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See DISCLAIMER in INTRODUCTION.

# CHAPTER 11: VWP COMPLIANCE PROGRAM

The primary goal of the Virginia Water Protection (VWP) Permit Compliance Program is to secure prompt and continued compliance with the requirements of State Water Control Law (statute), VWP Permit Program Regulation, and VWP permits. Priorities include:

* preventing violations from occurring
* identifying and resolving violations early to limit the amount of environmental damage, and
* ensuring that compliance is economically preferable to noncompliance

This chapter is designed to assist DEQ staff in consistent evaluation of projects against the requirements of the VWP Permit Program Regulation and associated permits, as well as applicable portions of State Water Control Law. The chapter’s secondary purpose is to assist landowners, permittees, and other regulated and interested parties in ensuring that their project remains in compliance. The policies and procedures described in this chapter promote compliance actions that are timely, appropriate, consistent, and certain.

## 11.1 Inspections

There are two different types of inspections that can be conducted for regulated activities. **Field inspections** are inspections of projects that are conducted in the field on permitted projects, projects without permit coverage or permittee-responsible mitigation areas. Field inspections can be “focused”, meaning that only a certain aspect or section of a project’s compliance is reviewed, or “comprehensive”, where the entire project and all relevant requirements are evaluated. A **desktop audit** is another type of inspection that is conducted in the office. Staff can utilize available resources, such as aerial imagery, DEQ’s Comprehensive Environmental Data System (CEDS), and DEQ’s Logi or Tableau reports tool to determine if a project is in compliance with administrative aspects of the permit, or to determine the construction status as of a certain date. Desktop audits may be conducted on a project-specific level, or on a region- or statewide level.

### 11.1.1 Prioritization

Given the hundreds of active VWP permits at any given time, site inspections should be prioritized based on several risk factors listed below. Ideally, each project should be inspected at least once during construction, and preferably more often and prior to expiration or termination; however, resources limitations may hinder achievement of this goal. Prioritization is therefore paramount to using available time effectively. The list of risk factors presented below is not limiting; staff and management may use other, region-specific criteria to prioritize inspections.

* **Construction status:** Projects where construction is ongoing or construction status is unknown because DEQ has not received a Construction Status Update (CSU) should be the highest priority.
* **Compliance history:** Projects that have a history of noncompliance with permit conditions within the past 12 months should be prioritized for inspections, particularly those with a history of noncompliance with construction special conditions or unauthorized impacts. Note that compliance history need not apply to a specific project. If a permittee has multiple projects and one or more of those projects has had a history of noncompliance, staff in consultation with regional management, may place that permittee’s other sites at a higher priority for inspection.
* **Expiration date:** Projects expiring in the upcoming 12 months that have not had an inspection documenting project completion should be prioritized.
* **Avoided surface waters**: Projects in which avoided surface waters are in close proximity to active construction activities should be inspected more frequently due to potential risk of unauthorized impacts. Projects with no remaining or downstream surface waters will be assigned a lower priority.
* **Mitigation type and status:** Permittee-responsible creation, restoration, or enhancement should be inspected once every monitoring year until the mitigation has been deemed successful. A final inspection prior to permit termination or expiration may be necessary if several years have passed since the last inspection. Permittee-responsible preservation areas should be inspected at least once every 2-3 years during the permit term, and a final inspection should be performed prior to permit expiration or termination if more than 12 months have passed since the most recent inspection.
* **Pending permit actions:** Projects that have pending permit actions, such as modification or termination requests, should be considered for inspection using a risk-based approach. If a field inspection cannot be completed prior to issuance or modification, a desktop audit must be completed to determine current compliance status. If a field inspection cannot be completed prior to termination, a desktop audit may be helpful but is not required, unless the risk-based assessment reveals concerns about the project site.
* **Public interest:** Projects that had a high degree of public interest during the application process or after issuance should be inspected on a more frequent basis during construction.
* **Condition of proximate waters:** Projects that drain directly to or adjoin [Tier III (Exceptional) state waters](https://www.deq.virginia.gov/our-programs/water/water-quality/standards/exceptional-state-waters-tier-iii) should be inspected frequently to ensure such waters are not adversely affected. Similarly, projects that have been identified as impaired, or that have a TMDL or Watershed Implementation Plan that may be affected by the project may also be deemed higher priority.
* **Multimedia or multi-program applicability:** Managers and staff may determine that projects with strong oversight from another program (such as the DEQ Solid Waste or Construction Stormwater Management Programs) or another agency (such as the Virginia Marine Resources Commission (VMRC)) can be inspected less frequently by VWP permit staff.

