

**ARTICLE VIII**  
**NATURAL RESOURCES**

This Article reflects and incorporates the Flood Damage Prevention, Water Supply Watershed Protection, Perennial and Intermittent Surface Water Buffers, Protected Mountain Ridges, and Soil Erosion and Sedimentation Control Ordinances previously adopted by the County. The purpose of this Article is to consolidate these existing ordinances into one article of the Land Development Code. This Article also includes *stormwater* management regulations for the purposes of improving the County's water quality and quantity.

**Subpart A. Flood Damage Prevention**

**§42-232. Statutory Authorization, Findings of Fact, Purpose and Objectives**

The following sections are incorporated herein by reference and considered to be a part of the regulations of this Article VIII, Subpart A: §42-307 (Henderson County Flood Damage Prevention Board), §42-311 (Henderson County Floodplain Administrator), §42-350 (Floodplain Development Permits), §42-355 (Special Fill Permits), §42-368 (Variances (Flood Damage Prevention), §42-378 (Violations of Article VIII (Natural Resources) Subpart A (Flood Damage Prevention), §42-379 (Appeals), and §42-391 (Definitions).

**§42-232.1 Statutory Authorization.**

The Legislature of the State of North Carolina has in Part 6 of Article 21 of Chapter 143; Parts 3 and 4 of Article 18 of Chapter 153A; and Article 6 of Chapter 153A of the North Carolina General Statutes (*NCGS*), delegated *local governmental* units the responsibility to adopt regulations designed to promote the public health, safety, and general welfare.

**§42-232.2 Findings.**

- A. The flood prone areas with the jurisdiction of Henderson County are subject to periodic inundation which results in loss of life, property, health and safety hazards, disruption of commerce and governmental services, extraordinary public expenditures of flood protection and relief, and impairment of the tax base, all of which adversely affect the public health, safety, and general welfare.
- B. These flood losses are caused by the cumulative effect of *obstructions* in *floodplains* causing increases in flood heights and velocities and by the occupancy in *flood prone areas* of *uses* vulnerable to floods or other hazards.

**§42-232.3 Objectives.**

The objectives of this Subpart A are to:

- A. Protect human life, safety and health;
- B. Minimize expenditure of public money for costly flood control projects;
- C. Minimize the need for rescue and relief efforts associated with flooding and generally undertaken at the expense of the general public;
- D. Minimize prolonged business losses and interruptions;
- E. Minimize interruptions and disruptions of family life caused by flooding;

- F. Minimize damage to public facilities and utilities (i.e. water and gas mains; electric, telephone and sewer lines; and *roads/bridges* located in *floodplain*;
- G. Help maintain a stable tax base by providing for the sound use and development of *flood prone areas*;
- H. Permit and encourage the retention of open land *uses* which will be so located and designed as to constitute a harmonious and appropriate part of the physical development of the community and which will not impede the flow of flood waters;
- I. Prevent victimization by ensuring that potential land, home and business buyers are notified that property is located in an identified flood hazard area; and
- J. Prevent increased flood levels caused by unwise *floodplain* development.

**§42-232.4 Purpose.**

It is the purpose of this Subpart A to promote public health, safety, and general welfare and to minimize public and private losses due to flood conditions within flood prone areas by provisions designed to:

- A. Restrict or prohibit uses that are dangerous to health, safety, and property due to water or erosion hazards or that result in increases in erosion, flood heights or velocities;
- B. Require that uses vulnerable to floods, including facilities that serve such uses, be protected against flood damage at the time of initial construction;
- C. Control the alteration of natural floodplains, stream channels, and natural protective barriers, which are involved in the accommodation of floodwaters;
- D. Control filling, grading, dredging, and all other development that may increase erosion or flood damage; and
- E. Prevent or regulate the construction of flood barriers that will unnaturally divert flood waters or which may increase flood hazards to other lands.

**§42-233. General Provisions**

**§42-233.1 Lands to Which this Article VIII, Subpart A Applies.**

The provisions of this Subpart A shall apply to all *Special Flood Hazard Areas* within (1) the unincorporated areas of Henderson County lying outside the extraterritorial jurisdiction of any municipality, and (2) the incorporated areas and extraterritorial jurisdiction of any municipality specifically requesting its enforcement by Henderson County upon the agreement of the Henderson County Board of Commissioners, in accordance with the *Flood Insurance Study* (FIS) and its accompanying *Flood Insurance Rate Map(s)* (*FIRM*), for Henderson County dated October 2, 2008. (In making such a request, the municipality must comply with the requirements of *NCGS §160A-360*). Unless otherwise provided herein, in no instance shall this subpart apply to any area which is not duly established and identified as a *Special Flood Hazard Area*, either by the methods listed in §42-233.2 (Basis for Establishing the Special Flood Hazard Areas), or as shown on the *Flood Insurance Study* (FIS) and its accompanying *Flood Insurance Rate Map(s)* (*FIRM*), for Henderson County dated October 2, 2008. Said map and all explanatory matter thereon accompanies and is hereby made a part of this Chapter. The Chapter and map shall be on file in the office of Henderson County *Floodplain Administrator*.

**§42-233.2 Basis for Establishing the Special Flood Hazard Areas.**

- A. The *Special Flood Hazard Areas* are those identified under the Cooperating Technical State (CTS) agreement between the State of North Carolina and the Federal Emergency Management Agency (FEMA) in its *Flood Insurance Study* (FIS) and its accompanying *Flood Insurance Rate Map(s)* (FIRM), for Henderson County dated October 2, 2008, which are adopted by reference and declared to be part of this Chapter. The initial Flood Insurance Rate Map(s) are as follows for the jurisdiction areas at the initial date:

Henderson County Unincorporated Area, dated March 1, 1982

Village of Flat Rock, dated March 1, 1982

Town of Fletcher, dated March 1, 1982

City of Hendersonville, dated January 20, 1982

Town of Laurel Park, dated October 2, 2008

Town of Mills River, dated March 1, 1982

NOTE: If detailed topographic mapping or surveying shows that a building site adjacent to a *Special Flood Hazard Area* is below the *Base Flood Elevation*, it must be regulated as being within the *Special Flood Hazard Area*, even if not shown within the boundaries of the *Special Flood Hazard Area* shown in the FIRM or any accompanying maps. For regulatory purposes, flood elevations are the ruling guideline.

- B. Delineation of *Floodway*: For the purposes of delineating the *floodway* and evaluating the possibility of flood damages, the *Floodplain Administrator* may:
- (1) Request technical assistance from the competent federal agencies, including the US Army Corps of Engineers, the Soil Conservation Service, and the US Geological Survey, or successor agencies, and
  - (2) Utilize reports and data supplied by federal and State agencies in delineating *floodways* and evaluating the possibilities of flood damages.

**§42-233.3 Establishment of Floodplain Development Permit.**

A *Floodplain Development Permit* shall be required in conformance with the provisions of this Subpart A and §42-350 (Floodplain Development Permits) prior to the commencement of any development activities within *Special Flood Hazard Areas* as determined in §42-233.2 (Basis for Establishing the Special Flood Hazard Areas).

**§42-233.4 Compliance.**

No *structure* or land shall hereafter be located, extended, converted, altered, or developed in any way without full compliance with the terms of this subpart and other applicable regulations.

**§42-233.5 Abrogation and Greater Restrictions.**

- A. Subpart A is not intended to repeal, abrogate, or impair any existing *easements*, covenants, or deed restrictions. However, where this Subpart A and another regulation conflict or overlap, whichever imposes the more stringent restrictions shall prevail.
- B. The following may impose additional regulations for land *uses* and *structures* located in any portion of a *floodplain* and are hereby adopted and incorporated into this Subpart A by reference as though they were copied herein fully. However, where this Subpart A and

another regulation conflict or overlap, whichever imposes the more stringent restrictions shall prevail.

- (1) The International Building Codes, as adopted by the North Carolina Building Code Council and enforced by State and local code enforcement officials, and including all volumes.
- (2) The Southern Building Code Congress International “SBCCI Standard for Floodplain Management” SSTD 4-89,
- (3) The US Army Corps of Engineers “Flood Proofing Regulations” – EPI 1651-2-314, December 15, 1995.
- (4) Federal Emergency Management Agency “Managing Floodplain Development in Approximate Zone A Areas,” April, 1995.

#### **§42-233.6 Other Approval Required.**

- A. The granting of a permit under the provisions of this Subpart A and §42-350 (Floodplain Development Permits) or §42-355 (Special Fill Permits) shall in no way affect any other type of approval required by any other statute or ordinance of the State or any political subdivision of the State, or of the United States, but shall be construed as an added requirement.
- B. No permit for the construction of any *structure* to be located within a *floodplain* shall be granted unless the *applicant* has first obtained the permit required by this Subpart A.

#### **§42-233.7 Interpretation.**

In the interpretation and application of this Subpart A, all provisions shall be:

- A. Considered as minimum requirements;
- B. Liberally construed in favor of the governing body; and
- C. Deemed neither to limit nor repeal any other powers granted under State statutes.

#### **§42-233.8 Warning and Disclaimer of Liability.**

The degree of flood protection required by this Subpart A is considered reasonable for regulatory purposes and is based on scientific and engineering consideration. Larger floods can and will occur. Actual flood heights may be increased by man-made or natural causes. Subpart A does not imply that land outside the *Special Flood Hazard Areas* or *uses* permitted within such areas will be free from flooding or flood damages. Subpart A shall not create liability on the part of Henderson County or by any officer or employee thereof for any flood damages that result from reliance on this Subpart A or any administrative decision lawfully made hereunder.

#### **§42-234. Administration**

The provisions of Subpart A, related to administration can be found in the following sections:

- A. Designation, Duties and Responsibilities of Floodplain Administrator. (See §42-311 (Henderson County Floodplain Administrator)).
- B. Floodplain Development Permit Application Requirements and Fees. (See §42-350 (Floodplain Development Permits)).

- C. Special Fill Permit Procedures and Fees. (See §42-355 (Special Fill Permits)).
- D. Variance Procedures. (See §42-368 (Variances (Flood Damage Prevention))).
- E. Appeal Procedures. (See §42-379 (Appeals)).
- F. Corrective Procedures and Penalties for Violation. (See §42-378 (Violations of Article VIII (Natural Resources) Subpart A (Flood Damage Prevention))).

## **§42-235. Flood Hazard Reduction**

### **§42-235.1 General Standards.**

In all *Special Flood Hazard Areas* the following provisions are required.

- A. In the *flood fringe* area as indicated on the *FIRM*, no fill whatsoever shall be allowed except on parcels of land, the boundaries of which are of record in the Henderson County Registry as of the original date of adoption of these regulations (July 5, 2005) , and then only upon no more than 20 percent of the total of the *flood fringe* area contained in each such parcel, except that additional fill may be permitted in the *flood fringe* pursuant to a *special fill permit* (See §42-355 (Special Fill Permits)).
- B. All *new construction* and substantially improvements shall be:
  - (1) Designed (or modified) and adequately anchored to prevent flotation, collapse, or lateral movement of the *structure*.
  - (2) Constructed with materials and utility equipment resistant to flood damage.
  - (3) Constructed by methods and practices that minimize flood damages.
- C. All new utility equipment, substations, lines and other materials used in the provision of services to the public such as telephone, electricity, natural gas, and cable television shall be located outside a *floodplain*, unless no viable alternative exists.
- D. Electrical, heating, ventilation, plumbing, air conditioning equipment, and other service facilities shall be designed and/or located so as to prevent water from entering or accumulating within the components during conditions of flooding to the Regulatory Flood Protection Elevation. These include but are not limited to HVAC equipment, water softener units, bath/kitchen fixtures, ductwork, electrical/gas meter panels/boxes, utility/cable boxes, appliances (i.e. washers, dryers, refrigerator, etc.), hot water heaters, electric outlets/switches.
- E. All new and replacement *water supply systems* shall be located outside the *Special Flood Hazard Area*, unless no other viable alternative exists. Where they must be placed in the *SFHA* the systems shall be designed to minimize or eliminate infiltration of flood waters into the system, and also to meet all other applicable State and local requirements.
- F. All new and replacement sanitary sewage and on-site waste disposal systems shall be located outside the *Special Flood Hazard Area*, unless no other viable alternative exists. Where they must be placed in the *SFHA* the systems shall be designed to minimize or eliminate infiltration of flood waters into the systems and discharges from the systems into flood waters, and also to meet all other applicable State and local requirements.

- G. On-site waste disposal systems constructed near or adjoining *Special Flood Hazard Areas* shall be located and constructed to avoid impairment to them or contamination from them during flooding.
- H. No new private wells shall be located within the *Special Flood Hazard Area* unless no viable alternative exists and that such wells meet all other applicable state and local requirements. Private wells constructed near or adjoining *Special Flood Hazard Areas* shall be located and constructed to minimize or eliminate infiltration of flood water into the system.
- I. Any alteration, repair, reconstruction, or improvements to a *structure* which is in compliance with the provisions of this Subpart A, shall meet the requirements of *new construction* as contained in this Subpart A.
- J. Any fill material on which a *structure* is located shall:
- (1) Be extended to grade ten (10) feet beyond the limits of the *structure* foundation;
  - (2) Be graded to drain;
  - (3) Be protected against *erosion*;
  - (4) Have a side *slope* no steeper than two (2) feet horizontal to one (1) foot vertical;
  - (5) Not contain any contaminated, toxic or hazardous materials; and
  - (6) Be approved before placement.
- M. *Nonconforming structures* or other development may not be enlarged, replaced, or rebuilt unless such enlargement or reconstruction is accomplished in conformance with the provisions of this Subpart A. Provided, however, nothing in this subpart shall prevent the repair, reconstruction, or replacement of a *structure* existing on the original effective date of these regulations (July 5, 2005) and located totally or partially within the *floodway*, *non-encroachment area*, or stream *setback*, provided that the bulk of the *structure* below the *Regulatory Flood Protection Elevation* in the *floodway*, *non-encroachment area*, or stream *setback* is not increased and provided that such repair, reconstruction, or replacement meets all of the other requirements of this Subpart A, and nothing in this Subpart A shall prevent the permitted maintenance, repair, reconstruction or replacement of *agriculture*-related water diversion *structures* where the permit for the same is granted by other than Henderson County. No permit shall be required from Henderson County to reconstruct agricultural development which pre-exists the original effective date of these regulations (July 5, 2005).
- N. The following are permitted *uses* for the *flood fringe*: all *uses* otherwise permitted by the applicable land *use* regulations, so long as such *uses* are in compliance with the terms of this Subpart A.
- O. New *solid waste disposal facilities* and sites, *hazardous waste management facilities*, *solid waste sites*, *salvage yards*, and *chemical storage facilities* shall not be permitted in *Special Flood Hazard Areas*, except by *variance* as specified in Subpart A and §42-368 (Variances (Flood Damage Prevention)). A *structure* or tank for chemical or fuel storage incidental to an allowed *use*, including but not limited to *agriculture*, or to the operation of a water treatment plant or *wastewater* treatment facility may be located in a *Special*

*Flood Hazard Area* only if the *structure* or tank is either elevated or floodproofed to at least the *Regulatory Flood Protection Elevation* and certified according to §42-350 (Floodplain Development Permits) C(2) (Certification Requirements).

