

REQUEST FOR TECHNICAL CHANGE

AGENCY: Soil and Water Conservation Commission

RULE CITATION: 02 NCAC 59H .0102

DEADLINE FOR RECEIPT: Thursday, October 6, 2016

NOTE WELL: *This request when viewed on computer extends 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 this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

Please restart the line numbers at 1 for each page. (See Rule 26 NCAC 02C .0108(1)(h))

Please put these defined terms in quotation marks and in alphabetical order.

In current Items (3) and (4), lines 8 and 10, should "detailed implementation plan" be capitalized to be consistent with Item (12)? I note the term is capitalized in Rule .0103(a).

In Item (4), line 10, I believe "Division" should be capitalized to be consistent with Item (14).

Also, what are the three regions? Are those set forth somewhere?

In Item (5), line 12, please be sure to also put "cooperator" in quotation marks.

In Item (6), please put "Actual costs" on line 14 in quotation marks as well.

On line 15, what are "direct costs"? Does your regulated public know?

In Item (7), are the practices known to your regulated public? Are you relying upon Rule .0104 of this Section to further clarify this concept?

On line 17, why not delete "those types of practices which are"? I think the sentence would be clearer without it. If you need to retain it, replace "which" with "that"

In Item (8), line 21, what is the "operating unit"?

In Item (9), line 22, replace "which" with "that"

In Item (12), line 33, how is the plan approved?

Amanda J. Reeder
Commission Counsel
Date submitted to agency: September 22, 2016

Consider breaking Item (12) into a list, like so:

“Detailed Implementation Plan” means the plan... including:

- (a) annual program goals;*
- (b) district, statewide, and regional allocations;*

In Item (13), line 36, please remove the underline from {44}

Also on line 36, please replace “and which” with “that”

On line 37, how is this approved by the Division? And what is “technically adequate”?

In Item (15), Page 2, line 39, I suggest replacing “allocation, which” with “allocation that”

In Item (16), line 41, please insert a comma after “annum”

Also on line 41, what is a “technical” position? Or is this tied to “District technicians” in Rule .0103(e)(6)?

In Item (17), so that I’m clear – the district must approve these before they are submitted to the Commission?

In Item (18), line 48, I believe “year-to-year” should be hyphenated.

On line 49, insert a comma after “quasi-governmental agency”

On line 50, do you need to retain “or any such agency, by whatever name called,” given the language on line 49? Could you say “Any governmental or quasi-governmental agency...” and delete the language on line 50?

In Item (20), line 55, define “successfully”

In Item (22), line 60, replace “their” with “its”

Is there a reason Item (23) does not parallel the language in Item (15)? Do both portions of the funds apply to the district funds?

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

Amanda J. Reeder
Commission Counsel
Date submitted to agency: September 22, 2016

02 NCAC 59H .0102 is amended as published in 31:01 NCR 7-8 as follows:

02 NCAC 59H .0102 DEFINITIONS FOR SUBCHAPTER 59H

The following terms used in this Subchapter have the following meanings:

- (1) Nonpoint Source (NPS) Pollution means pollution originating from a diffuse source.
- (2) District Allocation Pool means the annual share of the state's appropriation to participating districts.
- (3) Statewide Allocation Pool means the annual share of the state's appropriation allocated for applications ranked at the state level as specified in the annual detailed implementation plan.
- (4) Regional Allocation Pool means the annual share of the state's appropriation allocated for applications ranked in the division's three regions as specified in the annual detailed implementation plan.
- ~~(3)~~(5) Applicant means a person(s) who applies for best management practice cost sharing monies from the district. An applicant may also be referred to as a cooperator.
- ~~(4)~~(6) Average Costs means the calculated cost, determined by averaging actual costs and current cost estimates necessary for best management practice implementation. Actual costs include labor, supplies, and other direct costs required for physical installation of a practice.
- ~~(5)~~(7) Best Management Practice (BMP) means a practice used to reduce nonpoint source inputs to receiving waters, including both those types of practices which are structural or nonstructural management practices.
- ~~(6)~~(8) Conservation Plan of Operation (CPO) means a written plan scheduling the applicant's decisions concerning land use, and both cost shared and non-cost shared BMPs to be installed and maintained on the operating unit.
- ~~(7)~~(9) Cost Share Agreement means an agreement between the applicant and the district which defines the BMPs to be cost shared, rate and amount of payment, minimum practice life, and date of BMP installation. The agreement shall state that the recipient shall maintain and repair the practice(s) for the specified minimum life of the practice. The Cost Share Agreement shall have a maximum contract life of three years for BMP installation. The district shall perform an annual status review during the installation period.
- ~~(8)~~(10) Cost Share Incentive (CSI) means a predetermined fixed payment paid to an applicant for implementing a nonstructural management BMP in lieu of cost share on a structural practice.
- ~~(9)~~(11) Cost Share Rate means a cost share percentage paid to an applicant for implementing BMPs.
- ~~(10)~~(12) ~~Detailed Implementation Plan means the plan approved by the commission that specifies the guidelines for the current program year pursuant to the Rules of the Commission.~~ Detailed Implementation Plan means the plan approved by the Commission that specifies the guidelines for the current program year including annual program goals; district, statewide and regional allocations; BMPs that will be eligible for cost sharing and the minimum life expectancy of those practices.
- ~~(11)~~(13) District BMP means a BMP designated by a district to reduce the delivery of NPS pollution and which is reviewed and approved by the Division to be technically adequate prior to funding.