Using the matrix below, the inspection priority of a project may be determined. The matrix assumes that construction has started. If construction status is unknown because the CSU requirement has not been complied with, then the inspection priority should default to “1”. The only criterion that does *not* depend on construction status is permit expiration or termination. If a permit is expiring soon, has already expired, or if a termination request is pending, and a final inspection was never conducted documenting project completion, the project should be prioritized for an inspection.

The priority of the inspection does not dictate the *type* of inspection to be performed. For example, if CSUs have not been submitted but recent aerial photographs are available, DEQ staff may elect to use the aerial photos to conduct a desktop audit to determine construction status, and then contact the permittee separately to resolve the failure to submit CSUs. The priority assigned to a project should be assigned based on the highest priority row in the evaluation. For example, if a project has never been inspected and construction has started (Priority 1), and mitigation was provided through a credit purchase (Priority 4), the project should be ranked Priority 1.

Table 11‑1: Inspection Priority Matrix

|  |  | **Inspection Priority** |
| --- | --- | --- |
|  |  | **1 (highest)** | **2** | **3** | **4 (lowest)** |
| **Construction Has Started** | **Inspection History *During Construction***  | Never inspected | Last inspection more than 1 year ago | Inspected 3-12 months ago  | Inspected within past 3 months  |
| **Avoided surface waters** | Avoided surface waters are in close proximity to active construction activities, particularly those reporting-only projects that are close to full GP thresholds | Avoided surface waters are on site but not in close proximity to active construction activities |  | There are no avoided surface waters on site (all resources impacted). |
| **Mitigation Type/Status** | Permittee-responsible creation, restoration, or enhancement work started but not inspected in last 12 months | Permittee-responsible creation, restoration, or enhancement work started but HAS been inspected in last 12 months | Preservation | Bank/in-lieu fee purchase OR no compensation required |
| **Compliance History** | Ongoing violations or pending enforcement case**OR**CSUs have not been submitted and construction status is unknown | Violations discovered in last 12 months that have since been returned to compliance | All inspections or audits during previous 12 consecutive months have been in compliance. | All prior inspections or audits have been in compliance. (At least 2 inspections must have been conducted at least 12 months apart to qualify.) |
| **Construction Status**  | Construction is ongoing  | Primary impacts are complete but surrounding areas are not stable. (As determined by last inspection) | Activity is highly regulated by other programs or agencies (example: a landfill, dredging) | Complete and stable (as determined by last inspection) OR not started  |
|  | **Expiration / Termination** | No final inspection and the permit expires in 0-12 month(s), has a pending termination request, or has already expired | Expiring in 12-24 months | Expiring in 24-36 months | Expiring in 36-48 months + |

### 11.1.2 Establishing a Regional Inspection Strategy

On an annual or more frequent basis, using the criteria above and other criteria deemed appropriate by DEQ management, each regional office should establish a list of permitted projects and projects without permit coverage that are targeted for inspection. Typically, an inspection strategy will be developed for each upcoming state fiscal year. The strategy may be adjusted during the year as regional conditions change. An estimated Target Inspection Date can be entered into the CEDS Compliance Events tab so that the projects on each region’s or project manager’s strategy can be identified using database reports. The due date for the Target Inspection Date can be adjusted to reflect the inspection priority. For example, those projects with higher priority may have a due date earlier in the inspection year than those of lesser priority. During the year, if projects arise that need inspection but are not on the inspection strategy, a target inspection date can be entered into CEDS to flag the site for an inspection. For example, if DEQ is notified that construction will start soon, staff can enter a target inspection date to ensure that the project will be inspected during construction.

