

## **COOPERATOR NON-COMPLIANCE WITH MAINTENANCE REQUIREMENTS FOR COST SHARE CONTRACTS**

NC Soil & Water Conservation Commission

### **STATEMENT OF INTENT**

~~A BMP is considered to be non-compliant if the BMP is not functioning as planned or not being operated for its intended use. Refer to the cost share program manuals for more detailed information. Districts are not consistent in determining how many times a cooperater can be found in non-compliance with the maintenance requirements expressed in cost share contracts before being asked to repay cost share funds. Some districts have allowed cooperaters to go out of compliance multiple times without making the cooperater repay cost shared funds. This result in a situation where a cooperater may only be in compliance with the maintenance requirements for a cost shared practice for a fraction of the time expected. This also undermines the ability of districts to hold all cooperaters accountable to maintain the practices installed with public cost share assistance.~~

The intent of this policy is to outline the compliance process. It also clarifies the maximum number of times a cooperater may be found out of compliance with contract requirements before being required to repay cost share funds or cost share incentives.

### **STATEMENT OF POLICY**

The Commission's policy for addressing non-compliance on all cost share contracts is shall be as follows in the table below.

For cost share practices:

~~First time found out of compliance — district sends written warning by certified mail within 30 calendar days to cooperater with notification to correct non-compliance within 30 calendar days, or repay a prorated amount of contracted funds (with reasonable consideration for vegetation re-establishment up to 12 months);~~

~~If cooperater restored compliance, but was found out of compliance a second time, then the district must require cooperater to repay pro-rated funds.~~

Only the individual BMP that is out of compliance should be addressed if a contract includes multiple BMPs.

<b><u>STEP</u></b>	<b><u>TIMELINE</u></b>	<b><u>ACTION</u></b>
<u>1</u>	<u>30 calendar days from the date the BMP(s) were found out of compliance.</u>	<u>a. Cooperater is notified by warning letter of the non-compliance by certified mail return receipt or by a designated delivery service providing a signed delivery receipt. The letter includes notification to correct non-compliance within 30 calendar days, or to repay a prorated amount of contracted funds (with reasonable consideration</u>

		<p><u>for vegetation re-establishment up to 12 months) (02 NCAC 59D.0107).</u></p> <p><u>b. District to mail or email a copy of the letter and signature confirmation to the division.</u></p> <p><u>c. The commission recommends that the district contact the cooperator if they have not heard a response within the first 10 days of receiving the signature confirmation.</u></p> <p><u>d. If cooperator refuses to sign and accept this letter, district will resend the letter through first class mail. As long as the letter is not returned as undeliverable, after 30 days forward to the division.</u></p>
<u>2</u>	<u>20 calendar days from the date of certified mail return receipt or delivery receipt through a designated delivery service.</u>	<p><u>Cooperator responds to district in writing:</u></p> <p><u>a. Intent to repair or re-implement within 30 days or</u></p> <p><u>b. Repay funds:</u></p> <ul style="list-style-type: none"> <li><u>• Prorated amount for non-incentive BMPs.</u></li> <li><u>• 100% for incentive BMPs.</u></li> <li><u>• Checks are made payable to <b>NCDA&amp;CS</b>, rounded to the nearest dollar and mailed to the division by cooperator or district staff.</u></li> </ul>
<u>3</u>	<u>If no response from cooperator after 20 calendar days from the receipt of the letter or 2<sup>nd</sup> attempt delivery by first class mail.</u>	<p><u>a. The district must mail or email copies of all documentation (letters, receipts, notes, pictures, etc.) of the non-compliance to their cost share specialist.</u></p> <p><u>b. Division staff will turn over documentation to the Attorney General's office for collection of funds.</u></p>
<u>4</u>	<u>If a cooperator brings the BMP back in compliance or repays the prorated amount before the end of the 30 calendar days.</u>	<u>No further action is required.</u>
<u>5</u>	<u>If funds are not repaid within 20 days of the demand letter sent by the Attorney General's office.</u>	<u>The Attorney General's office will seek collection of funds through litigation.</u>
<u>6</u>	<u>If the cooperator restored compliance, but</u>	<u>a. The district must require cooperator to repay pro-rated funds within twenty days of receipt of written demand.</u>

	<u>was found out of compliance a second time.</u>	<p>b. <u>The district will notify the division.</u></p> <p>c. <u>If payment is not received the division will send the non-compliance issue to the Attorney General's office for collection.</u></p>
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1. District boards of supervisors are required to follow the process above within 30 days of finding the BMP out of compliance. Districts that do not follow the noncompliance policy will be required to have at least two district supervisors appear before the commission to explain why they refuse to follow this policy. Failure to appear at the next scheduled commission meeting may affect allocations, contract approvals, payments, and supervisor appointments.