(14) Division means the Division of Soil and Water Conservation.

~~(12)~~(15) Encumbered Funds means monies from a district's allocation, which have been committed to an applicant after initial approval of the cost share agreement.

~~(13)~~(16) Full Time Equivalent (FTE) means 2,080 hours per annum which equals one full time technical position.

~~(14)~~(17) In-kind Contribution means a contribution by the applicant towards the implementation of BMPs. In-kind contributions shall be approved by the district and may include labor, fuel, machinery use, and supplies and materials necessary for implementing the approved BMPs.

~~(15)~~(18) Landowner means any natural person or other legal entity, including a governmental agency, who holds either an estate of freehold (such as a fee simple absolute or a life estate) or an estate for years or from year to year in land, but does not include an estate at will or by sufferance in land. A governmental or quasi-governmental agency such as a drainage district or a soil and water conservation district, or any such agency, by whatever name called, exercising similar powers for similar purposes, can be a landowner for the purposes of this Subchapter if the governmental agency holds an easement in land.

~~(16)~~(19) Program Year means the period from July 1 through June 30 for which funds are allocated to districts.

~~(17)~~(20) Proper Maintenance means that a practice(s) is being maintained such that the practice(s) is successfully performing the function for which it was originally implemented.

~~(18)~~(21) Strategy Plan means the annual plan for the Community Conservation Assistance Program for Nonpoint Source Pollution Control to be developed by each district. The plan identifies pollution treatment needs and the level of cost sharing and technical assistance monies required to address those annual needs in the respective district.

~~(19)~~(22) Technical Representative of the district means a person designated by the district to act on their behalf who participates in the planning, design, implementation and inspection of BMPs.

~~(20)~~(23) Unencumbered Funds means the portion of the allocation to each district, which has not been committed for cost sharing.

*History Note: Authority G.S. 106-840; 106-860; 139-4; 139-8;
Eff. December 1, 2007;
Transferred from 15A NCAC 06I .0102 Eff. May 1, ~~2012~~-2012;
Amended Eff. November 1, 2016.*

REQUEST FOR TECHNICAL CHANGE

AGENCY: Soil and Water Conservation Commission

RULE CITATION: 02 NCAC 59H .0103

DEADLINE FOR RECEIPT: Thursday, October 6, 2016

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 this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

Please restart the line numbers at 1 for each page. (See Rule 26 NCAC 02C .0108(1)(h))

In (a), line 6, please insert a comma after "regional"

On line 6, so that I'm clear – the eligible purposes are what are in (a)(1) through (3)?

In (a)(1), to be consistent with (a)(2) and (3), please begin "cost" with a lowercase "c"

Please end (a)(1) through (2) with semicolons, not commas.

On line 8 and elsewhere the term is used, what is "cost share"? "Cost share incentive" is defined in Rule .0102, but this term is not. Does your regulated public know what this means?

On line 12, change "on" to "upon"

On line 12, Page 3, line 76 (both places) and line 82, and Page 4, lines 111 and 112, please capitalize "Division"

On line 12, so that I'm clear, the "needs expressed by the districts" will be those in the Strategy Plan defined in Rule .0102?