### 11.1.3 Field Inspections

Field inspections play a critical role in the VWP Permit Program and are essential for accurately determining project compliance. This section provides information regarding how to prepare for a field inspection, site access, safety, delineations, and factors to evaluate when on-site.

#### 11.1.3.1 Office Preparation

A field inspection should begin with office preparation. Preparation for permitted sites, sites without permit coverage and compensation sites will be slightly different but have many similarities. For permitted impact sites, staff should review permit conditions and document any project-specific conditions that should be evaluated in addition to the standard construction conditions. Staff should determine if any SPGP special conditions apply to the site, such as federal time of year restrictions or historic preservation conditions. The final impact map should be located and printed, to scale if possible, or loaded onto a mobile device, and the inspection/compliance history should be reviewed. Staff may wish to review the delineation data sheets submitted with the Joint Permit Application (JPA), aerial imagery, USGS topo maps, and [soil survey data](https://websoilsurvey.sc.egov.usda.gov/App/WebSoilSurvey.aspx) to familiarize themselves with site conditions prior to the inspection. For sites without permit coverage, staff should review these applicable sources as well as the [National Wetland Inventory](https://websoilsurvey.sc.egov.usda.gov/App/WebSoilSurvey.aspx) and CEDS to determine if DEQ has previously responded to any complaints at the location and the resolution of those complaints. Staff should also contact the U.S. Army Corps of Engineers (USACE) to determine if a JD or USACE permit exists for the site. Another source of information may be the [Wetland Condition Assessment Tool (WetCAT)](http://cmap2.vims.edu/WetCAT/WetCAT_Viewer/WetCAT_VA_2D.html).

Table 11‑2: Preparation Checklist for Field Inspections

| Type of Inspection | Preparation | Supplies |
| --- | --- | --- |
| Permitted Sites | * Review VWP & SPGP permits for any project-specific conditions in addition to standard permit conditions
* Print final impact map or download on mobile device
* Review compliance history and previous inspection reports
* Determine if permittee is in compliance with administrative requirements of permit (compensation, construction notice, reporting, etc.)
* Determine if pre-inspection notice to permittee is appropriate.
* Ensure that property owner has provided permission for the inspection, either within JPA signature block or DEQ Property Access-Agreement (Templates subfolder).
* Determine if a VPDES construction stormwater general permit has been issued and review if appropriate
 | * Hardhat
* High visibility safety vest
* Steel-toed boots
* Safety glasses and gloves
* GPS or other field-measurement tools such as measuring wheel
* Flagging
* Field notebook
* Pens
* Auger
* Camera (do not use personal cell phone)
* Tablet (if available)
* Maps, plan sheets as needed
* Inspection data sheets
* Insect repellant
* State ID & business cards
* Munsell book
* Vegetation keys
 |
| Sites without permit coverage / Complaints | * Determine property ownership using local government tax records or web real estate information
* Contact property owner (if appropriate) for permission and to schedule inspection
* Coordinate with sister agencies as appropriate (see Section 11.7)
* Review aerial imagery and topographic maps\*
* Review soil surveys\*
* Review National Wetland Inventory / WETCAT maps\*
* Review USGS topo maps
* Determine if a USACE JD or permit exists for the site.