- P. All *subdivision* and other development proposals shall:
- (1) Be consistent with the need to minimize flood damage;
  - (2) Have public utilities and facilities such as sewer, gas, electrical, and water systems located and constructed to minimize flood damage;
  - (3) Have adequate drainage provided to reduce exposure to flood hazards; and
  - (4) Have received all necessary permits from those governmental agencies for which approval is required by Federal or State law, including Section 404 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1334.
- Q. When a *structure* is partially located in a *Special Flood Hazard Area*, the entire *structure* shall meet the requirements for *new construction* and *substantial improvements*.
- R. When a *structure* is located in multiple flood hazard zones or in a flood hazard risk zone with multiple *Base Flood Elevations (BFEs)*, the provisions for the more restrictive flood hazard risk zone and the highest *Base Flood Elevation (BFE)* shall apply.

#### **§42-235.2 Specific Standards.**

In all *Special Flood Hazard Areas* where *BFE* data has been provided, as set forth in this Subpart A, the following provisions in addition to those required in §42-235.1 (General Standards) are required:

- A. Residential Construction. *New construction* and *substantial improvement* of any residential *structure* (including *manufactured/mobile homes*) shall have the *reference level*, including *basement*, elevated no lower than the *Regulatory Flood Protection Elevation*.
- B. Nonresidential Construction. *New construction* and *substantial improvement* of any nonresidential *structure* shall have the *reference level*, including *basement*, elevated no lower than the *Regulatory Flood Protection Elevation*. *Structures* located in A, AE and AO Zones may be floodproofed to the *Regulatory Flood Protection Elevation* in lieu of elevation provided that all areas of the *structure*, together with attendant utility and sanitary facilities, below the required flood protection elevation are watertight with walls substantially impermeable to the passage of water, using structural components having the capability of resisting hydrostatic and hydrodynamic loads and the effect of buoyancy. For AO Zones, the floodproofing elevation shall be in accordance with §42-235.7 (Standards for Areas of Shallow Flooding (Zone AO)). A registered professional engineer or architect shall certify that the floodproofing standards of this subsection are satisfied. Such certification shall be provided to the *Floodplain Administrator* as set forth in §42-350 (Floodplain Development Permits) C (2) (Certification Requirements), along with operational plan and the maintenance and inspection plan.
- C. Manufactured/Mobile Homes. No *manufactured/mobile homes* shall be permitted except replacement *manufactured/mobile homes* in an existing *manufactured home park*,

existing *manufactured home subdivision*, or replacement *manufactured/mobile homes* on an individual parcel, provided the following conditions are met:

- (1) *Manufactured/mobile homes* shall be elevated so that the *reference level* of the *manufactured/mobile home* is no lower than the *Regulatory Flood Protection Elevation*.
- (2) *Manufactured/mobile homes* shall be securely anchored to an adequately anchored foundation to resist flotation, collapse, and lateral movement in accordance with the State of North Carolina Regulations for Manufactured Homes adopted by the Commissioner of Insurance pursuant to *NCGS §143-143.15*. Additionally, when the elevation would be met by an elevation of the chassis 36 inches or less above the grade at the site, the chassis shall be supported by reinforced piers or engineered foundation system. When the elevation of the chassis is above 36 inches in height, an engineering certification is required.
- (3) All enclosures or skirting shall be in accordance with §42-235.2 (Specific Standards) D (Elevated Structures).
- (4) An evacuation plan must be developed for evacuation of all residents of all substantially improved or substantially damaged *manufactured/mobile home parks* or *subdivisions* located within *flood prone areas*. This plan shall be filed with and approved by the *Floodplain Administrator* and the local Emergency Management coordinator.

D. Elevated Structures. Enclosed areas, of *new construction* or substantially improved *structures*, which are below the *Regulatory Flood Protection Elevation* shall:

- (1) Not be designed to be used for human habitation, but shall only be used for parking of *vehicles*, *structure* access, or limited storage of maintenance equipment used in connection with the premises. Access to the enclosed area shall be the minimum necessary to allow for parking of *vehicles* (*garage* door) or limited storage of maintenance equipment (standard exterior door) or entry to the living area (stairway or elevator). The interior portion of such enclosed area shall not be partitioned or finished into separate rooms, except to enclose storage areas;
- (2) Be constructed entirely of flood resistant materials at least to the *Regulatory Flood Protection Elevation*;
- (3) Include, in Zones A, AO and AE, flood openings to automatically equalize hydrostatic flood forces on walls by allowing for the entry and exit of floodwaters. To meet this requirement, the openings must either be certified by a professional engineer or architect or meet or exceed the following minimum design criteria:
  - a. Provide a minimum of two (2) openings on different sides of each enclosed area subject to flooding;
  - b. The total net area of all openings must be at least one (1) square inch for each square foot of each enclosed area subject to flooding;
  - c. If a *structure* has more than one (1) enclosed area, each area must have flood openings to allow floodwater to automatically enter and exit;



- d. The bottom of all required openings shall be no higher than one (1) foot above the adjacent grade; and,
- e. Flood openings may be equipped with screens, louvers, or other opening coverings or devices provided they permit the automatic flow of floodwaters in both directions.

Foundation enclosures made of flexible skirting are not considered enclosures for regulatory purposes, and, therefore, do not require openings. Masonry or wood skirting, regardless of structural status, is considered an enclosure and requires openings as outlined above.

E. Additions/Improvements.

(1) *Additions* and/or improvements to *pre-FIRM structures* where the *addition* and/or improvements in combination with any interior modifications to the existing *structure* are:

- a. Not a *substantial improvement*, the *addition* and/or improvements must be designed to minimize flood damages and must not be any more *nonconforming* than the existing *structure*.
- b. A *substantial improvement*, both the existing *structure* and the *addition* and/or improvements must comply with the standards for *new construction*.

(2) *Additions* to *post-FIRM structures* with no modifications to the existing *structure* other than standard door in the common wall shall require only the *addition* to comply with the standards for *new construction*.

(3) *Additions* and/or improvements to *post-FIRM structures* where the *addition* and/or improvements in combination with any interior modifications to the existing *structure* are:

- a. Not a *substantial improvement*, the *addition* and/or improvements only must comply with the standards for new construction.
- b. A *substantial improvement*, both the existing *structure* and the *addition* and/or improvements must comply with the standards for new construction.

(4) Where a fire wall or independent perimeter load-bearing wall is provided between the *addition* and the existing *structure*, the addition(s) shall be considered a separate *structure* and only the *addition* must comply with the standards for *new construction*.

F. Recreational Vehicles. *Recreational vehicles (RVs)* shall either:

- (1) Be on site for fewer than 180 consecutive days and be fully licensed and ready for highway use (a *recreational vehicle* is ready for highway use if it is on its wheels or jacking system, is attached to the site only by quick disconnect type utilities, and has no permanently attached *additions*); or

- (2) Meet all the requirements for *new construction*. (See also §42-63 (Supplemental Requirements to the Table of Permitted and Special Uses) SR 4.18 (Recreational Vehicle Park)).

G. Temporary Nonresidential Structures. Prior to the issuance of a Floodplain Development Permit for a *temporary structure*, *applicants* must submit to the *Floodplain Administrator* a plan for the removal of such *structure(s)* in the event of a hurricane, flash flood or other type of flood warning notification. The following information shall be submitted in writing to the *Floodplain Administrator* for review and written approval:

- (1) A specified time period for which the *temporary use* will be permitted, time specified may not exceed three (3) months, renewable up to one (1) year;
- (2) The name, address, and phone number of the individual responsible for the removal of the *temporary structure*;
- (3) The timeframe prior to the event at which a *structure* will be removed (i.e. minimum of 72 hours before landfall of a hurricane or immediately upon flood warning notification);
- (4) A copy of the contract or other suitable instrument with the entity responsible for physical removal of the *structure* insuring the availability of removal equipment when needed; and
- (5) Designation, accompanied by documentation, of a location outside the *Special Flood Hazard Area* to which the *temporary structure* will be moved.

H. Accessory Structures. When *accessory structures* (sheds, detached garages, etc.) are to be placed within a *Special Flood Hazard Area*, the following criteria shall be met:

- (1) *Accessory structures* shall not be used for human habitation (including working, sleeping, living, cooking or restroom areas);
- (2) *Accessory structures* shall not be temperature controlled;
- (3) *Accessory structures* shall be designed to have low flood damage potential;
- (4) *Accessory structures* shall be constructed and placed on the *structure* site so as to offer the minimum resistance to the flow of floodwaters;
- (5) *Accessory structures* shall be firmly anchored in accordance with §42-235.1 (General Standards) B(1);
- (6) All service facilities such as electrical and heating equipment shall be installed in accordance with §42-235.1 (General Standards) B(2);
- (7) Flood openings to facilitate automatic equalization of hydrostatic flood forces shall be provided below *Regulatory Flood Protection Elevation* in conformance with §42-235.2 (Specific Standards) D (Elevated Structures) (3);
- (8) An *accessory structure* with a *footprint* less than 150 square feet does not require an elevation or *floodproofing* certificate (a Floodplain Development Permit is still required). Elevation or *floodproofing* certifications are required for all other *accessory structures* in accordance with §42-350 (Floodplain Development Permits) C (2) (Certification Requirements).

**§42-235.3 Subdivisions, Manufactured Home Parks, Manufactured Home Subdivisions, And Other Residential Development.**

No new *manufactured home parks* or *manufactured home subdivisions* shall be allowed within a *Special Flood Hazard Area* (except that where real estate located within a *Special Flood Hazard Area* which is a part of such *manufactured home park* or *subdivision* and upon which no development has occurred can be considered as “*open space*” within such *park* or *subdivision*). In addition, *manufactured home parks* and *manufactured home subdivisions* existing on the date of original enactment (July 5, 2005) of this Subpart A may not be expanded. All other *subdivisions* or other *residential development* located wholly or in part within a *Special Flood Hazard Area* shall:

- A. Be consistent with the need to minimize flood damage;
- B. Have public utilities and facilities such as sewer, gas, electrical, and water systems located and constructed to minimize flood damage;
- C. Have adequate drainage provided to reduce exposure to flood hazards; and,
- D. Have *Base Flood Elevation (BFE)* data provided if development is greater than the lesser of five (5) acres or 50 *lots / manufactured/mobile home sites*. Such *Base Flood Elevation (BFE)* data shall be adopted by reference in accord with §42-233.2 (Basis for Establishing the Special Flood Hazard Areas)in implementing this Subpart A.

**§42-235.4 Standards for Floodplains Without Established Base Flood Elevations.**

Within the *Special Flood Hazard Areas* designated as Approximate Zone A and established in§42-233.2 (Basis for Establishing the Special Flood Hazard Areas), where no *BFE* data has been provided by *FEMA*, the following provisions, in addition to §42-235.1 (General Standards), shall apply:

- A. No *encroachments*, including fill, new construction, *substantial improvements* or new development shall be permitted within a distance of 20 feet from each side of the stream measured from the top of the bank or five (5) times the width of the stream, whichever is greater, unless certification with supporting technical data by a registered professional engineer is provided demonstrating that such *encroachments* shall not result in any increase in flood levels during the occurrence of the *base flood* discharge.
- B. The *BFE* used in determining the *Regulatory Flood Protection Elevation* shall be determined based on one (1) of the following criteria set in priority order:
  - (1) When *BFE* data is available from other sources, such as Federal, State or other, all *new construction* and *substantial improvements* within such areas shall also comply with all applicable provisions of this subpart and shall be elevated or floodproofed in accordance with standards in this §42-235.1 (General Standards) and §42-235.2 (Specific Standards).
  - (2) When *floodway* or *non-encroachment area* data are available from a Federal, State, or other source, all *new construction* and *substantial improvements* within *floodway* and *non-encroachment areas* shall also comply with the requirements of §42-235.2 (Specific Standards) and §42-235.6 (Floodways and Non-Encroachment Areas).

- (3) When a *subdivision, manufactured home park* or other development proposal is greater than five (5) acres or has more than 50 *lots/manufactured home sites/spaces*, *BFE* data shall be provided. Such *BFE* data shall be adopted by reference in accordance with §42-233.2 (Basis for Establishing the Special Flood Hazard Areas).
- (4) When *BFE* data is not available from a Federal, State, or other source as outlined above, the *reference level* shall be elevated or floodproofed to or above the *Regulatory Flood Protection Elevation* as defined in Article XIV (Definitions).

**§42-235.5 Standards for Riverine Floodplains With Base Flood Elevations but Without Established Floodways or Non-encroachment Areas.**

Along rivers and streams where *BFE* data is provided by FEMA or is available from another source but neither *floodway* nor *non-encroachment areas* are identified for a *Special Flood Hazard Area* on the *FIRM* or in the FIS reports, the following requirements shall apply to all development within such areas:

- A. Standards outlined in §42-235 (Flood Hazard Reduction); and
- B. Until a regulatory *floodway* or *non-encroachment area* is designated, No *encroachments*, including fill, *new construction*, *substantial improvements*, or other development, shall be permitted unless certification with supporting technical data by a registered professional engineer is provided demonstrating that the cumulative effect of the proposed development, when combined with all other existing and anticipated development, will not increase the *water surface elevation* of the *base flood* more than one (1) foot at any point within the community.

**§42-235.6 Floodways or Non-encroachment Areas.**

Areas designated as *floodways* or *non-encroachment areas* are located within the Special Flood Hazard Areas established in §42-233.2 (Basis for Establishing the Special Flood Hazard Areas). The floodways and non-encroachment areas are extremely hazardous areas due to the velocity of floodwaters that have erosion potential and carry debris and potential projectiles. The following provisions, in addition to the standards outlined in §42-235.1 (General Standards) and §42-235.2 (Specific Standards), shall apply to all development within such areas.

- A. No *encroachments*, including fill, new construction or substantial improvements shall be permitted unless:
  - (1) The structure is a *functionally dependent facility*, excluding *enclosed structures*, new water and sewer lines provided no viable alternative exists, recreational *uses* (excluding *enclosed structures*) and streambank restoration projects, provided the requirements of §42-235.2 (Specific Standards) and §42-235.6 (Floodways or Non-Encroachment Areas) A (2) are met;
  - (2) The parcel *owner* first having obtained and submitted to the *Floodplain Administrator* an acceptable certification by a registered professional engineer proving that the anticipated *encroachment(s)* shall not result in any increase in the elevation of the regulatory flood during an occurrence of the *base flood*. The *Floodplain Administrator* shall require documentation of the certification which shall include either:

- a. A completed “engineering no-rise” certification form as published by *FEMA*, or acceptable alternative form approved by *FEMA* together with:
    - 1. Technical documentation in the form of detailed site and construction plans, showing that all requirements of this Subpart A are met;
    - 2. Technical documentation in the form of hydraulic analysis of the existing and proposed conditions. This documentation shall be either: complete runs of existing and proposed conditions using the HEC II/HEC-RAS step backwater analysis computer program as prepared by the US Army Corps of Engineers for the analysis of flow plan hydraulics; or
    - 3. An alternative method currently approved by *FEMA* for use in the revision process for *FEMA* flood maps. In this case, the engineer shall provide a letter from *FEMA* indicating that the method used is acceptable; or
  - b. A Conditional Letter of Map Revision (CLOMR) which has been approved by FEMA. A Letter of Map Revision (LOMR) must also be obtained upon completion of the proposed encroachment.
- B. If 203.6 (Floodways of Non-encroachment Areas) A is satisfied, all development shall comply with all applicable flood hazard reduction provisions of this Subpart A.
- C. No *manufactured/mobile homes* shall be permitted, except replacement *manufactured/mobile homes* in an existing *manufactured home park* or *subdivision*, provided the following provisions are met:
- (1) The anchoring and the elevation standards of §42-235.2 (Specific Standards) C (Manufactured/Mobile Homes); and
  - (2) The no encroachment standard of §42-235.6 (Floodways of Non-encroachment Areas).