In (b), line 14, how are the districts "designated eligible"?

On line 15, do you need to retain "annual" before "strategy plan" since the term as defined in Rule .0102 states that it is annual?

On line 16, do you mean "program year" instead of "fiscal year" given that program year is defined in Rule .0102?

On line 24, what is meant by "sufficient"?

Amanda J. Reeder
Commission Counsel
Date submitted to agency: September 22, 2016

On line 25, how is this identified? And should it read “NPS pollution problems”?

On line 27, please replace “is based on” with “shall be based upon”

On line 28, please replace “are” with “shall be”

In (c)(3), Page 2, line 42, please strike “to be used”

In (c)(4), lines 46-47, how does this determination occur?

So that I’m clear, where does the money from (c)(5) come from? The emergency funds? Or unallocated funds?

What does (c)(6) mean? I’m sure your regulated public knows, but I do not, so I would appreciate clarification.

In (c)(7)(A), line 57, districts can be comprised of more than one county, correct? If so, then how will this work? The Commission will still consider by county, rather than the district as a whole?

In (c)(7)(A), (B), and (E), since you are relying upon outside sources, I assume you wish to incorporate them by reference using G.S. 150B-21.6? If so, please state where someone can obtain them, at what cost, and whether you are including subsequent amendments and editions (and given the text of the Rule, I assume you are).

In (c)(7)(C), does your regulated public know what “Phase I and Phase II requirements” are?

In (c)(7)(B), lines 64-65, you specify that the Division is within DEQ. Why aren’t you doing the same in (c)(7)(A) and (E)?

How will (c)(7)(F) work? Since 100 points are already allocated by (c)(7)(A) through (E), will there be bonus points? What other factors may the Division recommend, and why will it do so? You need to provide guidance on this in the Rule.

In (d), Page 3, line 76, I take it that the determination of “appropriate” will be made by the district?

Also on line 76, how will the Division rank them? Using what criteria?

In (e), line 79, replace “on” with “upon”

On line 80, the needs expressed by the district will be through the strategy plan, correct?

On line 83, the term “at least” is generally not favored in rule, as rules set the minimum requirement. However, I take it you need to retain the term here?

On line 84, replace “to which funds are allocated” with “allocated funds”

Also on line 84, how shall the district demonstrate this?

On line 86, replace “is” with “shall be”

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On line 87, replace “are” with “shall be”

In (e)(3), line 93, I suggest you strike “beyond those requested by the district”

In (e)(4)(B) and (C), can you please explain the “normalized to 1 to 100 scale” to me? I am sure your regulated public is familiar with this, but I need clarification.

In (e)(5), it seems you are missing words after “local match.” Should it read “the funding shall” or “the Commission shall” before “provide support”? Who is going to do this?

In (e)(6), line 110, how is this eligibility determined? Is it because there is a cost share agreement?

In (e)(6), Page 4, line 111, replace “must” with “shall”

On line 112, is “concerned” the right word? What about “participating”?

I am unclear about the scenario on lines 112-113. What if there are 3 districts participating in this agreement – how will this work then?

On line 113, replace “must” with “shall”

In (e)(7), line 116, do you mean “shall” rather than “may”? If not, then when will the Commission decide when there are funds available to not allocate monies for administrative costs?

In (f), line 119, replace “on” with “upon”

On line 120, again “as expressed” will be in the Strategy Plan?

On line 122, replace “must” with “shall”

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

02 NCAC 59H .0103 is amended as published in 31:01 NCR 8-10 as follows:

02 NCAC 59H .0103 ALLOCATION GUIDELINES AND PROCEDURES

(a) The Commission shall consider the total amount of funding available for allocation, relative needs of the program for BMP implementation, local technical assistance, and education to determine the proportion of available funds to be allocated for each eligible purpose. This determination shall be done prior to allocating funds to statewide, regional and district allocation pools and the Division. Funds may be allocated for any or all of the following purposes:

- (1) Cost share and cost share incentive payments,
- (2) technical assistance and administrative assistance, and
- (3) statewide or local education and outreach activities.

The percentage of funding available for each purpose and each allocation pool shall be specified in the annual Detailed Implementation Plan based on the recommendation of the division and the needs expressed by the districts.