\*print or download onto mobile device | * Hardhat (as applicable)
* High visibility safety vest
* Steel-toed boots (as applicable) or other boots
* Safety glasses and gloves
* GPS
* Flagging
* Field notebook
* Pens / markers
* Auger
* Camera (do not use personal cell phone)
* Tablet (if available)
* Maps, plan sheets as needed
* Inspection data sheets
* Insect repellant
* State ID & business cards
* Munsell book
* Vegetation keys
 |

#### 11.1.3.2 Site Access

The statute, regulation, and permits require that a permittee provide DEQ staff access to the site and to records upon presentation of DEQ credentials during normal business hours. VWP permit compliance inspections for a permitted site can be announced or unannounced. Reasonable concerns for safety or site access may necessitate providing some advance notice to a permittee. For announced inspections, verbal or written notification at least 24 hours prior to a planned inspection should be afforded to the permittee. Inspections should be conducted only during regular business hours of DEQ. For residential development projects, when conducting a site visit that requires access to property that has an occupied dwelling, staff should provide advance notice to the permittee and ask that the permittee notify the residential owner of the pending site visit. Once on site, staff should attempt to make contact with the residential owner and notify them of DEQ’s presence to conduct an inspection of a permitted project.

Chapter 3 discusses site ownership and property access in more detail. Also, see Chapter 7 of the DEQ Enforcement Manual for more information on site access.

Inspections of sites without permit coverage may require prior contact with the property owner; the easement holder, as often occurs in residential development situations; or the controlling entity over the property, as often occurs in executed lease situations (hereafter ‘ property owner’) to obtain permission to access the site if public access points or the view from neighboring properties is insufficient to determine compliance status, or if DEQ cannot accompany other agency staff who already have obtained permission (such as USACE or County staff). Staff should also assess whether on-site resources can be reviewed utilizing existing rights-of-way (ROW).

Upon arrival at any site, staff should locate the property owner or authorized representative (such as site foreman) if available, present DEQ credentials (state identification badge), and indicate that they are present to conduct an inspection of the site in accordance with the VWP permit (or for sites without permit coverage, the VWP Permit Program Regulations). Staff do not have to be accompanied by the owner or representative during the inspection but should allow the owner or representative to accompany them upon request. In rare occasions, an owner or representative may deny access by:

* Prohibiting access to the entire property, or portions thereof;
* Requiring a waiver of liability or a confidentiality agreement;
* Denying staff ability to take photographs that are reasonably related to the inspection, to take samples, or view documents;
* Delaying the inspection unreasonably; or
* Making threats to, intimidating, harassing, or coercing staff.

If any of these situations arises, staff should leave the site immediately and return to the office to discuss the situation with his or her supervisor, and if needed, DEQ’s Enforcement Program. See Section 11.8.5 of this manual for information regarding administrative warrants.

#### 11.1.3.3 Safety

Staff should always wear or carry appropriate safety equipment when on site. Hazards on regulated sites might include heavy equipment and construction activity, snakes, ticks, mosquitos, isolation, uneven terrain, and weather. Safety boots, hardhat, safety glasses, weather- and site condition-appropriate clothing, cell phone, bug spray, and other protective equipment appropriate for site conditions should be used at all times. A change of clothing may be necessary for very wet or muddy sites, or sites with a high volume of ticks. Staff should always make sure that his or her supervisor knows their location, either via email, calendar appointment, or other method. If staff expects to return to the office after business hours, establish a way to let the supervisor know that you have returned safely, such as via text, etc. If you are in doubt regarding their safety in a situation, they should immediately leave the site and speak to their supervisor.

#### 11.1.3.4 Delineations

If an approved or preliminary Jurisdictional Determination (JD) is active for a site, the approved surface water boundaries associated with that JD should be used for compliance purposes (i.e., to determine the presence and extent of any unauthorized impacts). Generally, a JD remains active for 5 years, or for as long as a site has an active federal permit.

On sites for which there is no current approved or preliminary JD, the VWP Permit Program Regulation requires the use of the 1987 USACE Wetland Delineation Manual and the most recent Regional Supplement to determine the boundaries of unauthorized impacts to surface waters. Staff should collect sufficient data points and delineate, flag and GPS-locate or otherwise field-measure the surface waters boundary(ies)[[1]](#footnote-1). Staff should differentiate stream channels and open water from wetlands and delineate changes in Cowardin classification (if possible) so that appropriate corrective action can be determined. Data points should be of sufficient number and frequency to assess the boundary accurately. Additional reference data points may be necessary to adequately characterize the impacted site.