**§42-235.7 Standards for Areas of Shallow Flooding (Zone AO).**

Located within the *Special Flood Hazard Areas* established in §42-233.2 (Basis for Establishing the Special Flood Hazard Areas) designated as shallow flooding areas. These areas have special flood hazards associated with base flood depths of one (1) to three (3) feet where a clearly defined channel does not exist and where the path of flooding is unpredictable and indeterminate. In addition to §42-235.1 (General Standards) and §42-235.2 (Specific Standards), all *new construction* and *substantial improvements* shall meet the following requirements:

- A. The *reference level* shall be elevated at least as high as the depth number specified on the *FIRM*, in feet, plus a *freeboard* of two (2) feet, above the *highest adjacent grade*; or at least four (4) feet above the *highest adjacent grade* if no depth number is specified.
- B. Nonresidential *structures* may, in lieu of elevation, be floodproofed to the same level as required by §42-235.7 (Standards for Areas of Shallow Flooding (Zone AO)) (1) so that the *structure*, together with attendant utility and sanitary facilities, below that

level shall be watertight with walls substantially impermeable to the passage of water and with structural components having the capability of resisting hydrostatic and hydrodynamic loads and effects of buoyancy. Certification is required in accordance with §42-350 (Floodplain Development Permits) C (2) (Certification Requirements) and §42-235.2 (Specific Standards) B (Nonresidential Construction).

- C. Adequate drainage paths shall be provided around *structures* on slopes, to guide flood waters around and away from the *structures*.

## **§42-236. Legal Status**

### **§42-236.1 Effect on Rights and Liabilities Under the Existing Flood Damage Prevention Regulations.**

This Subpart A in part comes forward by re-enactment of some of the provisions of the Flood Damage Prevention Ordinance enacted July 5, 2005 as amended, and it is not the intention to repeal but rather to re-enact and continue to enforce without interruption of such existing provisions, so that all rights and liabilities that have accrued thereunder are reserved and may be enforced. The enactment of this ordinance shall not affect any action, suit or proceeding instituted or pending. All provisions of the Flood Damage Prevention Ordinance of Henderson County enacted on July 5, 2005, as amended, which are not reenacted herein are repealed.

The dates of the initial flood damage prevention ordinance for each municipal jurisdiction within Henderson County are as follows:

Town of Fletcher, dated January 13, 2003  
City of Hendersonville, dated January 7, 1982  
Town of Laurel Park, dated December 20, 2005

### **§42-236.2 Effect on Outstanding Floodplain Development Permits.**

Nothing herein contained shall require any change in the plans, construction, size or designated *use* of any development or any part thereof for which a Floodplain Development Permit has been granted by the *Floodplain Administrator* or his or her authorized agents before the time of passage of this Subpart A; provided, however, that when construction is not begun under such outstanding permit within a period of six (6) months subsequent to passage of this subpart or any revision thereto, construction or *use* shall be in conformity with the provisions of this Subpart A.

### **§42-236.3 Effect on Outstanding Building Permits.**

Nothing herein contained shall require any change in the plans, construction, size or designated *use* of any development or any part thereof for which a Building Permit has been granted by the Building Codes Administrator or his authorized agents before the time of passage of this Subpart A (July 5, 2005); provided, however, that when construction is not begun under such outstanding permit within a period of six (6) months subsequent to passage of this subpart or any revision thereto, construction or *use* shall be in conformity with the provisions of this Subpart A.

### **§42-236.4 Effective Date:**

Subpart A originally became effective 30 July 2005 as amended through 1 October 2008.

### **§42-237. Reserved**

## Subpart B. Water Quality

### §42-238. General Provisions

#### §42-238.1 Statutory Authorization

This Subpart B is adopted pursuant to North Carolina law, including but not limited to Article 14, Section 5 of the Constitution of North Carolina; *NCGS* 143-214.7 and rules promulgated by the North Carolina Environmental Management Commission (*NCEMC*) thereunder; Session Law 2004-163; *NCGS* 160A, Article 19; *NCGS* 160A-174 and 185; *NCGS* 113A, Article 4; *NCGS* 143, Article 21, Part 6; *NCGS* 153A, Article 18 (including Parts 1, 2, and 3); *NCGS* 153A-324, 330, 331, and 340; and the authority vested by *NCGS* Chapter 153A, Article 6, Section 121 and Chapter 143, Article 21 (Watershed and Air Resources).

Further, the Federal Water Pollution Control Act of 1972 (“Clean Water Act”) and federal Water Quality Rules promulgated under it, as well as rules of the *NCEMC* promulgated in response to federal Phase II requirements, compel certain urbanized areas, including this jurisdiction, to adopt minimum *stormwater* controls such as those included in this Subpart B.

#### §42-238.2 Effect on Other Laws and Agreements

This Subpart B shall not be construed to repeal or modify applicable local, state and federal laws, except that to the extent that the provisions of this Subpart B conflict with any applicable local, state or federal laws, the most stringent of all applicable laws shall govern. It is not intended that these regulations interfere with any *easement*, covenants or other agreements between parties. However, if the provisions of these regulations impose greater restrictions or higher standards for the *use* of a *structure* or land, then the provisions of these regulations shall control.

#### §42-238.3 Findings.

- A. *Development* and *redevelopment* alter the hydrologic response of local *watersheds* and as reduce groundwater recharge increase:
  - (1) *Stormwater runoff* rates and volumes,
  - (2) *Flooding*,
  - (3) *Soil erosion*,
  - (4) Stream channel *erosion*,
  - (5) Nonpoint and point source pollution, and
  - (6) *Sediment* transport and deposition.
- B. Changes in *stormwater runoff* contribute to increased quantities of water-borne pollutants and alterations in hydrology that are harmful to public health and safety and the natural environment;
- C. These effects can be managed and minimized by applying proper design and well-planned controls to manage *stormwater runoff* from *development* sites; and
- D. The Federal Water Pollution Control Act of 1972 (“Clean Water Act”) and federal Phase II Stormwater Rules promulgated under it, as well as rules of the North Carolina Environmental Management Commission promulgated in response to federal Phase II

requirements, compel certain urbanized areas, including this jurisdiction, to adopt minimum stormwater controls such as those included in this Subpart B.

- E. It is the intention of the Board of Commissioners to enact provisions which are identical to those existing under the laws of the State of North Carolina, and provisions which in no event are more restrictive of the landowners of Henderson County than those of the State of North Carolina.

**§42-238.4 Purpose.**

- A. General. The provisions established in this Subpart B are designed to protect, maintain, and enhance public health, safety, environment and general welfare and protect water and aquatic resources by:
- (1) Managing (by enforcing standards which shall limit the impact from existing or potential sources of contamination through the regulation of *lot sizes* and development intensity ) the *uses* of land and *structures* encompassed by *watersheds* in order to maintain the high quality of surface water in these *watersheds*;
  - (2) Managing (by establishing minimum requirements and procedures to control the adverse effects of increased *post-development stormwater runoff* and nonpoint and point source pollution associated with new *development* and *redevelopment*) construction-related and *post-development stormwater runoff* to minimize damage to public and private property and infrastructure;
- B. Specific. This Subpart B seeks to meet its general purpose by:
- (1) Establishing decision-making processes for *development* that protect the integrity of *watersheds* and preserve the health of water resources;
  - (2) Requiring new *development* and *redevelopment* maintain the *pre-development* hydrologic response in their *post-development* state as nearly as practicable for the applicable design storm to reduce flooding, streambank *erosion*, nonpoint and point source pollution and increases in stream temperature, and to maintain the integrity of stream channels and aquatic habitats;
  - (3) Establishing minimum *post-development stormwater* management standards and design criteria for the regulation and control of *stormwater runoff* quantity and quality;
  - (4) Establishing design and review criteria for the construction, function, and use of *structural stormwater BMPs* that may be used to meet the minimum *post-development stormwater* management standards;
  - (5) Encouraging the use of better management and site design practices, such as the use of vegetated conveyances for *stormwater* and the preservation of greenspace, *riparian buffers* and other conservation areas to the maximum extent practicable;
  - (6) Establishing provisions for the long-term responsibility for and maintenance of *structural stormwater BMPs* and nonstructural *stormwater BMPs* to ensure that they continue to function as designed, are maintained appropriately, and pose no threat to public safety;



- (7) Establishing administrative procedures for the submission, review, approval and disapproval of *stormwater* management plans, for the inspection of approved projects, and to assure appropriate long-term maintenance.

#### **§42-238.5 Lands to Which This Subpart B Applies.**

This Subpart B shall apply to all land-disturbing activity, *development* and *redevelopment* including, but not limited to, site plan applications, *subdivision* applications, and grading applications) within the unincorporated areas of Henderson County and its municipalities as allowed by agreement between local governments, other appropriate legal instrument or law.

*Water supply watershed* regulations shall apply within any unincorporated areas and also to incorporated areas specifically requesting enforcement by Henderson County upon the consent of the Commissioners, and which are designated as a public *water supply watershed* by NCEMC and delineated on the map titled "Henderson County Water Supply Watershed Protection Map," herein referred to as the "*Watershed Map*," as amended. (In making such a request, the city or town must comply with the requirements of NCGS §153A-122.) The *Watershed Map* and all explanatory matter contained thereon accompany and are hereby made a part of this Chapter. This Chapter shall be permanently kept, along with subsequent amendments thereto, on file in the office of the Clerk to the Board of Commissioners.

In cases where a municipality extends its extraterritorial jurisdiction into a *watershed* herein defined, the restrictions applicable to development in that *watershed* shall remain in effect until they are amended or repealed or until the County and such municipality, by mutual consent, transfer authority to administer and enforce *watershed* regulations not inconsistent with state rules.

*Stormwater management* regulations shall apply within any unincorporated and also to any incorporated areas specifically requesting enforcement by Henderson County upon the consent of the Commissioners, provided that areas designated as a public *water supply watershed* by NCEMC and delineated on the *Watershed Map* are specifically excluded. A map shall be maintained by the *Stormwater Administrator* indicating the geographic location of all *structural best management practices* permitted under this Subpart B.

#### **§42-238.6 Designation of Water Quality Administrator**

The "*Water Quality Administrator*" hereby appointed and authorized to administer and enforce the *water supply watershed* and *stormwater* regulations under the terms and conditions of this Subpart B.

#### **§42-239. Water Supply Watershed Regulations**

##### **§42-239.1 Establishment of Watershed Protection Overlay District**

The Watershed Protection Overlay District (and the subdistricts thereof) is/are outlined in Article II of this Chapter. The Watershed Protection Overlay District, and all regulations outlined therein, is included by reference in this Subpart B.

##### **§42-239.2 Water Supply Watershed Map**

For purposes of this Subpart B, all *watershed* areas designated by the North Carolina Environmental Management Commission which are within the County's jurisdiction pursuant to

Article II of this Chapter are shown on the Official Water Supply Watershed Map which is maintained by the *Water Quality Administrator*.

### **§42-239.3 Interpretation of Boundaries of the Water Supply Watershed Map**

Where uncertainty exists as to the boundaries of the *watershed* areas, as shown on the *Watershed Map*, the following rules shall apply. Where:

- A. Area boundaries are indicated as approximately following either *road*, *alley*, railroad or highway lines or center lines thereof, such lines shall be construed to be said boundaries;
- B. Area boundaries are indicated as approximately following *lot* lines, such *lot* lines shall be construed to be said boundaries. However, a surveyed *plat* prepared by a professional land surveyor may be submitted to Henderson County as evidence that one or more properties along these boundaries do not lie within the *watershed* area;
- C. Area boundaries lie at a scaled distance more than 25 feet from any parallel *lot* line, the location of *watershed* area boundaries shall be determined by *use* of the scale appearing on the *Watershed Map*;
- D. Area boundaries lie at a scaled distance of 25 feet or less from any parallel *lot* line, the location of *watershed* area boundaries shall be construed to be the *lot* line; and
- E. Other uncertainty exists, the *Water Quality Administrator* shall interpret the *Watershed Map* as to the location of such boundaries. This decision may be *appealed* to the Water Quality Board.

### **§42-239.4 Establishment of Water Supply Watershed Permits**

A Water Supply Watershed Use Permit, Watershed Protection Compliance Permit and Watershed High-Density Development Permit (§42-361) shall be required in conformance with the provisions of this Chapter for development activities within the *water supply watershed*.

### **§42-239.5 Application of Regulations**

- A. Minimizing Impact on Water Quality. No *building* or land shall hereafter be used and no development shall take place except in conformity with the regulations herein specified for the *watershed* area in which it is located. All development must minimize built-upon surface area; direct *stormwater* away from surface waters; and incorporate *best management practices* to minimize water quality impacts.
- B. Prevent Impact on Water Quality and Public Health. No activity, situation, *structure* or land *use* shall be allowed within the *watershed* which poses a threat to water quality and the public health, safety and welfare. Such conditions may arise from inadequate on-site sewage systems which utilize ground absorption; inadequate *sedimentation* and *erosion* control measures; the improper storage or disposal of junk, trash or other refuse within a *buffer* area; the improper management of *stormwater runoff*; or any other situation found to pose a threat to water quality.
- C. Nontransferable Area. No area required for the purpose of complying with the provisions of this Subpart B shall be included in the area required for another *building*.

### **§42-239.6 Subdivisions within the Water Supply Watershed**

*Subdivisions* of land within defined *watershed* areas shall require a *plat* to be prepared, approved and recorded pursuant to this Subpart B. No *subdivision plat* within a *water supply watershed* shall be filed or recorded by the Register of Deeds until it has been approved in accordance with the provisions of this Chapter and certified as being in compliance with the terms of this Subpart B by the *Water Quality Administrator*. Likewise, the Clerk of Superior Court shall not order or direct the recording of a *plat* if the recording of such *plat* would be in conflict with this Subpart B. *Subdivisions* within a designated *watershed* area shall adhere to the following additional processes:

- A. Upon receipt of an application for the *subdivision* of property as set forth in Article III, such application shall be reviewed by the *Water Quality Administrator* to determine if such property lies wholly or in part within a *water supply watershed* area.
- B. If a parcel is determined to be in a *watershed*, the *Water Quality Administrator* shall determine if such application complies with the requirements of this Chapter and shall certify to such on any application forms, on preliminary development drawings and on any *plat* proposed for recordation. The certification shall state:

I certify that property shown on this plat is located in a watershed area classified \_\_\_\_\_ . The plat shown hereon complies with the Henderson County Water Supply Watershed Protection Requirements and is approved for recordation in the Register of Deeds office.