~~(a)~~(b) District Allocations: The Commission shall allocate ~~the~~ cost share funds from the district allocation pool to the ~~districts in the designated program areas: districts.~~ To receive fund allocations, each district designated eligible by the ~~commission~~ Commission shall submit an annual strategy plan to the ~~commission~~ Commission at the beginning of each fiscal year. ~~Funds may be allocated to each district and the Division for any or all of the following purposes:~~

- ~~(1) Cost share and cost share incentive payments,~~
- ~~(2) technical assistance and administrative assistance, and~~
- ~~(3) statewide or local education and outreach activities.~~

~~(b) The Commission shall consider the relative needs of the program for BMP implementation, local technical assistance, and education to determine the proportion of available funds to be allocated for each eligible purpose prior to allocating funds to districts and the Division.~~

(c) Funds for cost share and cost share incentive payments shall be allocated to the districts at the beginning of the fiscal year and whenever the Commission determines that sufficient funds are available in the district allocation pool to justify a reallocation. Districts shall be allocated monies based on the identified level of nonpoint source pollution problems and the respective district's BMP installation goals as demonstrated in the district annual strategy plan. The allocation method used for disbursement of funds is based on the score of each respective district for those parameters approved by the Commission pursuant to Subparagraph ~~(9)~~(7) of this Paragraph. The points each district scores on each parameter are totaled and proportioned to the total dollars available for district allocation under the current program year funding according to the following formula:

- (1) Sum of Parameter Points = Total Points
- (2) Percentage Total x Total Dollars = Dollars Available
- Points Each District Available to Each District
- ~~(3) The minimum allocated to a particular district shall be one thousand five hundred dollars (\$1,500) per program year, unless the district requests less than one thousand five hundred dollars (\$1,500).~~
- ~~(4) If a district requests less than the dollars available to that district in Subparagraph (2) of this Paragraph, then the excess funds beyond those requested by the district shall be allocated to the~~

districts who did not receive their full requested allocation using the same methodology described in Subparagraph (2) of this Paragraph.

(5)(3) 95 percent of the total program funding designated for district allocations shall be allocated to the district accounts in the initial allocation. The Division shall retain five percent of the total funding in a contingency fund to be used to respond to an emergency or natural disaster. ~~If the funds are not needed to respond to an emergency, then the contingency fund shall be allocated at the March meeting of the Commission.~~

(6)(4) The Commission may recall funds allocated to a district that have not been encumbered to an agreement during a fiscal year that have not been encumbered to an agreement at any time if it determines the recalled funds are needed to respond to an emergency or natural disaster.

(7)(5) At any time a district may submit a revised strategy plan and apply to the Commission for additional funds.

(8)(6) CPOs that encumber funds under the current year must be submitted to the Division by 5:00 p.m. on the first Wednesday in June.

(9)(7) Districts shall be allocated funds based on their respective data for each of the following parameters:

(A) ~~Relative rank of the number of miles of stream identified as less than fully supporting due to nonpoint source pollution as reported in the North Carolina Water Quality Assessment and Impaired Waters List and the most recent Basinwide Water Quality Plan for each river basin, where the source of pollution is not solely due to agriculture. (20 percent)~~ Relative rank of the percentage of the county draining to waters identified as impaired or impacted on the most recent Integrated Report produced by the North Carolina Division of Water Resources. (20 percent). ~~The North Carolina Water Quality Assessment and Impaired Waters list and the Basinwide Water Quality Plans are produced by the Division of Water Quality.~~

(B) Relative rank of the percentage of the county draining to waters classified as Outstanding Resource Waters, High Quality Waters, Trout, Waters and Trout Waters or Shellfishing ~~(open)~~ on the current schedule of Water Quality Standards and Classifications. ~~Classifications, and shellfish growing areas (open) as determined by the Department of Environmental Quality's Division of Marine Fisheries.~~ (20 percent)

(C) The percentage of each county covered by ~~NPDES~~ Phase I and Phase II requirements. (20 percent)

(D) Relative rank of population density for the county. (20 percent)

(E) Relative rank of the percentage of a county's land area that is located within drinking water assessment areas, as delineated by the Public Water Supply Section of the Division of Environmental Health. Water Resources. (20 percent)

(F) The Commission may consider additional factors as recommended by the Division of Soil and Water Conservation when making its allocations.