Surface water boundaries delineated by DEQ staff in accordance with [9VAC25-210-45](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section45/) may be used for compliance and enforcement purposes. Approval of the boundary by the USACE is not required; however, coordination with the USACE is recommended.

#### 11.1.3.5 Permitted Impact Site Compliance

Permitted site compliance involves the evaluation of a project which currently has a VWP permit or coverage.

The program goal is for each project to be inspected at least once during construction, and preferably, more often and prior to expiration or termination, as agency staffing allows. In addition, a final inspection to document completion of authorized activities and restoration of any temporary impacts must be performed prior to terminating the permit or allowing the permit to expire.

For permitted sites, the focus of a field inspection will vary depending on the phase of construction and type of compensation. During active construction near surface waters, inspections should focus on ensuring that:

* surface water impacts are within the permitted limits
* secondary impacts, such as sedimentation, reduced or eliminated hydrology, or other types of unauthorized discharges, are not occurring
* on-site compensation areas, such as preservation areas, are well-protected from secondary impacts
* other construction special conditions, such as flagging, time-of-year restrictions (TOYR), culvert countersinking, etc. are being adhered to
* movement of aquatic life is protected
* instream work is occurring in the dry, unless otherwise approved in advance by DEQ
* time-of-year restrictions are being adhered to
* temporary impacts are constructed with equipment on mats, restored to preconstruction contours and vegetative conditions, the use of invasive or undesirable plant and seed species identified on the most recent Department of Conservation and Recreation Virginia Invasive Plant Species List is minimized to the maximum extent practicable unless previously approved by DEQ, and do not involve fill below OHW (such as riprap).
* self-inspections are occurring and documented - once stabilization is achieved in accordance with 9VAC25-875-560.3, self-inspections in the applicable area can be suspended. (Oftentimes the self-inspection checklists will be found in or with the Construction Stormwater on-site documentation).

After active construction is completed, inspections should focus on ensuring that:

* permanent impacts are within specified permit limits and quantities or specified coverage limits and quantities.
* temporary impacts have been restored without the use of species on the most recent VDCR Virginia Invasive Plant Species List, unless previously approved by DEQ.
* areas surrounding surface waters are stable such that sedimentation impacts are unlikely to occur.
* avoided waters have not been impacted.

#### 11.1.3.6 Compensation Site Inspections

Compensation site inspections will focus on the success of the permittee-responsible compensation site. The program goal is to conduct at least one inspection during or immediately after grading activities, during or immediately after planting, and then annually (or as needed) during the monitoring period, as agency staffing allows. An inspection is required prior to deeming a site successful.

During compensation site construction, staff should consider:

* Do structures appear to conform to design plans?
* Do grade transitions in the field appear to be as designed?
* Has (or will) the surface layer of wetlands been disked or ripped once heavy equipment has been removed?
* Are monitoring wells installed correctly and located as approved in the final plan?
* Are plants being installed at appropriate times during the year, and are plant species and sizes consistent with the approved plan(s)?
* Does plant material appear healthy and properly installed?

During the monitoring period, staff should consider:

* Is the latest monitoring report representative of site conditions?
* Are there any concerns with the progress of the site? Are additional monitoring wells or plots appropriate?
* Are there any encroachments into the boundaries of the compensation area?
* Is control of invasive species[[2]](#footnote-2) warranted?

