ 100 | 101-500 | 501-1,000 | 1001-3000 | 3001-5000 | 5001-8000 | 8001-11,000 | 11,001 - 15,000 | 15,001 - 20,000 | 20,001 - 25,000 | >25,000 |
|--|-------|---------|-----------|-----------|-----------|-----------|-------------|-----------------|-----------------|-----------------|---------|
| Coastal Shorelines | \$225 | \$250 | \$275 | \$325 | \$375 | \$450 | \$525 | \$625 | \$750 | \$875 | \$1,000 |
| ORW- Adjacent Areas | \$125 | \$150 | \$175 | \$225 | \$275 | \$350 | \$425 | \$375 | \$250 | \$125 | n/a |
| OCEAN HAZARD SYSTEM (1)(2) | \$225 | \$250 | \$275 | \$325 | \$375 | \$450 | \$525 | \$625 | \$750 | \$875 | \$1,000 |
| Primary or Frontal Dune | \$125 | \$150 | \$175 | \$225 | \$275 | \$350 | \$425 | \$375 | \$250 | \$125 | n/a |
| PUBLIC WATER SUPPLIES (3) | \$225 | \$250 | \$275 | \$325 | \$375 | \$450 | \$525 | \$625 | \$750 | \$875 | \$1,000 |

| NATURAL AND CULTURAL RESOURCE AREAS (4) | \$225 | \$250 | \$275 | \$325 | \$375 | \$450 | \$525 | \$625 | \$750 | \$875 | \$1,000 |
|--|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|---------|
|--|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|---------|

(1) Includes the Ocean Erodible, ~~High Hazard Flood Area~~, Inlet Hazard Area, and Unvegetated Beach Area.

(2) If the AEC physically overlaps another AEC, use the greater penalty schedule.

(3) Includes Small Surface Water Supply, Watershed and Public Water Supply Well Fields.

(4) Includes Coastal Complex Natural Areas, Coastal Areas Sustaining Remnant Species, Unique Geological Formations, Significant Coastal Archaeological Resources, and Significant Coastal Historical Architectural Resources.

(C) Violations by public agencies (e.g. towns, counties and state agencies) shall be handled by the local permit officer or one of the Commission's delegates within their respective jurisdictions except that in no case shall a local permit officer handle a violation committed by the local government they represent. Penalties shall be assessed in accordance with Parts ~~(g)(5)(A) and (B) of this Rule~~. (A) and (B) of this Subparagraph.

(D) Willful and intentional violations. The penalty assessed under Parts ~~(g)(5)(A) and (B) of this Rule~~ (A) and (B) of this Subparagraph shall be doubled for willful and intentional violations except that the doubled penalties assessed under this Subparagraph shall not exceed one thousand dollars (\$1,000.00) for each separate violation. A violation shall be considered to be willful and intentional when:

(i) The person received written instructions from the local permit officer or one of the Commission's delegates that a permit would be required for the development and subsequently undertook development without a permit; or

(ii) The person received written instructions from the local permit officer or one of the Commission's delegates that the proposed development was not permissible under the Commission's rules, or received denial of a permit application for the proposed activity, and subsequently undertook the development without a permit; or

(iii) The person committed previous violations of the Commission's rules; or

(iv) The person refused or failed to restore a damaged area as ordered by the local permit officer or one of the Commission's delegates. If necessary, a court order shall be sought to require restoration.

(E) Assessments against contractors. Any contractor or subcontractor or person or group functioning as a contractor shall be subject to a notice of violation and assessment of a civil penalty in accordance with Paragraph (f) of this Rule. Such penalty shall be in addition to that assessed against the landowner. When a penalty is being doubled pursuant to Part ~~(g)(5)(D)~~ (D) of this Subparagraph and the element of willfulness is present only on the

part of the contractor, the landowner shall be assessed the standard penalty and the contractor shall be assessed the doubled penalty.

(F) Continuing violations.

(i) Pursuant to G.S. 113A-126(d)(2), each day that the violation continues after the date specified in the notice of violation for the unauthorized activity to cease and restoration to be completed shall be considered a separate violation and shall be assessed an additional penalty.

(ii) Refusal or failure to restore a damaged area as ordered shall be considered a continuing violation and shall be assessed an additional penalty. The amount of the penalty shall be determined according to Part ~~(e)(5)(B) of this Rule. (B) of this Subparagraph.~~ The continuing penalty period shall be calculated from the date specified in the notice of violation for the unauthorized activity to cease and restoration to be completed and run until:

(I) the Commission delegate's order is satisfied, or

(II) the respondent enters into good faith negotiations with the local permit officer or the Division, or

(III) the respondent contests the local permit officer's or the Division's order in a judicial proceeding by raising a justiciable issue of law or fact therein.

The continuing penalty period shall resume if the respondent terminates negotiations without reaching an agreement with the local permit officer or the Division, fails to comply with court ordered restoration, or fails to meet a deadline for restoration that was negotiated with the local permit officer or the Division.

(h) Hearings and Final Assessment. Final decisions in contested case hearings concerning assessments shall be made by the Commission. The final decision shall be based on evidence in the official record of the contested case hearing, the administrative law judge's recommended decision, any exceptions filed by the parties and oral arguments. Oral arguments shall be limited to the facts in the official record.

(i) Referral. If any civil penalty as finally assessed is not paid, the Director on behalf of the Commission shall request the Attorney General to commence an action to recover the amount of the assessment.

(j) Reports to the Commission. Action taken by the Director shall be reported to the Commission at the next meeting. Such reports shall include information on the following:

(1) respondent(s) against whom penalties have been assessed;

(2) respondent(s) who have paid a penalty, requested remission, or requested an administrative hearing;

(3) respondent(s) who have failed to pay; and

(4) cases referred to the Attorney General for collection.

(k) Settlements. The Commission hereby delegates to the Director the authority to enter into a settlement of a civil penalty appeal at any time prior to decision in an administrative contested case hearing. Such settlements shall not

1 require the approval of the Commission and shall not be considered a final Commission decision for purposes of G.S.
2 113A-123.

3 (l) Any settlement agreement proposed subsequent to a final Commission decision in the contested case shall be
4 submitted to the Commission for approval.

5
6 *History Note:* Authority G.S. 113A-124; 113A-126(d);
7 Eff. January 24, 1980;
8 ARRC Objection August 18, 1988;
9 Amended Eff. January 1, 1989; November 1, 1986; November 1, 1984;
10 ARRC Objection Lodged Eff. January 18, 1991;
11 Amended Eff. July 1, 2019; February 1, 2008; July 1, 1991; June 1, 1991.