\_\_\_\_\_

Water Quality Administrator

\_\_\_\_\_

Date

This certification shall constitute *water supply watershed* development approval and shall not operate so as to amend, repeal or replace any other approvals or certifications required on such *plat* by other applicable local, state or federal laws.

#### **§42-239.7 Exceptions for Existing Development.**

*Existing development* is not subject to the requirements of this Subpart B. Expansions to *structures* classified as *existing development* must meet the requirements of this Subpart B; however, the *built-upon area* of the *existing development* is not required to be included in the density calculations.

#### **§42-240. Stormwater Management Regulations**

##### **§42-240.1 Stormwater BMP Manual**

- A. Stormwater BMP Manual. The *Water Quality Administrator* shall use the policy, criteria, and information, including technical specifications and standards, in the *Stormwater BMP Manual* as the basis for decisions about *Stormwater Management Permits* and about the design, implementation and performance of *structural stormwater BMPs* and non-structural *stormwater BMPs*. The *Stormwater BMP Manual* includes a list of acceptable *stormwater* treatment practices, including specific design criteria for each *stormwater* practice. *Stormwater* treatment practices that are designed, constructed, and maintained in accordance with these design and sizing criteria will be presumed to meet the minimum water quality performance standards of the Phase II laws.

- B. Relationship of Stormwater BMP Manual to Other Laws and Regulations. If the specifications or guidelines of the *Stormwater BMP Manual* are more restrictive or apply a higher standard than other laws or regulations, that fact shall not prevent application of the specifications or guidelines in the *Stormwater BMP Manual*.
- C. Changes to Standards and Specifications. If the standards, specifications, guidelines, policies, criteria, or other information in the *Stormwater BMP Manual* are amended subsequent to the submittal of an application for approval pursuant to this Subpart B but prior to approval, the new information shall control and shall be utilized in reviewing the application and in implementing this Subpart B with regard to the application.

#### **§42-240.2 Establishment of Stormwater Management Permit**

- A. A Stormwater Management Permit (see §42-357 (Stormwater Management Permit)) shall not be required for *development* and *redevelopment* that: (1) cumulatively disturbs less than one (1) acre and is not part of a *larger common plan of development or sale* is exempt from the provisions of this Subpart B; (2) occurs within a designated *water supply watershed*; or (3) occurs within a larger development for which a stormwater management permit has been issued, provided the property owner complies with the requirements of the overall project's stormwater management permit. A Stormwater Management Permit (see §42-357 (Stormwater Management Permit)) shall be required in conformance with the provisions of this Chapter for:
  - (1) *Development* and *redevelopment* that cumulatively disturbs more than one (1) acre and is not part of a *larger common plan of development or sale*;
  - (2) *Development* and *redevelopment* that disturb less than one (1) acre where such activities are part of a *larger common plan of development or sale*, even though multiple, separate or distinct activities take place at different times on different schedules; or
  - (3) Any activity not exempt from permit requirements of Section 404 of the federal Clean Water Act as specified in 40 CFR 232 (primarily, ongoing *agriculture* and *forestry* activities).
- B. Where a Stormwater Management Permit is required for a *high-density project* as noted in §42-240.5 (Standards for High-Density Projects), *stormwater* control measures shall be implemented that comply with each of the following standards:
  - (1) The measures shall control and treat *stormwater runoff* from the first inch of rain over a 24-hour period. Runoff volume drawdown time shall be a minimum of 48 hours, but not more than 120 hours.
  - (2) All structural *stormwater* treatment systems used to meet these requirements shall be designed to have a minimum of 85% average annual removal for Total Suspended Solids (TSS).
  - (3) General engineering design criteria for all projects shall be in accordance with 15A NCAC 2H .1008(c), as explained in the *Stormwater BMP Manual*.

No *development* or *redevelopment* shall occur except in compliance with the provisions of this Subpart B or unless exempted. No *development* for which a permit is required pursuant to this

Subpart B shall occur except in compliance with the provisions, conditions, and limitations of the permit.

The approval of the *Stormwater Management Permit* shall require an enforceable restriction on property usage that runs with the land, such as a recorded deed restriction or protective covenants, to ensure that future *development* and *redevelopment* maintains the site consistent with the approved project plans.

### **§42-240.3 Determining Project Density Type**

*A low-density project:*

- A. Has no more than two (2) *dwelling units per acre* or 24 percent *built-upon area* for all *residential* and *non-residential development*; and
- B. The overall *density* of a project is at or below the relevant low-density threshold (and which may contain areas with a *density* greater than the overall project *density*, provided the project meets or exceeds the post construction model practices for *low-density projects* and, to the maximum extent practicable, locates the higher-density portion in upland areas and away from surface waters and drainageways).

*A high-density project* is anything that exceeds the thresholds outlined herein above.

### **§42-240.4 Standards for Low-Density Projects**

*Stormwater runoff* from the *development* shall be transported from the *development* by vegetated conveyances to the maximum extent practicable.

### **§42-240.5 Standards for High-Density Projects**

*High-density projects* shall implement *stormwater* control measures that comply with each of the standards outlined in §42-240.2 (Establishment of Stormwater Management Permit) B.

### **§42-240.6 Standards for Stormwater Control Measures**

- A. Evaluation According to Contents of Stormwater BMP Manual. All *stormwater* control measures and *structural stormwater BMPs* required under this Subpart B shall be evaluated by the *Water Quality Administrator* according to the policies, criteria, and information, including technical specifications and standards and the specific design criteria for each *stormwater* practice, in the *Stormwater BMP Manual*. The *Water Quality Administrator* shall determine whether proposed *stormwater BMPs* will be adequate to meet Subpart B requirements.
- B. Determination of Adequacy; Presumptions and Alternatives. *Stormwater* treatment practices that are designed, constructed, and maintained in accordance with the criteria and specifications in the *Stormwater BMP Manual* will be presumed to meet the minimum water quality and quantity performance standards of Subpart B. Whenever an *applicant* proposes to utilize a practice or practices not designed and constructed in accordance with the criteria and specifications in the *Stormwater BMP Manual*, the *applicant* shall have the burden of demonstrating that the practice(s) will satisfy the minimum water quality and quantity performance standards of Subpart B. The *Water Quality Administrator* may require the *applicant* to provide the documentation, calculations, and examples necessary so he/she may determine whether such an affirmative showing is made.

- C. Separation from Seasonal High Water Table. For *stormwater BMPs* that require a separation from the seasonal high water table, the separation shall be provided by at least 12 inches of naturally occurring soil above the seasonal high water table.

#### **§42-240.7 Standards for Trout Waters**

In addition to the standards for handling *stormwater* set out in the *Stormwater BMP Manual*, *development* and *redevelopment* that drains in whole or part to class TR waters shall design and implement the best *stormwater* practices that do not result in a sustained increase in receiving water temperature, while still meeting the other requirements of Subpart B.

#### **§42-240.8 Transitional Provisions**

- A. Final Approvals, Complete Applications. All *development* and *redevelopment* projects for which complete and full applications were submitted and approved by the *County* prior to the effective date of Subpart B and which remain valid, unexpired, unrevoked and not otherwise terminated at the time of *development* or *redevelopment* shall be exempt from complying with all provisions of this subpart dealing with the control and/or management of post-construction runoff, but shall be required to comply with all other applicable provisions.

A phased *development* plan shall be deemed approved prior to the effective date of Subpart B if it has been approved by all necessary government units, it remains valid, unexpired, unrevoked and not otherwise terminated, and it shows for:

- (1) The initial or first phase of *development*, the type and intensity of use for a specific parcel or parcels, including at a minimum, the boundaries of the project and a *subdivision* plan that has been approved.
  - (2) Any subsequent phase of *development*, sufficient detail so that implementation of the requirements of Subpart B to that phase of *development* would require a material change in that phase of the plan.
- B. Violations Continue. Any violation of provisions existing on the effective date of Subpart B shall continue to be a violation under this Subpart B and be subject to penalties and enforcement under this subpart unless the *use*, *development*, construction, or other activity complies with the provisions of this Subpart B.

#### **§42-240.9 Onsite Wastewater**

- A. Operation and Maintenance Requirements. New and replaced onsite systems for domestic *wastewater* installed after the effective date of Subpart B shall be subject to the same requirements for operation and maintenance as *structural stormwater BMPs* for *stormwater*, including, at a minimum, annual inspection reports and a recorded operation and maintenance agreement, pursuant to §42-241 (Maintenance).
- B. Standards for Operation and Maintenance. Onsite systems for domestic *wastewater* covered by Subpart B shall be operated and maintained so as to avoid adverse effects on surface water and groundwater, including eutrophication of surface water and microbial or nitrate contamination of groundwater. Septic tank residuals shall be pumped whenever necessary to assure the proper operation of the system to meet these standards, and the septage shall be reused or disposed of in a manner that does not present significant risks to human health, surface water or groundwater.

**§42-240.10 Statutory Exceptions (See §42-366 Variances)**

Exceptions shall be granted from the 30 foot landward location of *built-upon area* requirement and deed restrictions/protective covenants requirements in any of the following instances:

B. When there is a lack of practical alternatives for a:

- (1) *Road* crossing,
- (2) *Railroad* crossing,
- (3) Bridge,
- (4) Airport facility,
- (5) Utility crossing
- (6) *Stormwater* management facility,
- (7) *Stormwater* management pond, or
- (8) Utility (including, but not limited to, water, sewer, or gas construction and maintenance corridor)

And such are located, designed, constructed, and maintained to:

- (1) Minimize disturbance,
- (2) Provide maximum nutrient removal,
- (3) Protect against *erosion* and *sedimentation*,
- (4) Have the least adverse effects on aquatic life and habitat,
- (5) Protect water quality to the maximum extent practicable through the use of *BMPs*, and
- (6) Remain 15 feet landward of all perennial and intermittent surface waters (this provision applies only to *stormwater* management facilities, *stormwater* management ponds, and *stormwater* utility).

C. Showing a Lack of Practical Alternatives. A lack of practical alternatives may be shown by demonstrating that, considering the potential for a reduction in size, configuration, or *density* of the proposed activity and all alternative designs, the basic project purpose cannot be practically accomplished in a manner which would avoid or result in less adverse impact to surface waters.

**§42-241. Structural and Nonstructural Stormwater BMPs Maintenance**

**§42-241.1 Dedication of BMPs, Facilities and Improvements**

The *County* may, but is not obligated to, accept dedication of any existing or future *stormwater* management facility for maintenance, provided such facility meets all the requirements of Subpart B and includes adequate and perpetual access and sufficient area, by *easement* or otherwise, for inspection and regular maintenance.

**§42-241.2 General Standards for Maintenance**

- A. Function of Stormwater BMPs As Intended. The *owner* of each *structural stormwater BMP* installed pursuant to Subpart B shall maintain and operate it so as to preserve and continue its function in controlling *stormwater* quality and quantity at the degree or amount of function for which the *structural stormwater BMP* was designed.
- B. Annual Maintenance Inspection and Report. The person responsible for maintenance of any *structural stormwater BMP* installed pursuant to Subpart B shall submit to the *Water*

*Quality Administrator* an inspection report from either a qualified registered North Carolina professional engineer or landscape architect. The inspection report shall contain all of the following:

- (1) The name and address of the land *owner*;
- (2) The recorded book and page number of the *lot* of each *structural BMP*;
- (3) A statement that an inspection was made of all *structural stormwater BMPs*;
- (4) The date the inspection was made;
- (5) A statement that all inspected *structural stormwater BMPs* are performing properly and are in compliance with the terms and conditions of the approved maintenance agreement required by Subpart B; and
- (6) The original signature and seal of the engineer or landscape architect.

All inspection reports shall be on forms supplied by the *Water Quality Administrator*. An original inspection report shall be provided to the *Water Quality Administrator* beginning one (1) year from the date of as-built certification and each year thereafter on or before the date of the as-built certification.

#### **§42-241.3 Operation and Maintenance Agreement**

- A. In General. Prior to the conveyance or transfer of any *lot* or *building* site to be served by a *structural stormwater BMP* pursuant to Subpart B, and prior to issuance of any permit for *development* or *redevelopment* requiring a *structural stormwater BMP* pursuant to Subpart B, the *applicant* or *owner* of the site must execute an operation and maintenance agreement that shall be binding on all subsequent *owners* of the site, portions of the site, and *lots* or parcels served by the *structural BMP*. Until the transference of all property, sites, or *lots* served by the *structural BMP*, the original *owner* or *applicant* shall have primary responsibility for carrying out the provisions of the maintenance agreement.

The operation and maintenance agreement shall require the *owner* or *owners* maintain, repair and, if necessary, reconstruct the *structural BMP*, and shall state the terms, conditions, and schedule of maintenance for the *structural BMP*. In addition, it shall grant the *County* a right of entry in the event that the *Water Quality Administrator* has reason to believe it has become necessary to inspect, monitor, maintain, repair, or reconstruct the *structural BMP*; however, in no case shall the right of entry, of itself, confer an obligation on the *County* to assume responsibility for the *structural BMP*.

The operation and maintenance agreement must be approved by the *Water Quality Administrator* prior to plan approval, and it shall be referenced on the *final plat* and shall be recorded with the *County Register of Deeds* upon *final plat* approval. A copy of the recorded maintenance agreement shall be given to the *Water Quality Administrator* within 14 days following its recordation.

- B. Special Requirement for Homeowners' and Other Associations. For all *structural stormwater BMPs* required pursuant to Subpart B and that are to be or are owned and maintained by a homeowners' association, property owners' association, or similar entity, the required operation and maintenance agreement shall include all of the following provisions:



- (1) Acknowledgment that the association shall continuously operate and maintain the *stormwater* control and management facilities.
- (2) Granting to the *County* a right of entry to inspect, monitor, maintain, repair, and reconstruct *structural stormwater BMPs*.
- (3) Allowing the *County* to recover from the association and its members any and all costs the *County* expends to maintain or repair the *structural stormwater BMPs* or to correct any operational deficiencies. Failure to pay the *County* all of its expended costs, after 45 days written notice, shall constitute a breach of the agreement. In case of a deficiency, the *County* shall thereafter be entitled to bring an action against the association and its members to pay, or foreclose upon the lien hereby authorized by the agreement against the property, or both. Interest, collection costs, and attorney fees shall be added to the recovery.
- (4) A statement that this agreement shall not obligate the *County* to maintain or repair any *structural stormwater BMPs*, and the *County* shall not be liable to any *person* for the condition or operation of *structural stormwater BMPs*.
- (5) A statement that this agreement shall not in any way diminish, limit, or restrict the right of the *County* to enforce any of its ordinances as authorized by law.
- (6) A provision indemnifying and holding harmless the *County* for any costs and injuries arising from or related to the *structural stormwater BMP*, unless the *County* has agreed in writing to assume the maintenance responsibility for the *BMP* and has accepted dedication of any and all rights necessary to carry out that maintenance.