#### 11.1.3.7 Inspections of Sites without Permit Coverage

Inspections of sites without permit coverage will vary greatly depending on site conditions. The primary goal of this type of inspection is usually to determine if regulated, unauthorized activities have occurred within surface waters. Prior to performing a site inspection, staff should contact the USACE to determine if a USACE permit or JD exists for the site, or check DEQ’s Comprehensive Environmental Data System (CEDS). If a JD exists for the site, staff should obtain a copy of any pertinent records and use the confirmed surface water boundaries to determine the limits and extent of surface water impacts. If the USACE authorizes a project under a Nationwide or Regional permit that received § 401 certification, or the work appears to qualify for a non-reporting Nationwide or Regional Permit, DEQ staff need not inspect the site. The matter may be referred to the USACE for follow-up under their permit authority. Please see Table 11-3 for additional information on compliance and enforcement responses with respect to USACE permit status.

If staff suspects that unauthorized impacts have occurred and a current JD does not exist, a delineation of surface waters should be performed as soon as possible, preferably during the initial inspection. Sufficient data points should be collected to 1) identify and support the delineated surface water boundary and 2) identify reference (undisturbed) conditions. The number of recorded data points sufficient for a normal delineation may not be sufficient to document noncompliance or determine the area of impact. The burden of proof, in such cases, rests with DEQ, and staff should be cognizant that their work could be subject to a high degree of scrutiny. At minimum, staff should determine and document:

* the type of physical impact (clearing, filling, draining, excavation, etc.);
* the dimensions (width, length, and depth) of the physical impact;
* the type of surface water and Cowardin classification, if discernable;
* Biological impacts (if applicable), such as loss of habitat, effect on aquatic life species or movement;
* reference physical and biological conditions; and
* other activities potentially regulated under other DEQ programs, such as unauthorized solid waste disposal, other discharges of pollutants, or construction stormwater concerns.

Staff should strive to collect as much field data as possible during the initial inspection to minimize the need for a return trip. Once a responsible party is made aware of a potential compliance issue, permission to access the site a second time may be more difficult to secure.

### 11.1.4 Desktop Audits

Desktop audits should be a routine aspect of the compliance program. Database reports should be generated to determine 1) if notification of construction commencement has been received, but CEDS indicates compensation has not been completed, or 2) construction status updates indicate that construction has commenced, but preconstruction notice or compensation documentation has not been received. Desktop audits may also be used to determine construction status and, if aerial photographs are recent enough, estimate the extent of impacts. Audits should be conducted as frequently as staffing allows, to determine if any compliance deliverables, such as status updates or monitoring reports are overdue.

### 11.1.5 Timeliness

During the exit interview for the inspection, the inspector should identify any noncompliance and recommended corrective action. If the inspection was performed unescorted or an agent is not available during an inspection, the inspector should attempt to contact the responsible party and their agent verbally or via email on the next business day after the inspection, or as soon as practicable thereafter,to provide a summary of the inspection, the nature of the noncompliance observed and any recommended corrective actions.

Inspectors should strive to provide the inspection report and request for corrective action to the permittee, agent, and contractor (if appropriate) as soon as possible after the inspection but **no later than 10 business days after the inspection.**  Any accompanying compliance action (Warning Letter (WL) or Notice of Violation (NOV)) that requires supervisor signature should be submitted for review **within 10 days of the date of the inspection** **or audit.**

### 11.1.6 Inspection Documentation

#### 11.1.6.1 Inspection Reports

Every inspection should generate an inspection report. The length, detail and storage of the report will depend on the type of inspection being performed. CEDS data entry may suffice as the report for the following inspection types:

* pre-application or consultation inspections;
* inspections performed to confirm the accuracy of a report; and
* inspections of sites found to be in compliance.

If CEDS is used as the sole inspection documentation, inspection notes should be included in the CEDS record with sufficient detail to document what areas and aspects of the site were evaluated with reference to the photo log provided. A separate photo log saved in ECM is recommended for all inspections. Each region will have procedures for saving inspection documentation so that it is maintained in a manner that can be easily located and disseminated during a FOIA request. If CEDS data is not routinely captured and provided in response to FOIA requests, a screenshot of the CEDS Inspection record should be saved in ECM.