Draft template letter from division/commission to notify district of lack of following non-compliance policy, cost share committee to decide signatory.

4.2. For incentive practices, districts must require the cooperator to repay 100% of funds associated with the noncompliance the first time the cooperator is found out of compliance, unless the cooperator has failed to achieve compliance despite making a good faith effort. The district may grant a prescribed extension period if it determines compliance cannot be met due to circumstances beyond the applicant's control (02 NCAC 59D .0107).

3. If any soil and water conservation district, division and/or Soil and Water Conservation Commission representatives are denied reasonable access to a cooperator's property or if a cooperator revokes permission to access the BMP(s) so the district he/she can perform an inspection of a cost shared BMP(s), the BMP(s) shall be considered out of compliance.

4. If a BMP is maintained for its intended use but is not being used, it is still considered in compliance.

5. If a BMP is being used for other than its intended use, it is out of compliance.

6. The operator is not eligible to receive cost share funds for the repair/reimplementation of BMP(s) found out of compliance AND is not eligible for funds for any BMP(s) on a different site, field or operation until the BMP(s) is back in compliance.

7. When a cost shared BMP is damaged or destroyed and the operator is not at fault, a contract may be approved for cost share funds for the repair or reimplementation of the BMP(s). The repair must be implemented before cost share funds can be used for BMPs on a different site, field or operation. Contracts for repairs must be limited to one calendar year. Repair contracts require approval by the division prior to the start of installation and follow the routine procedures of the Cost Share Programs.

a. If the district certifies that the unrepaired BMP poses an immediate threat to public health or the environment, then procedural changes to expedite approval of the contract should be followed. District staff must certify that a site visit has been performed which verifies the damage to the BMP, that an immediate threat exists, and that the damage has occurred through no fault of the cooperator. The

district should notify the division in writing. Refer to the repair policy for more detailed information. ~~(See Section VI for more information on Repair contracts.)~~

b. Any request to cancel a repair contract must include a written justification. The district must provide an explanation to the division for all repair contracts which expire without installation. If an operator chooses not to repair the BMP within the one year time stipulated by the contract, then he/she is in noncompliance and subject to reimbursing the State regardless of the fact that the need for repair/reimplementation was not the fault of the operator.<sup>1</sup> Refer to the repair policy for more detailed information.

8. For all structural practices, any additional area needed to accommodate the producer's equipment and/or desires will be at the producer's expense. The additional area must be stipulated on the design and not receive cost share assistance. For example, if the operator stores equipment other than waste handling equipment in the structure and the design plan did not stipulate that the area of the designed structure was increased at the producer's expense, then the operator is out of compliance.

### **Calculating repayment**

If destroyed or improperly maintained BMPs are not repaired or re-implemented within the specified time, the applicant shall be required to repay the division for cost shared BMPs. The amount to be repaid is shown in the prorated refund schedule for noncompliance of cost share payments as listed in 02 NCAC 59D .0107 and 02 NCAC 59H .0107. To compute the amount to be repaid, the district should use as the life of the practice the time period between the date of installation and the date which the BMP was found to be in need of repair or reimplementation. When cost share incentive payments have been received, 100 percent of the cost share payments for the non-compliant BMP(s) are to be repaid (02 NCAC 59D .0107, 02 NCAC 59H .0107). Refer to the refund calculator.

### **Allocating refunds**

Refunded cost share funds are added to the district's current year allocation. Refer to refunded funds from cost share program contracts policy.

~~This policy applies to all cost share programs under the Commission's authority.~~

~~This policy was approved by the Soil and Water Conservation Commission in regular session on September 16, 2009.~~

~~Richard Smith, Acting Chairman~~

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<sup>1</sup> This policy is supported by the N.C. Department of Justice, Office of the Attorney General opinion of July 1991.

[Soil and Water Conservation Commission](#)

| [September 16, 2009](#)