#### **§42-241.4 Inspection Program**

Inspections and inspection programs by the *County* may be conducted or established on any reasonable basis, including but not limited to routine inspections; random inspections; inspections based upon complaints or other notice of possible violations; and joint inspections with other agencies inspecting under environmental or safety laws. Inspections may include, but are not limited to, reviewing maintenance and repair records; sampling discharges, surface water, groundwater, and material or water in *stormwater BMPs*; and evaluating the condition of *stormwater BMPs*.

If the *owner* or occupant of any property refuses to permit such inspection, the *Water Quality Administrator* shall proceed to obtain an administrative search warrant pursuant to *NCGS 15-27.2* or its successor. No *person* shall obstruct, hamper or interfere with the *Water Quality Administrator* while carrying out his/her official duties.

#### **§42-241.5 Reserved**

#### **§42-241.6 Notice to Owners**

- A. Deed Recordation and Indications on Plat. The applicable operations and maintenance agreement, conservation easement, or dedication and acceptance into public maintenance (whichever is applicable) pertaining to every *structural stormwater BMP* shall be referenced on the *final plat* and shall be recorded with the County Register of Deeds upon *final plat* approval. If no *subdivision plat* is recorded for the site, the operations and maintenance agreement, conservation easement, or dedication and acceptance into public

maintenance, whichever is applicable shall be recorded with the *County Register of Deeds* so as to appear in the chain of title of all subsequent purchasers under generally accepted searching principles.

- B. Signage. Where appropriate in the determination of the *Water Quality Administrator* to assure compliance with this Subpart B, *structural stormwater BMPs* shall be posted with a conspicuous *sign* stating who is responsible for required maintenance and annual inspection. The *sign* shall be maintained so as to remain visible and legible.

#### **§42-241.7 Records of Installation and Maintenance Activities**

The *owner* of each *structural stormwater BMP* shall keep records of inspections, maintenance, and repairs for at least five (5) years from the date of creation of the record and shall submit the same upon reasonable request to the *Water Quality Administrator*.

#### **§42-241.8 Nuisance**

The *owner* of each *stormwater BMP*, whether *structural stormwater BMP* or non-structural *BMP*, shall maintain it so as not to create or result in a nuisance condition.

#### **§42-241.9 Maintenance Easement**

Every *structural stormwater BMP* installed pursuant to Subpart B shall be made accessible for adequate maintenance and repair by a maintenance *easement*. The easement shall be recorded and its terms shall specify who may make use of the *easement* and for what purposes.

#### **§42-242. Responsible Persons/Entities**

Any *person* who erects, constructs, reconstructs, alters (whether actively or passively), or fails to erect, construct, reconstruct, alter, repair or maintain any *structure, BMP, practice, or condition* in violation of this Subpart B shall be subject to the remedies, penalties, and/or enforcement actions in accordance with this §42-377 (Violations). *Persons* subject to the remedies and penalties set forth herein may include any architect, engineer, builder, contractor, developer, agency, or any other *person* who participates in, assists, directs, creates, causes, or maintains a condition that results in or constitutes a violation of this Subpart B, or fails to take appropriate action, so that a violation of the same results or persists; or an *owner, any tenant or occupant, or any other person, who has control over, or responsibility for, the use or development* of the property on which the violation occurs. Responsible person(s) shall include but not be limited to:

- A. Person Maintaining Condition Resulting In or Constituting Violation. An architect, engineer, builder, contractor, developer, agency, or any other person who participates in, assists, directs, creates, causes, or maintains a condition that constitutes a violation of this Subpart B or fails to take appropriate action, so that a violation of the same results or persists.
- B. Responsibility For Land or Use of Land. The *owner* of the land on which the violation occurs, any tenant or occupant of the property, any *person* who is responsible for *stormwater* controls or practices pursuant to a private agreement or public document, or any *person, who has control over, or responsibility for, the use, development or redevelopment* of the property.

#### **§42-243. Fees**

The Board of Commissioners shall establish permit review fees as well as policies regarding refund of any fees upon withdrawal of an application, and may amend and update the fees and policies from time to time.

**§42-244. Effective Date**

This stormwater regulations of this Subpart B shall take effect September 1, 2010.

**§42-245. Severability**

If the provisions of any section, subsection, paragraph, subdivision or clause of Subpart B shall be adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or invalidate the remainder of any section, subsection, paragraph, subdivision or clause of this subpart.

Notwithstanding any other provision contained herein, nothing herein shall be construed to restrict any property owner subject to this ordinance in any manner or to any extent greater than otherwise would be the case in the absence of the adoption of this Ordinance. Any provision hereof which restricts any property owner subject to this ordinance in any manner or to any extent greater than otherwise would be the case in the absence of the adoption of this Ordinance is declared to be a nullity, and shall have no effect.

**§42-246. Reserved**

**§42-247. Reserved**

**§42-248. Reserved**

**§42-249. Reserved**

**§42-250. Reserved**

**Subpart C. Perennial and Intermittent Surface Water Buffers**

**§42-251. Perennial and Intermittent Surface Water Buffers**

A surface water shall be deemed present if the feature is approximately shown on either the most recent version of the soil survey map prepared by the Natural Resources Conservation Service of the United States Department of Agriculture or the most recent version of the 1:24,000 scale (7.5 minute) quadrangle topographic maps prepared by the United States Geological Survey (*USGS*). An exception to this requirement may be allowed when surface waters are not present in accordance with the provisions of 15A *NCAC* 2B .0233 (3)(a) or similar site-specific determination made using methodology approved by *NCDENR* Division of Water Quality. All *built-upon area* shall be at a minimum of:

- A. 30 feet landward of all perennial and intermittent surface waters; or
- B. 100 feet landward of any perennial surface waters located within a *water supply watershed* when using the *high-density option*.

Desirable artificial stream bank or shoreline stabilization is permitted. No new development is allowed in the *buffer* except for *water dependent structures*, other *structures* such as flag poles, *signs* and security lights which result in only minimal increases in *impervious surface* area and public projects, such as *road* crossings and *greenways* where no practical alternative exists.

These activities should minimize *built-upon area*; direct runoff away from the surface waters; and maximize the utilization of *stormwater best management practices*.

### **Subpart D. Protected Mountain Ridges**

#### **§42-252. Protected Mountain Ridges**

The 300 foot elevation requirement shall be eliminated from the definition of “*protected mountain ridges*” for Henderson County as authorized by *NCGS 113A-206(6)*, and the Board of Commissioners requests that the provisions of *NCGS 113A-209* apply to all mountain ridges in Henderson County whose elevation is 500 feet or more above the valley floor beginning January 1, 1984.

**Note:** The foregoing is a re-codification of an ordinance adopted by Henderson County in 1983. The adoption of the Henderson County Land Development Code only relocated its text within the Henderson County Code. Following is the applicable North Carolina General Statute as of November 6, 1983. Henderson County will make every attempt to update the language in this section in a timely manner as the State revised its *Protected Mountain Ridges* legislation. Below is Article 14 which describes the Mountain Ridge Protection Act of 1983, but readers are directed to the North Carolina General Statutes for the most current text.

#### **ARTICLE 14. MOUNTAIN RIDGE PROTECTION.**

##### **§ 113A-205. Short title.**

This Article shall be known as the Mountain Ridge Protection Act of 1983. (1983, c. 676, s. 1.)

##### **§ 113A-206. Definitions.**

Within the meaning of this Article:

- (1) The word "*person*" includes any individual, partnership, firm, association, joint venture, public or private corporation, trust, estate, commission, board, public or private institution, utility, cooperative, interstate body, the State of North Carolina and its agencies and political *subdivisions*, or other legal entity.
- (2) A *person*, as defined in this section, doing business or maintaining an office within a county is a resident of the county.
- (3) "Tall *buildings* or *structures*" include any *building*, *structure* or unit within a multiunit *building* with a vertical height of more than 40 feet measured from the top of the foundation of said *building*, *structure* or unit and the uppermost point of said *building*, *structure* or unit; provided, however, that where such foundation measured from the natural finished grade of the crest or the natural finished grade of the high side of the *slope* of a ridge exceeds 3 feet, then such measurement in excess of 3 feet shall be included in the 40-foot limitation described herein; provided, further, that no such *building*, *structure* or unit shall protrude at its uppermost point above the crest of the ridge by more than 35 feet. "Tall *buildings* or *structures*" do not include:
  - a. Water, radio, telephone or television towers or any equipment for the transmission of electricity or communications or both.
  - b. *Structures* of a relatively slender nature and minor vertical projections of a parent *building*, including chimneys, flagpoles, flues, spires, steeples, belfries, cupolas, *antennas*, poles, wires, or windmills.
  - c. *Buildings* and *structures* designated as National Historic Sites on the National Archives Registry.
- (4) "Construction" includes reconstruction, alteration, or expansion.

- (5) "Ridge" means the elongated crest or series of crests at the apex or uppermost point of intersection between two opposite *slopes* or sides of a mountain, and includes all land within 100 feet below the elevation of any portion of such line or surface along the crest.
- (6) "Protected mountain ridges" are all mountain ridges whose elevation is 3,000 feet and whose elevation is 500 or more feet above the elevation of an adjacent *valley floor*; provided, however, that a county, or a city with a population of fifty thousand (50,000) or more, may elect to eliminate the requirement for an elevation of 3,000 feet, and such election shall apply both to an ordinance adopted under G.S. 113A-208 and the prohibition against construction under G.S. 113A-209; provided, further, that such ordinance shall be adopted pursuant to the procedures of G.S. 113A-208.
- (7) "Crest" means the uppermost line of a mountain or chain of mountains from which the land falls away on at least two sides to a lower elevation or elevations. (1983, c. 676, s. 1; 1985, c. 713, s. 1.)

**§ 113A-207. Legislative findings.**

The construction of tall or major *buildings* and *structures* on the ridges and higher elevations of North Carolina's mountains in an inappropriate or badly designed manner can cause unusual problems and hazards to the residents of and to visitors to the mountains. Supplying water to, and disposing of the sewage from, *buildings* at high elevations with significant numbers of residents may infringe on the ground water rights and endanger the health of those *persons* living at lower elevations. Providing fire protection may be difficult given the lack of water supply and pressure and the possibility that fire will be fanned by high winds. Extremes of weather can endanger *buildings*, *structures*, *vehicles*, and *persons*. Tall or major *buildings* and *structures* located on ridges are a hazard to air navigation and *persons* on the ground and detract from the natural beauty of the mountains. (1983, c. 676, s. 1.)

**§ 113A-208. Regulation of mountain ridge construction by counties and cities.**

(a) Any county or city may adopt, effective not later than January 1, 1984, and may enforce an ordinance that regulates the construction of tall *buildings* or *structures* on protected mountain ridges by any *person*. The ordinance may provide for the issuance of permits to construct tall *buildings* on protected mountain ridges, the conditioning of such permits, and the denial of permits for such construction. Any ordinance adopted hereunder shall be based upon studies of the mountain ridges within the county, a statement of objectives to be sought by the ordinance, and plans for achieving these objectives. Any such county ordinance shall apply countywide except as otherwise provided in G.S. 160A-360, and any such city ordinance shall apply citywide, to construction of tall *buildings* on protected mountain ridges within the city or county, as the case may be.

A city with a population of 50,000 or more may adopt, prior to January 1, 1986, an ordinance eliminating the requirement for an elevation of 3,000 feet, as permitted by G.S. 113A-206(6).

(b) Under the ordinance, permits shall be denied if a permit application (and shall be revoked if a project) fails to provide for:

- (1) Sewering that meets the requirements of a public *wastewater* disposal system that it discharges into, or that is part of a separate system that meets applicable State and federal standards;
- (2) A *water supply system* that is adequate for *fire protection*, drinking water and other projected system needs; that meets the requirements of any public *water supply system* that it interconnects with; and that meets any applicable State standards, requirements and approvals;
- (3) Compliance with applicable State and local *sedimentation* control regulations and requirements; and
- (4) Adequate consideration to protecting the natural beauty of the mountains, as determined by the local governing body.

(c) Permits may be conditioned to insure proper operation, to avoid or mitigate any of the problems or hazards recited in the findings of G.S. 113A-207, to protect natural areas or the public health, and to prevent badly designed, unsafe or inappropriate construction.

(d) An ordinance adopted under the authority of this section applies to all protected mountain ridges as defined in G.S. 113A-206. A county or city may apply the ordinance to other mountain ridges within its jurisdiction if it finds that this application is reasonably necessary to protect against some or all of the hazards or problems set forth in G.S. 113A-207. Additionally, a city with a population of 50,000 or more may apply the ordinance to other mountain ridges within its extraterritorial planning jurisdiction if it finds that this application is reasonably necessary to protect against some or all of the hazards or problems set forth in G.S. 113A-207.

(e) Determinations by the county or city governing board of heights or elevations under this Article shall be conclusive in the absence of fraud. Any county or city that adopts a ridge ordinance under the authority of this section or other authority shall send a copy of the ordinance to the Secretary of Environment and Natural Resources.

(f) Any county or city that adopts an ordinance pursuant to this section must hold a public hearing before adopting the ordinance upon the question of adopting the ordinance or of allowing the construction of tall *buildings* on protected mountain ridges to be governed by G.S. 113A-209. The public hearing required by this section shall be held upon at least 10 days' notice in a newspaper of general circulation in the unit adopting the ordinance. Testimony at the hearing shall be recorded and any and all exhibits shall be preserved within the custody of the governing body. The testimony and evidence shall be made available for inspection and scrutiny by any *person*.

(g) Any resident of a county or city that adopted an ordinance pursuant to this section, or of an adjoining county, may bring a civil action against the ordinance-adopting unit, contesting the ordinance as not meeting the requirements of this section. If the ordinance is found not to meet all of the requirements of this section, the county or city shall be enjoined from enforcing the ordinance and the provisions of G.S. 113A-209 shall apply. Nothing in this Article authorizes the State of North Carolina or any of its agencies to bring a civil action to contest an ordinance, or for a *violation* of this Article or of an ordinance adopted pursuant to this Article. (1983, c. 676, s. 1; 1985, c. 713, ss. 2, 4; 1989, c. 727, s. 218(78); 1997-443, s. 11A.119(a).)

#### **§ 113A-209. Certain *buildings* prohibited.**

(a) This section applies beginning January 1, 1984, in any county or city that has failed to adopt a ridge protection ordinance pursuant to G.S. 113A-208 by January 1, 1984.

(b) No county or city may authorize the construction of, and no *person* may construct, a tall *building* or *structure* on any protected mountain ridge.

(c) No county or city may authorize the providing of the following utility services to any *building* or *structure* constructed in *violation* of subsection (b) of this section: electricity, telephone, gas, water, sewer, or septic system. (1983, c. 676, s. 1.)

#### **§ 113A-210. Application to existing *buildings*.**

General Statutes 113A-208 and 113A-209 apply to *buildings* that existed upon the effective date of this Article as follows:

- (1) No reconstruction, alteration or expansion may aggravate or intensify a *violation* by an existing *building* or *structure* that did not comply (a) with G.S. 113A-209 upon its effective date, or (b) with an ordinance adopted under G.S. 113A-208 upon its effective date.
- (2) No reconstruction, alteration or expansion may cause or create a *violation* by an existing *building* or *structure* that did comply (a) with G.S. 113A-209 upon its effective date, or (b) with an ordinance adopted under G.S. 113A-208 upon its effective date. (1983, c. 676, s. 1.)