(d) Statewide and Regional Allocations: The Commission shall allocate cost share funds from the statewide and regional allocation pools. To receive fund allocations, each district designated eligible by the Commission shall submit applications to appropriate pools when solicited by the division. The division shall rank each application and recommend to the Commission for its approval an amount to allocate to each district corresponding to the highest ranking applications.

~~(d)~~(e) The funds available for technical and administrative assistance shall be allocated by the Commission based on the needs as expressed by the district and needs to accelerate the installation of BMPs in the respective district. Each district may use these monies to fund new positions or to accelerate present technical assistance. Districts must provide an itemized budget to the division in order to qualify for technical assistance funds. N.C. Community Conservation Assistance Program technical assistance funds may be used for technical assistance with the district matching at least 50 percent of the total. Each district to which funds are allocated for technical assistance shall demonstrate to the Commission that matching funds are available prior to any expenditure of funds. The allocation method used for disbursement of funds is based on the score of each respective district for those parameters approved by the Commission pursuant to Subparagraph (4) of this Paragraph. The points each district scores for each parameter are totaled and proportioned to the total dollars available under the current program year funding according to the following formula:

$$\begin{array}{llllll} (1) & \text{Sum of Parameter Points} & & = & & \text{Total Points} \\ (2) & \text{Percentage Total} & \times & \text{Total Dollars} & = & \text{Dollars Available} \\ & \text{Points Each District} & & \text{Available} & & \text{to Each District} \end{array}$$

(3) If a district requests less than the dollars available to that district in Subparagraph (2) of this Paragraph, then the excess funds beyond those requested by the district shall be allocated to the districts who did not receive their full requested allocation using the same methodology described in Subparagraph (2) of this Paragraph.

(4) Priority for funding shall be based upon the following parameters:

(A) Whether the position is presently funded by Community Conservation Assistance Program technical assistance funds. (25 percent)

(B) The proportion of Community Conservation Assistance Program funds for cost share and cost share incentive allocated to districts served by this technical assistance request (normalized to 1 to 100 scale by multiplying each district's score by a factor such that the product of the highest score for this parameter is 100) (50 percent), and

(C) The amount of additional funds leveraged by grants and other funds committed to districts served by this technical assistance request (normalized to 1 to 100 scale by multiplying each district's score by a factor such that the product of the highest score for this parameter is 100). (25 percent)

(5) Subject to availability of funds and local match, provide support for technical assistance for every district.

(6) District technicians may be jointly funded by more than one district to accelerate the program in each participating district. Each district must be eligible for cost sharing in the program. Requests for

funding (salary, FICA, insurance, etc.) of a shared position must be presented to the division by all concerned districts and the division shall cost share to the billing district at a 50-50 rate based on the portion of the FTE provided each respective district. A shared position must be officially housed in one specific district and cost share for support items (office rent, telephone, etc.) shall be paid to one district only.

- (7) Funds, if available, may be allocated to each participating district to provide for administrative costs under this program. These funds shall be used for clerical assistance and other related program administrative costs and shall be matched with in-kind funds of an equal amount from the district.

~~(e)~~(f) The funds available for the education and outreach purpose shall be allocated by the Commission based on the needs as expressed by the district and needs to accelerate the installation of BMPs in that respective district. Districts and the Division may use these funds for holding workshops for potential applicants and for developing, duplicating, and distributing outreach materials or signs. Districts must provide an itemized budget to the Division in order to qualify for education and outreach funds. Education and outreach funds shall be allocated to each district in accordance with the following formula:

- (1) Each district shall receive the lesser of one thousand dollars (\$1,000) or the result of the following equation:

$$\frac{\text{Total Education and Outreach Dollars Requested by Each District}}{\text{Total Education and Outreach Dollars Requested by All Districts}} = \frac{\text{Education and Outreach Dollars Available to Each District}}{\text{Total Education and Outreach Dollars Available}}$$

- (2) If more Education and Outreach funds are available for allocation than are requested by districts or the Division, then the excess funds shall be added to the funds to be allocated for cost share and cost share incentive payments.

History Note: Authority G.S. 106-840; 106-860; 139-4; 139-8; Eff. January 1, 2008; Transferred from 15A NCAC 06I .0103 Eff. May 1, ~~2012~~ 2012; Amended Eff. November 1, 2016.