#### **§ 113A-211. Enforcement and penalties.**

(a) *Violations* of this Article shall be subject to the same criminal sanctions, civil penalties and equitable remedies as *violations* of county ordinances under G.S. 153A-123.

(b) Any *person* injured by a *violation* of this Article or any *person* who resides in the county in which the *violation* occurred may bring a civil action against the *person* alleged to be in *violation*. The action may seek:

- (1) Injunctive relief; or
- (2) An order enforcing the provision violated; or
- (3) Damages caused by the *violation*; or
- (4) Both damages and injunctive relief; or
- (5) Both damages and an enforcement order; or
- (6) Both an enforcement order and injunctive relief.

If actual damages as found by the court or jury in suits brought under this subsection are five hundred dollars (\$500.00) or less, the plaintiff shall be awarded double the amount of actual damages; if the amount of actual damages as found by the court or jury is greater than five hundred dollars (\$500.00), the plaintiff shall receive damages in the amount so found. Injunctive relief or an enforcement order under this subsection may be based upon a threatened injury, an actual injury, or both.

Civil actions under this subsection shall be brought in the General Court of Justice of the county in which the alleged *violation* occurred. The court, in issuing any final order in any action brought pursuant to this section may award costs of litigation, including reasonable attorney and expert-witness fees, to any party, whenever it determines that such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is

sought, require the filing of a *bond* or equivalent security, the amount of such *bond* or security to be determined by the court. Nothing in this section shall restrict any right which any *person* or class of *persons* may have under the common law or under any statute to seek injunctive or other relief.

(c) Within the meaning of this section, *violations* of this Article include *violations* of local ordinances adopted pursuant to G.S. 113A- 208. (1983, c. 676, s. 1.)

#### **§ 113A-212. Assistance to counties and cities under ridge law.**

(a) The Secretary of Environment and Natural Resources shall provide assistance upon request to the counties and cities in carrying out their functions pursuant to this Article, such as by providing model studies, plans, and ordinances for their consideration.

(b) The Secretary of Environment and Natural Resources shall identify the protected mountain ridge crests in each county by showing them on a map or drawing, describing them in a document, or any combination thereof. Such maps, drawings, or documents shall identify the protected mountain ridges as defined in G.S. 113A-206 and such other mountain ridges as any county may request, and shall specify those protected mountain ridges that serve as all or part of the boundary line between two counties. By November 1, 1983, the map, drawing, or document tentatively identifying the protected mountain ridge crests of each county shall be filed with the board of county commissioners and with the city governing body of each city that requests it. By January 1, 1984, the map, drawing, or document identifying the protected mountain ridge crests shall be permanently filed by the Secretary with the register of deeds in the county where the land lies, and made available for inspection at the Secretary's office in Raleigh. Copies of the maps, drawings, or documents certified by the register of deeds, shall be admitted in evidence in all courts and shall have the same force and effect as would the original.

(b1) By January 1, 1986, a map, drawing, or document tentatively identifying the protected mountain ridge crests of each city with a population of fifty thousand (50,000) or more that has eliminated the requirement for a minimum elevation of 3,000 feet, shall be filed by the Secretary of Environment and Natural Resources with the board of county commissioners and with the city governing body. By March 1, 1986, the map, drawing, or document identifying the protected mountain ridge crests in the city with a population of fifty thousand (50,000) or more shall be permanently filed by the Secretary with the register of deeds in the county where the land within that city with a population of fifty thousand (50,000) or more lies, and shall be made available for inspection at the Secretary's office in Raleigh. Copies of the maps, drawings, or documents certified by the register of deeds shall be admitted in evidence in all courts and shall have the same force and effect as would the original.

(c) Determinations by the Secretary of elevations under this section shall be conclusive in the absence of fraud. (1983, c. 676, s. 1; 1985, c. 713, s. 3; 1989, c. 727, s. 218(79); 1997-443, s. 11A.119(a).)

#### **§ 113A-213. Article is supplemental.**

This Article provides a supplemental source of authority in addition to other present or future legislation and shall not be construed as prescribing an exclusive procedure or as granting exclusive powers. (1983, c. 676, s. 1.)

#### **§ 113A-214. Choosing coverage or removal from coverage of this Article.**

(a) This Article shall apply in all counties and cities unless and until the jurisdiction adopts an ordinance exempting itself from the coverage of this Article.

This exemption shall only be effective after a binding referendum, in which all registered voters in the jurisdiction are eligible to vote, which shall be held on or before May 8, 1984. The binding referendum shall be held either as a result of a resolution passed by the governing body of the jurisdiction or as a result of an initiative petition signed by fifteen percent (15%) of the registered voters in the jurisdiction and filed with the Board of Elections of that county not later than 60 days before the election is to be held. At that referendum, each qualified voter desiring to vote shall be provided a ballot on which shall be printed the following:

FOR coverage under the Mountain Ridge Protection Act of 1983.

AGAINST coverage under the Mountain Ridge Protection Act of 1983.

(b) If a jurisdiction removes itself from the coverage of this Article, by means of a binding referendum, as provided for in subsection (a) of this section, then it shall have until May 13, 1986 to place itself again under the coverage of this Article by means of an ordinance passed after a similar binding referendum. Once a jurisdiction opts out and then opts back under the Article, it may not take any further action to again remove itself from the coverage of the Article.

(c) If a county has chosen the permit procedure authorized by G.S. 113A-208, and then opts out of and either the county or any city in the county opts back under the coverage of this Article, then that jurisdiction may choose the permit procedure even after January 1, 1984.

(d) When a county removes itself from the coverage of this Article all cities within the county shall be removed from the coverage of this Article. Provided, however, a city in a county that has removed itself from coverage may, under the procedure set forth in subsection (b) of this section, place itself again under the coverage of this Article.

(e) When a protected mountain ridge is any part of the boundary between two jurisdictions then that part of the ridge shall be covered by this Article unless both jurisdictions remove themselves from the coverage of this Article. (1983, c. 676, s. 1.)

**§§ 113A-215 through 113A-219. Reserved for future codification purposes.**

### **Subpart E. Soil Erosion and Sedimentation Control**

#### **§42-253. Purpose**

This subpart is adopted for the purposes of: (1) regulating certain *land-disturbing activity* to control *accelerated erosion* and *sedimentation* in order to prevent the pollution of water and other damage to lakes, watercourses, and other public and private property by *sedimentation*; (2) protecting economic and ecological integrity of the County; and (3) establishing procedures through which these purposes can be fulfilled.

#### **§42-254. Scope and Exclusions**

- A. Geographical Scope of Regulated Land-Disturbing Activity. This subpart shall apply to *land-disturbing activity* within the unincorporated areas of Henderson County and its municipalities as allowed by agreement between *local governments*, other appropriate legal instrument or law.
- B. Exclusions from Regulated Land-Disturbing Activity. Notwithstanding the general applicability of this subpart to all *land-disturbing activity*, this subpart shall not apply to the following types of *land-disturbing activity*:
  - (1) An activity, including breeding and grazing of livestock, *undertaken* on agricultural land for the production of plants and animals useful to man, including, but not limited to:
    - a. forage and sod crops, grain and feed crops, tobacco, cotton, orchards and fruit crops, and peanuts.
    - b. dairy animals and dairy products.
    - c. poultry and poultry products.
    - d. livestock, including beef cattle, sheep swine, horses, ponies, mules, and goats.
    - e. bees and apiary products.
    - f. fur producing animals.
  - (2) An activity *undertaken* on forestland for the production and harvesting of timber and timber products and conducted in accordance with best management practices set out in Forest Practice Guidelines Related to Water Quality, as adopted by *NC DENR*. If *land-disturbing activity undertaken* on forestland for the production and harvesting of timber and timber products is not conducted in accordance with Forest Practice Guidelines Related to Water Quality, the provisions of this subpart shall apply to such activity and any related *land-disturbing activity* on the *tract*.



- (3) An activity for which a permit is required under the Mining Act of 1971, Article 7 of Chapter 74 of the *NCGS*.
  - (4) A *land-disturbing activity* over which the State has exclusive regulatory jurisdiction as provided in *NCGS* §113A-56(a).
  - (5) An activity which is essential to protect human life during an emergency.
- C. Plan Approval Requirement for Land-Disturbing Activity. No *person* shall undertake any *land-disturbing activity* subject to this subpart without first obtaining an Erosion and Sedimentation Control Plan approval from the *Soil Erosion and Sedimentation Control Administrator*.
- (1) For the purpose of the subpart, an erosion control plan shall be required for:
    - a. Any *land-disturbing activity* which uncovers one or more acres (43,560 square feet) of land.
    - b. Any *land-disturbing activity* which uncovers one-half (1/2) acre or more (21,780 square feet) of land with an *average slope* of 16 percent (7.2 degrees) to 25 percent (11.25 degrees) in its natural state. The *average slope* shall be calculated only for the disturbed area.
    - c. Any *land-disturbing activity* which uncovers one-quarter (1/4) acre or more (10,890 square feet) of land with an *average slope* over 25 percent (11.25 degrees in its natural state). The *average slope* shall be calculated only for the disturbed area.
- D. Protection of Property. *Persons* conducting *land-disturbing activity* shall take all reasonable measures to protect all public and private property from damage caused by such activity.
- E. More Restrictive Rules Shall Apply. Whenever conflicts exist between federal, state, or local laws, ordinances, or rules, the more restrictive provision shall apply.
- F. Plan Approval Exceptions. Notwithstanding the general requirement to obtain an Erosion and Sedimentation Control Plan approval prior to undertaking *land-disturbing activity*, an Erosion and Sedimentation Control Plan approval shall not be required for *land-disturbing activity* that does not exceed the provisions as specified in §42-254 (Scope and Exclusions) C (Plan Approval Requirement for Land-Disturbing Activity). No Erosion and Sedimentation Control Plan approval is required if a building permit has been obtained prior to the effective date of this subpart (October 1, 2007) and Erosion and Sedimentation Control Plan approval was not required under State rules. In determining the area, lands under one or diverse ownership being developed as a unit will be aggregated.

#### **§42-255. Mandatory Standards for Land Disturbing Activity**

No *land-disturbing activity* subject to the control of this subpart shall be *undertaken* except in accordance with the following mandatory standards:

- A. Buffer Zone

- (1) Standard Buffer. No *land-disturbing activity* during periods of construction or improvement to land shall be permitted in proximity to a *lake or natural watercourse* unless a *buffer zone* is provided along the margin of the watercourse of sufficient width to confine visible *siltation* within the 25 percent of the *buffer zone* nearest the *land-disturbing activity*.
  - a. Projects On, Over or Under Water. This subsection shall not apply to a *land-disturbing activity* in connection with the construction of facilities to be located on, over, or under a *lake or natural watercourse*.
  - b. Buffer Measurement. Unless otherwise provided, the width of a *buffer zone* is measured horizontally from the edge of the *bankfull* elevation to the nearest edge of the disturbed area, with the 25 percent of the strip nearer the *land-disturbing activity* containing natural or artificial means of confining visible *siltation*.
- (2) Trout Buffer. Waters that have been classified as trout waters by the Environmental Management Commission shall have an undisturbed *buffer zone* 25 feet wide or of sufficient width to confine visible *siltation* within the 25 percent of the *buffer zone* nearest the *land-disturbing activity*, whichever is greater. Provided, however, that the North Carolina Sedimentation Control Commission may approve plans which include *land-disturbing activity* along trout waters when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal.
  - a. Projects On, Over or Under Water. This subsection shall not apply to a *land-disturbing activity* in connection with the construction of facilities to be located on, over, or under a *lake or natural watercourse*.
  - b. Trout Buffer Measurement. The 25 foot minimum width for an undisturbed *buffer zone* adjacent to designated trout waters shall be measured horizontally from the top of the bank to the nearest edge of the disturbed area.
  - c. Limit on Land Disturbance. Where a temporary and minimal disturbance has been permitted as an exception to the trout buffer, *land-disturbing activities* in the *buffer zone* adjacent to designated trout waters shall be limited to a maximum of ten (10) percent of the total length of the *buffer zone* within the *tract* to be disturbed such that there is not more than 100 linear feet of disturbance in each 1000 linear feet of *buffer zone*. Larger areas may be disturbed with the written approval of the Director of the Division of Land Resources of *NC DENR*.
  - d. Limit on Temperature Fluctuations. No *land-disturbing activity* shall be *undertaken* within a *buffer zone* adjacent to designated trout waters that will cause adverse temperature fluctuations in the trout waters, as set forth in 15 *NCAC* 2B.0211 "Fresh Surface Water Classification and Standards."
- B. Graded Slopes and Fills. The 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*. In any event, slopes left exposed will, within 21 calendar days of

completion of any *phase of grading*, be planted or otherwise provided with temporary or permanent *ground cover*, devices, or *structures* sufficient to restrain *erosion*. The angle for graded slopes and fills must be demonstrated to be stable. Stable is the condition where the soil remains in its original configuration, with or without mechanical constraints.

- C. Fill Material. Unless a permit from *NCDENR's* Division of Waste Management to operate a *landfill* is on file for the official site, acceptable fill material shall be free of organic or other degradable materials, masonry, concrete and brick in sizes exceeding 12 inches, and any materials which would cause the site to be regulated as a *landfill* by the State of North Carolina.
- D. Ground Cover. Whenever *land-disturbing activity* is undertaken on a *tract*, the *person* conducting the *land-disturbing activity* shall install *erosion* and *sedimentation* control devices and practices that are sufficient to retain the *sediment* generated by the *land-disturbing activity* within the boundaries of the *tract* during construction upon and development of said *tract*, and shall plant or otherwise provide a permanent *ground cover* sufficient to restrain *erosion* after *completion of construction or development*. Except as provided in §42-258 (Design and Performance Standards) B(5) of this subpart, provisions for a *ground cover* sufficient to restrain *erosion* must be accomplished within 21 calendar days following *completion of construction or development*.
- E. Prior Plan Approval. No *person* shall initiate any *land-disturbing activity* on a *tract* unless, 30 or more days prior to initiating the activity, an Erosion and Sedimentation Control Plan for the activity is filed with and approved by the *Soil Erosion and Sedimentation Control Administrator*. An Erosion and Sedimentation Control Plan may be filed less than 30 days prior to initiation of a *land-disturbing activity* if the plan is submitted under an approved express permit program, and the *land-disturbing activity* may be initiated and conducted in accordance with the plan once the plan has been approved. The County shall forward to the Director of the Division of Water Quality a copy of each Erosion and Sedimentation Control Plan for a *land-disturbing activity* that involves the utilization of ditches for the purpose of de-watering or lowering the water table of the *tract*.

#### **§42-256. Erosion and Sedimentation Control Plans**

- A. Pre-Submittal Conference. A pre-submittal conference can be requested by a *person* or an agent of that party conducting *land-disturbing activity*. At the pre-submittal, the *Soil Erosion and Sedimentation Control Administrator* shall inform the *applicant* of the processes involved with Erosion and Sedimentation Control Plan review and approval, issuance of an Erosion and Sedimentation Control Plan Certificate and Letter of Approval, and the relationship of said Erosion and Sedimentation Control Plan and Letter of Approval with zoning, building code, and other land-use regulations in effect in Henderson County. At the time of application submission, the *Soil Erosion and Sedimentation Control Administrator* also shall notify the *applicant* of the *appeal* process as provided in the subpart.
- B. Plan Submission. An Erosion and Sedimentation Control Plan shall be prepared for all *land-disturbing activities* subject to this subpart. An Erosion and Sedimentation Control Plan shall be prepared by a *design professional*. Three (3) copies of the Erosion and

Sedimentation Control Plan shall be filed with the *Soil Erosion and Sedimentation Control Administrator* at least 30 days prior to the commencement of the proposed activity.

- C. Financial Responsibility and Ownership. Erosion and Sedimentation Control Plans may be disapproved when not accompanied by an authorized statement of financial responsibility and ownership. This statement shall be signed by the *person* financially responsible for the *land-disturbing activity* or his attorney in fact. The statement shall include the mailing and street addresses of the principal place of business of (1) the *person* financially responsible, (2) the *owner* of the land, and (3) any registered agents. If the *person* financially responsible is not a resident of North Carolina, a North Carolina agent must be designated in the statement for the purpose of receiving notice of compliance or non-compliance with the Erosion and Sedimentation Control Plan, the North Carolina Sedimentation Pollution Control Act of 1973, this subpart, or rules or orders adopted or issued pursuant to this subpart. If the *applicant* is not the *owner* of the land to be disturbed, the draft Erosion and Sedimentation Control Plan must include the *owner's* written consent for the *applicant* to submit a draft Erosion and Sedimentation Control Plan and to conduct the anticipated *land-disturbing activity*.
- D. Environmental Policy Act Document. Any Erosion and Sedimentation Control Plan submitted for a *land-disturbing activity* for which an environmental document is required by the North Carolina Environment Policy Act (*NCGS* §113A-1, et seq.) shall be deemed incomplete until a complete environmental document is available for review. The *Soil Erosion and Sedimentation Control Administrator* shall promptly notify the *person* submitting the Erosion and Sedimentation Control Plan that the 30 day time limit for review of the Erosion and Sedimentation Control Plan pursuant to this subpart shall not begin until a complete environmental document is available for review.
- E. Content. The Erosion and Sedimentation Control Plan required by this section shall contain architectural and engineering drawings, maps, assumptions, calculations, and narrative statements as needed to adequately describe the proposed development of the *tract* and the measures planned to comply with the requirements of this subpart. Erosion and Sedimentation Control Plan content may vary to meet the needs of specific site requirements. Detailed guidelines for Erosion and Sedimentation Control Plan preparation may be obtained from the *Soil Erosion and Sedimentation Control Administrator* on request.
- F. Erosion and Sedimentation Control Design Manual. Appropriate *erosion* and *sedimentation* practices and measures shall be in accordance to the *Erosion and Sedimentation Control Design Manual* developed by the State or any Erosion and Sedimentation Control Design Manual adopted by Henderson County or any supplemental materials.
- G. Soil and Water Conservation District Comments. The Henderson County Soil and Water Conservation District, created pursuant to *NCGS* Chapter 139, and hereafter “the District” shall review the Erosion and Sedimentation Control Plan and submit any comments and recommendations to the *Soil Erosion and Sedimentation Control Administrator* within 20 days after the District received the Erosion and Sedimentation Control Plan or within any shorter period of time as may be agreed upon by the District

and Henderson County. Failure of the District to submit its comments and recommendations within 20 days or within any agreed-upon shorter period of time shall not delay final action on the Erosion and Sedimentation Control Plan.

- H. Timeline for Decisions on Plans. The *Soil Erosion and Sedimentation Control Administrator*, will review each complete Erosion and Sedimentation Control Plan submitted to them and within 30 days of receipt thereof will notify the *person* submitting the Erosion and Sedimentation Control Plan that it has been approved, approved with modifications, approved with performance reservations, or disapproved. Failure to approve, approve with modifications, or disapprove a complete Erosion and Sedimentation Control Plan within 30 days of receipt shall be deemed approval. The *Soil Erosion and Sedimentation Control Administrator* will review each revised Erosion and Sedimentation Control Plan submitted to them and within 15 days of receipt thereof will notify the *person* submitting the Erosion and Sedimentation Control Plan that it has been approved, approved with modifications, approved with performance reservations, or disapproved. Failure to approve, approve with modifications, or disapprove a revised Erosion and Sedimentation Control Plan within 15 days of receipt shall be deemed approval.
- I. Approval. The *Soil Erosion and Sedimentation Control Administrator* shall only approve an Erosion and Sedimentation Control Plan upon determining that it complies with all applicable State and local regulations for *erosion* and *sedimentation* control. Approval assumes the *applicant's* compliance with the federal and state water quality laws, regulations and rules. The *Soil Erosion and Sedimentation Control Administrator* shall condition approval of Erosion and Sedimentation Control Plans upon the *applicant's* compliance with federal and state water quality laws, regulations and rules. The *Soil Erosion and Sedimentation Control Administrator* may establish an expiration date, not to exceed three (3) years, for Erosion and Sedimentation Control Plans approved under this subpart.
- J. Disapproval for Content. The *Soil Erosion and Sedimentation Control Administrator* may disapprove an Erosion and Sedimentation Control Plan or draft Erosion and Sedimentation Control Plan based on its content. A disapproval based upon an Erosion and Sedimentation Control Plan's content must specifically state in writing the reasons for disapproval.
- K. Other Disapprovals. The *Soil Erosion and Sedimentation Control Administrator* may disapprove an Erosion and Sedimentation Control Plan or draft Erosion and Sedimentation Control Plans if implementation of the Erosion and Sedimentation Control Plan would result in a *violation* of the rules adopted by the Environmental Management Commission to protect riparian buffers along surface waters. A *local government* may disapprove an Erosion and Sedimentation Control Plan upon finding that an *applicant*, or a *parent, subsidiary, or other affiliate* of the *applicant*:
- (1) Is conducting or has conducted *land-disturbing activity* without an approved Erosion and Sedimentation Control Plan, or has received notice of *violation* of an Erosion and Sedimentation Control Plan previously approved by the North Carolina Sedimentation Control Commission or a *local government* pursuant to

the North Carolina Sedimentation Pollution Control Act of 1973 and has not complied with the notice within the time specified in the notice;

- (2) Has failed to pay a civil penalty assessed pursuant to the North Carolina Sedimentation Pollution Control Act of 1973 or a local ordinance adopted pursuant to the North Carolina Sedimentation Pollution Control Act of 1973 by the time the payment is due;
- (3) Has been convicted of a misdemeanor pursuant to *NCG S* §113A-64(b) or any criminal provision of a local ordinance adopted pursuant to the North Carolina Sedimentation Pollution Control Act of 1973; or
- (4) Has failed to substantially comply with State rules or local ordinances and regulations adopted pursuant to the North Carolina Sedimentation Pollution Control Act of 1973.

For purposes of this subsection, an *applicant's* record may be considered for only the two (2) years prior to the application date.

In the event that an Erosion and Sedimentation Control Plan is disapproved pursuant to this subsection, the *Soil Erosion and Sedimentation Control Administrator* shall notify the Director of the Division of Land Resources of *NCDENR* of such disapproval within ten (10) days. The *Soil Erosion and Sedimentation Control Administrator* shall advise the *applicant* and the Director of the Division of Land Resources of *NCDENR* in writing as to the specific reasons that the Erosion and Sedimentation Control Plan was disapproved.

- L. Notice of Activity Initiation. No *person* may initiate a *land-disturbing activity* before notifying the agency that issued the Erosion and Sedimentation Control Plan approval of the date that *land-disturbing activity* will begin.
- M. Preconstruction Conference. When deemed necessary by the approving authority a preconstruction conference may be required.
- N. Display of Plan Approval. An Erosion and Sedimentation Control Plan approval issued under this subpart shall be prominently displayed until all construction is complete, all permanent *sedimentation* and *erosion* control measures are installed and the site has been stabilized. A copy of the approved plan shall be kept on file at the job site.
- O. Required Revisions. After approving an Erosion and Sedimentation Control Plan, if the *Soil Erosion and Sedimentation Control Administrator* either upon review of such Erosion and Sedimentation Control Plan or on inspection of the job site, determines that a significant risk of *accelerated erosion* or off-site *sedimentation* exists, the *Soil Erosion and Sedimentation Control Administrator* shall require a revised Erosion and Sedimentation Control Plan. Pending the preparation of the revised Erosion and Sedimentation Control Plan, work shall cease or shall continue under conditions outlined by the appropriate authority. If following commencement of a *land-disturbing activity* pursuant to an approved Erosion and Sedimentation Control Plan, the *Soil Erosion and Sedimentation Control Administrator* determines that the Erosion and Sedimentation Control Plan is inadequate to meet the requirements of this subpart, the *Soil Erosion and Sedimentation Control Administrator* may require any revision of the Erosion and Sedimentation Control Plan that is necessary to comply with this subpart.

- P. Amendment to a Plan. Applications for amendment of an Erosion and Sedimentation Control Plan in written and/or graphic form may be made at any time under the same conditions as the original application. Until such time as said amendment is approved by the *Soil Erosion and Sedimentation Control Administrator* the *land-disturbing activity* shall not proceed except in accordance with the Erosion and Sedimentation Control Plan as originally approved.
- Q. Failure to File a Plan. Any *person* engaged in *land-disturbing activity* who fails to file an Erosion and Sedimentation Control Plan in accordance with this subpart, or who conducts a *land-disturbing activity* except in accordance with provisions of an approved Erosion and Sedimentation Control Plan shall be deemed in *violation* of this Chapter.

#### **§42-257. Basic Control Objectives**

An *erosion and sedimentation control Erosion and Sedimentation Control Plan* may be disapproved if the Erosion and Sedimentation Control Plan fails to address the following control objectives:

- A. Identify Critical Areas. On-site areas which are subject to severe *erosion*, and off-site areas which are especially vulnerable to damage from *erosion* and/or *sedimentation*, are to be identified and receive special attention.
- B. Limit Time of Exposure. All *land-disturbing activities* are to be planned and conducted to limit exposure to the shortest feasible time.
- C. Limit Exposed Areas. All *land-disturbing activity* is to be planned and conducted to minimize the size of the area to be exposed at any one (1) time.
- D. Control Surface Water. Surface water runoff originating upgrade of exposed areas should be controlled to reduce *erosion* and *sediment* loss during the period of exposure.
- E. Control Sedimentation. All *land-disturbing activity* is to be planned and conducted so as to prevent off-site *sedimentation* damage.
- F. Manage *Stormwater* Runoff. When the increase in the *velocity* of *stormwater runoff* resulting from a *land-disturbing activity* is sufficient to cause *accelerated erosion* of the receiving watercourse, an Erosion and Sedimentation Control Plan is to include measures to control the *velocity* to the point of discharge so as to minimize *accelerated erosion* of the site and increased *sedimentation* of the stream.

#### **§42-258. Design and Performance Standards**

- A. Except as provided in §42-258 (Design and Performance Standards) B(2) of this subpart, *erosion* and *sedimentation* control measures, *structures*, and devices shall be planned, designed, and constructed to provide protection from the calculated maximum peak rate of runoff from the ten (10) year storm. Runoff rates shall be calculated using the procedures in the USDA, Soil Conservation Service's "National Engineering Field Manual for Conservation Practices", or other acceptable calculation procedures.
- B. HQW Zones. In *High Quality Water (HQW) zones* the following design standards shall apply:
  - (1) Limit on Uncovered Area. *Uncovered* areas in *HQW zones* shall be limited at any time to a maximum total area of 20 acres within the boundaries of the *tract*. Only

the portion of the *land-disturbing activity* within a *HQW zone* shall be governed by this section. Larger areas may be *uncovered* within the boundaries of the *tract* with the written approval of the Director of the Division of Land Resources of *NCDENR*.

- (2) Maximum Peak Rate of Runoff Protection. *Erosion* and *sedimentation* control measures, *structures*, and devices within *HQW zones* shall be planned, designed and constructed to provide protection from the runoff of the *25-year storm* which produces the maximum peak rate of runoff as calculated according to procedures in the United States Department of Agriculture Soil Conservation Service's "National Engineering Field Manual for Conservation Practices" or according to procedures adopted by any other agency of this state or the United States or any generally recognized organization or association.
- (3) Settling Efficiency. *Sediment* basins within *HQW zones* shall be designed and constructed such that the basin will have a settling efficiency of at least 70 percent for the 40 micron (0.04 millimeter) size soil particle transported into the basin by the runoff of that two (2) year storm which produces the maximum peak rate of runoff as calculated according to procedures in the United States Department of Agriculture Soil Conservation Service's "National Engineering Field Manual for Conservation Practices" or according to procedures adopted by any other agency of this state or the United States or any generally recognized organization or association.
- (4) Grade. Newly constructed open channels in *HQW zones* shall be designed and constructed with side slopes no steeper than two (2) horizontal to one (1) vertical if a vegetative cover is used for stabilization unless soil conditions permit a steeper slope or where the slopes are stabilized by using mechanical devices, structural devices or other acceptable ditch liners. In any event, the angle for side slopes shall be sufficient to restrain *accelerated erosion*.
- (5) Ground Cover. *Ground cover* sufficient to restrain *erosion* must be provided for any portion of a *land-disturbing activity* in a *HQW zone* within 15 *working days* or 60 calendar days following *completion of construction or development*, whichever period is shorter.

#### **§42-259. Stormwater Outlet Protection**

- A. Intent. Stream banks and channels downstream from any *land-disturbing activity* shall be protected from increased degradation by *accelerated erosion* caused by increased *velocity* of runoff from the *land-disturbing activity*.
- B. Performance Standard. *Persons* shall conduct *land-disturbing activity* so that the post construction *velocity* of the ten (10) year storm runoff in the receiving watercourse to the *discharge point* does not exceed the greater of:
  - (1) the *velocity* established by the Maximum Permissible Velocities Table set out within this subsection; or
  - (2) the *velocity* of the *ten-year storm* runoff in the receiving watercourse prior to development.



If condition (1) or (2) of this Paragraph cannot be met, then the receiving watercourse to and including the *discharge point* shall be designed and constructed to withstand the expected *velocity* anywhere the *velocity* exceeds the “prior to development” *velocity* by 10 percent.

<b>Table 8.1. Maximum Permissible Velocities</b>		
<b>Material</b>	<b>Feet Per Second (F.P.S.)</b>	<b>Meters Per Second (M.P.S.)</b>
Fine sand (noncolloidal)	2.5	0.8
Sandy loam (noncolloidal)	2.5	0.8
Silt loam (noncolloidal)	3.0	0.9
Ordinary firm loam	3.5	1.1
Fine gravel	5.0	1.5
Stiff clay (very colloidal)	5.0	1.5
Graded, loam to cobbles (noncolloidal)	5.0	1.5
Graded, silt to cobbles (colloidal)	5.5	1.7
Alluvial silts (noncolloidal)	3.5	1.1
Alluvial silts (colloidal)	5.0	1.5
Coarse gravel (noncolloidal)	6.0	1.8
Cobbles and shingles	5.5	1.7
Shales and hard pans	6.0	1.8

Source - Adapted from recommendations by Special Committee on Irrigation Research, American Society of Civil Engineers, 1926, for channels with straight alignment. For sinuous channels, multiply allowable *velocity* by 0.95 for slightly sinuous, by 0.9 for moderately sinuous channels, and by 0.8 for highly sinuous channels.

C. Acceptable Management Measures. Measures applied alone or in combination to satisfy the intent of this section are acceptable if there are no objectionable secondary consequences. The *Soil Erosion and Sedimentation Control Administrator* recognizes that the management of *stormwater runoff* to minimize or control downstream channel and bank *erosion* is a developing technology. Innovative techniques and ideas will be considered and may be used when shown to have the potential to produce successful results. Some alternatives, while not exhaustive, are to:

- (1) Avoid increases in surface runoff volume and *velocity* by including measures to promote infiltration to compensate for increased runoff from areas rendered impervious;
- (2) Avoid increases in *stormwater* discharge velocities by using vegetated or roughened swales and waterways in place of closed drains and high *velocity* paved sections;
- (3) Provide *energy dissipators* at outlets of *storm drainage facilities* to reduce flow velocities to the point of discharge;
- (4) Protect watercourses subject to *accelerated erosion* by improving cross sections and/or providing *erosion-resistant lining*; and

- (5) Upgrade or replace the receiving device *structure* or watercourse such that it will receive and conduct the flow to a point where it is no longer subject to degradation from the increased rate of flow or increased *velocity*.

D. Exceptions. This rule shall not apply where it can be demonstrated to the *Soil Erosion and Sedimentation Control Administrator* that *stormwater* discharge velocities will not create an *erosion* problem in the receiving watercourse.

#### **§42-260. Borrow and Waste Areas**

When the *person* conducting the *land-disturbing activity* is also the *person* conducting the *borrow* or *waste* disposal activity, areas from which *borrow* is obtained and which are not regulated by the provisions of the Mining Act of 1971, and *waste* areas for surplus materials other than *landfills* regulated by *NCDENR's* Division of Waste Management shall be considered as part of the *land-disturbing activity* where the *borrow* material is being used or from which the *waste* material originated. When the *person* conducting the *land-disturbing activity* is not the *person* obtaining the *borrow* and/or disposing of the *waste*, these areas shall be considered a separate *land-disturbing activity*.

#### **§42-261. Access and Haul Roads**

Temporary access and haul *roads*, other than *public roads*, constructed or used in connection with any *land-disturbing activity* shall be considered a part of such activity. Whenever an access or haul *road* adjoins a dedicated public or private *road*, sufficient depth, width, and type of stone, properly compacted, shall be installed as a mud matt to prevent the accumulation of soil and mud on existing *roads*.

#### **§42-262. Operations in Lakes or Natural Watercourses**

*Land-disturbing activity* in connection with construction in, on, over, or under a *lake* or *natural watercourse* shall minimize the extent and duration of disruption of the stream channel. Where relocation of a stream forms an essential part of the proposed activity, the relocation shall minimize unnecessary changes in the stream flow characteristics.

#### **§42-263. Responsibility for Maintenance**

During the development of a site, the *person* conducting the *land-disturbing activity* shall install and maintain all temporary and permanent *erosion* and *sedimentation* control measures as required by the approved plan or any provision of this subpart, the North Carolina Sedimentation Pollution Control Act of 1973, or any order adopted pursuant to this subpart or the North Carolina Sedimentation Pollution Control Act of 1973. After site development, the landowner or *person* in possession or control of the land shall install and/or maintain all necessary permanent *erosion* and *sediment* control measures, except those measures installed within a *road right-of-way* or *easement* accepted for maintenance by a governmental agency.

#### **§42-264. Additional Measures**

Whenever the *Soil Erosion and Sedimentation Control Administrator* determines that significant *erosion* and *sedimentation* is occurring as a result of *land-disturbing activity*, despite application and maintenance of protective practices, the *person* conducting the *land-disturbing activity* will be required to and shall take additional protective action.

#### **§42-265. Existing Uncovered Areas**

- A. All *uncovered* areas existing on the effective date of this subpart which resulted from *land-disturbing activity*, exceed one (1) acre, are subject to continued *accelerated erosion*, and are causing off-site damage from *sedimentation*, shall be provided with a *ground cover* or other protective measures, *structures*, or devices sufficient to restrain *accelerated erosion* and control off-site *sedimentation*.
- B. The *Soil Erosion and Sedimentation Control Administrator* shall serve upon the landowner or other *person* in possession or control of the land a written notice to comply with the North Carolina Sedimentation Pollution Control Act of 1973, this subpart, a rule or order adopted or issued pursuant to the North Carolina Sedimentation Pollution Control Act of 1973 by the North Carolina Sedimentation Control Commission or by the *Soil Erosion and Sedimentation Control Administrator*. The notice to comply shall be sent by registered or certified mail, return receipt requested, or other means provided in GS 1A-1, Rule 4. The notice will set forth the measures needed to comply and will state the time within which such measures must be completed. In determining the measures required and the time allowed for compliance, the authority serving notice shall take into consideration the economic feasibility, technology, and quantity of work required, and shall set reasonable and attainable time limits of compliance.
- C. The *Soil Erosion and Sedimentation Control Administrator* reserves the right to require preparation and approval of an Erosion and Sedimentation Control Plan in any instance where extensive control measures are required.
- D. This rule shall not require *ground cover* on cleared land forming the future basin of a planned reservoir.

#### **§42-266. Fees**

- A. Henderson County may establish a fee schedule for the review and approval of Erosion and Sedimentation Control Plans.
- B. In establishing the fee schedule, the County shall consider the administrative and personnel costs incurred for reviewing the Erosion and Sedimentation Control Plans and for related compliance activities.

#### **§42-267. Plan Appeals**

- A. Except as provided in §42-267 (Plan Appeals) B of this subpart, the *appeal* of a disapproval or approval with modifications of an Erosion and Sedimentation Control Plan shall be governed by the following provisions:
  - (1) The disapproval or modification of any proposed Erosion and Sedimentation Control Plan by the *Soil Erosion and Sedimentation Control Administrator* shall entitle the *person* submitting the Erosion and Sedimentation Control Plan to a public hearing if such *person* submits written demand for a hearing within 15 days after receipt of written notice of disapproval or modifications.
  - (2) A hearing held pursuant to this section shall be conducted by the Henderson County Zoning Board of Adjustment (*ZBA*) within 60 days after the date of the *appeal* or request for a hearing.
  - (3) The *ZBA* will render its final decision on any *appeal* within 45 days of the completion of the hearing.

- (4) If the *ZBA* upholds the disapproval or modification of a proposed Erosion and Sedimentation Control Plan following the hearing, the *person* submitting the Erosion and Sedimentation Control Plan shall then be entitled to *appeal* the County's decision to the Competent Court of Jurisdiction.
- B. In the event that an Erosion and Sedimentation Control Plan is disapproved pursuant to §42-256 (Erosion and Sedimentation Control Plans) J of this subpart, the *applicant* may *appeal* the *Board of Adjustment's* disapproval of the Erosion and Sedimentation Control Plan directly to the North Carolina Sediment Control Commission.

#### **§42-268. Inspections and Investigations**

- A. Inspection. Agents, officials, or other qualified *persons* authorized by the *Soil Erosion and Sedimentation Control Administrator* will periodically inspect *land-disturbing activities* to ensure compliance with the North Carolina Sedimentation Pollution Control Act of 1973, this subpart, or rules or orders adopted or issued pursuant to this subpart, and to determine whether the measures required in the Erosion and Sedimentation Control Plan or Permit are effective in controlling *erosion* and *sedimentation* resulting from *land-disturbing activity*. Notice of the right to inspect shall be included in the certificate of approval of each Erosion and Sedimentation Control Plan.
- B. Willful Resistance, Delay or Obstruction. No *person* shall willfully resist, delay, or obstruct an authorized representative, employee, or agent of the County, while that *person* is inspecting or attempting to inspect a *land-disturbing activity* under this section.
- C. Notice of Violation. If the *Soil Erosion and Sedimentation Control Administrator* determines that a *person* engaged in *land-disturbing activity* has failed to comply with the North Carolina Sedimentation Pollution Control Act of 1973, this subpart, or rules, or orders adopted or issued pursuant to this subpart, a notice of *violation* shall be served upon that *person*. The notice may be served by any means authorized under *NCGS 1A-1, Rule 4* upon the *person* conducting the *land-disturbing activity* and, if different from that party, the property *owner*. The notice shall specify a date, by which the *person* must comply with the North Carolina Sedimentation Pollution Control Act of 1973, or this subpart, or rules, or orders adopted pursuant to this subpart, and inform the *person* of the actions that need to be taken to comply with the North Carolina Sedimentation Pollution Control Act of 1973, this subpart, or rules or orders adopted pursuant to this subpart. Any *person* who fails to comply within the time specified is subject to additional civil and criminal penalties for a continuing *violation* as provided in *NCGS §113A-64* and this subpart.
- D. Revocation of Permits. The notice shall set forth the actions necessary to achieve compliance with the plan or this section, specify a reasonable time period within which such measures must be completed, and warn that failure to correct the *violation* within the time period will result in one or more of the following:
- (1) Revocation of the land-disturbing permit, all building permits, and any other permits issued by the County;
  - (2) The issuance of a stop work order;
  - (3) The assessment of civil penalties; or

(4) Other enforcement action.

If work has not begun within six (6) months following the issuance date, the land-disturbing permit shall be deemed expired. Renewal of the land-disturbing permit will require submittal of a new application and associated plan review fees. No grading work is to be performed until the new permit is issued.

- E. Investigation. The *Soil Erosion and Sedimentation Control Administrator* shall have the power to conduct such investigation as it may reasonably deem necessary to carry out its duties as prescribed in this subpart, and for this purpose to enter at reasonable times upon any property, public or private, for the purpose of investigating and inspecting the sites of any *land-disturbing activity*.
- F. Statements and Reports. The *Soil Erosion and Sedimentation Control Administrator* shall also have the power to require written statements, or filing of reports under oath, with respect to pertinent questions relating to *land-disturbing activity*.

**§42-269. Penalties**

A. Civil Penalties

(1) Civil Penalty for a Violation. Any *person* who violates any of the provisions of this subpart, or rule or order adopted or issued pursuant to this subpart, or who initiates or continues a *land-disturbing activity* for which an Erosion and Sedimentation Control Plan is required except in accordance with the terms, conditions, and provisions of an approved Erosion and Sedimentation Control Plan or Permit, is subject to a civil penalty. The maximum civil penalty amount that the *Soil Erosion and Sedimentation Control Administrator* may assess per *violation* is 5,000 dollars. A civil penalty may be assessed from the date of the *violation*. Each day of a continuing *violation* shall constitute a separate *violation*.

(2) Civil Penalty Assessment Factors. The *Soil Erosion and Sedimentation Control Administrator* shall determine the amount of the civil penalty based upon the following factors:

- a. the degree and extent of harm caused by the *violation*,
- b. the cost of rectifying the damage,
- c. the amount of money the violator saved by noncompliance,
- d. whether the *violation* was committed willfully, and
- e. the prior record of the violator in complying or failing to comply with this subpart.

(3) Notice of Civil Penalty Assessment. The *Soil Erosion and Sedimentation Control Administrator* shall provide notice of the civil penalty amount and basis for assessment to the *person* assessed. The notice of assessment shall be served by any means authorized under *NCGS 1A-1, Rule 4*, and shall direct the violator to either pay the assessment or contest the assessment, within 30 days after receipt of the notice of assessment, by written demand for a hearing.

(4) Hearing. A hearing on a civil penalty shall be conducted by the *ZBA* within 30 days after the date of the written demand for the hearing.

- (5) Final Decision. The *Board of Adjustment* shall render its final decision on the civil penalty within 45 days of the receipt of the *appeal*.
  - (6) Appeal of Final Decision. Appeal from the final decision of the *Board of Adjustment* shall be to the Competent Court of Jurisdiction.
  - (7) Collection. If payment is not received within 30 days after it is due, Henderson County may institute a civil action to recover the amount of the assessment. The civil action may be brought in the Superior Court of the county where the *violation* occurred, or the violator's residence or where the violator's principal place of business is located. Such civil actions must be filed within three (3) years of the date the assessment was due. An assessment that is not contested is due when the violator is served with a notice of assessment. An assessment that is contested is due at the conclusion of the administrative and judicial review of the assessment.
  - (8) Credit of Civil Penalties. Civil penalties collected pursuant to this subpart shall be credited to the Civil Penalty and Forfeiture Fund.
- B. Criminal Penalties. Any *person* who knowingly or willfully violates any provision of this subpart, or rule or order adopted or issued pursuant to this subpart, or who knowingly or willfully initiates or continues a *land-disturbing activity* for which an Erosion and Sedimentation Control Plan is required except in accordance with the terms, conditions, and provisions of an approved Erosion and Sedimentation Control Plan, shall be guilty of a Class 2 misdemeanor which may included a fine not to exceed 5,000 dollars as provided in *NCGS* §113A-64.

#### **§42-270. Injunctive Relief**

- A. Violation of Local Program. Whenever Henderson County has reasonable cause to believe that any *person* is violating or threatening to violate any subpart, rule, regulation or order adopted or issued by Henderson County, or any term, condition, or provision of an approved Erosion and Sedimentation Control Plan, it may, either before or after the institution of any other action or proceeding authorized by this subpart, institute a civil action in the name of the County, for injunctive relief to restrain the *violation* or threatened *violation*. The action shall be brought in the superior court of the county in which the *violation* is occurring or is threatened.
- B. Abatement of Violation. Upon determination by a court that an alleged *violation* is occurring or is threatened, the court shall enter any order or judgment that is necessary to abate the *violation*, to ensure that restoration is performed, or to prevent the threatened *violation*. The institution of an action for injunctive relief under this section shall not relieve any party to the proceedings from any civil or criminal penalty prescribed for *violations* of this subpart.

#### **§42-271. Restoration After Non-Compliance**

The *Soil Erosion and Sedimentation Control Administrator* may require a *person* who engaged in a *land-disturbing activity* and failed to retain *sediment* generated by the activity, as required by *NCGS* §113A-57 (3), to restore the waters and land affected by the failure so as to minimize the

detrimental effects of the resulting pollution by *sedimentation*. This authority is in addition to any other civil or criminal penalty or injunctive relief authorized under this subpart.

**§42-272. Severability**

If any section or sections of this subpart is/are held to be invalid or unenforceable, all other sections shall nevertheless continue in full force and effect.

**§42-273. Effective Date**

This subpart becomes effective on October 1, 2007.

**§42-274. Reserved**

**§42-275. Reserved**

**§42-276. Reserved**

**§42-277. Reserved**

**§42-278. Reserved**

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**§42-292. Reserved**

**§42-293. Reserved**