Inspection reports outside of CEDS should include the following:

* locations and notes regarding any alleged noncompliance;
* photographs sufficient to document site conditions, labeled with orientation, Impact Site ID# or other identifying feature, and a brief description of what is being shown;
* map depicting photograph location and directions, approximate boundaries of any potential unauthorized impacts, and other areas to which you may want to call attention;
* delineation data sheets, for sites without an existing JD that have unauthorized impacts; and
* a description of beneficial uses lost or impaired, and/or the physical, chemical, or biological properties that were impacted, due to unauthorized impacts.

Field notes do not need to be included in the formal inspection report, but if collected, they should be recorded in a bound field book with consecutively numbered pages. The site name, permit number (or non-permit site number), and date should be listed on all pages during each site visit. Observations should be described and/or sketched in the field book, as well as any other data collected. The field book pages should be scanned and added to the ECM file upon return to the office since they are subject to Freedom of Information Act request.

Template inspection reports are provided in the Templates subfolder, as an attachment to Chapter 11 (referenced in Appendix 11.A). Focused inspections for permitted sites, or simple comprehensive inspections may use the “Inspection Short Form”. This form may be edited to include any additional special conditions that are unique to a site (such as TOYR). If a row in the report is flagged as potential noncompliance, the notes on that row should include a description of the noncompliance so that the reader knows what and where the issue is. Alternatively, more detail on the alleged violation may be provided on the back of the form in the Notes section. Any alleged noncompliance should have at least one photograph that documents the field conditions and allegations of non-compliance. Multiple photographs may be necessary.

More complex sites or reports through the Pollution Response Program may require the use of multiple short forms (one for each phase or section) or a long-form inspection report. The long-form inspection report has only basic information at the top of the form. The remainder of the report follows and should be in the format that best presents the information. Oftentimes, this form is most useful when there is substantial noncompliance or unauthorized impacts that require additional explanation. It may also be useful when the site is very large and one short-form is insufficient to document the entire site. Finally, it may be easier to use this type of inspection report for activities that are not typically related to construction, such as dredging.

An audit of administrative requirements may be performed every time a field inspection of a permitted or compensation site has been completed. For permitted sites, the inspector should check to ensure that:

* compensation has been completed and/or compensation monitoring reports are current;
* construction status updates are current;
* preconstruction notice was received;
* other administrative requirements have been met; and
* requirements of any previous compliance or enforcement actions, such as letters of agreement (LOA) or consent orders (CO), have been fulfilled.

#### 11.1.6.2 CEDS

Every inspection, its accompanying violations, unauthorized impacts, compensation, and any compliance activities should be documented in CEDS.

## 11.2 Identifying Responsible Parties

The VWP Permit Regulation states that no “person” can impact state waters without a VWP permit or coverage. The term “person” is defined within the regulation as an “individual, corporation, partnership, association, governmental body, municipal corporation, or any other legal entity”.

Permitted sites: The Responsible Party is usually the person to whom the permit is issued. In some cases, the permittee may not have operational control over the portions of the project that are in noncompliance. For example, the permittee may have obtained a VWP permit or coverage and then sold the property but neglected to transfer the permit to the new owner. Another example is when the permittee sold the property but opted to retain permit responsibility. In such cases, DEQ staff should review the facts of the case to determine if another person is the responsible party. Staff should also review the permit to determine if it should be terminated. In these cases, the permittee may also elect to request a Transfer of Coverage. In cases where the responsible party is a person other than the permittee, an NOV or other compliance action cannot cite permit requirements, including the lack of compensatory mitigation. The action can only cite failure to obtain a VWP permit or coverage as the alleged violation.

Sites without permit coverage: The responsible party may be the property owner and/or the operator on the site. Typically, enforcement chooses to hold the property owner responsible, however, an operator, such as a contractor or tenant, may be held liable as well. Staff should consider the merits of each option and may discuss the matter with their supervisor before deciding on a course of action.

## 11.3 Compliance Response

The VWP Permit Program “Points Assessment Criteria” (also known as the “points system”) is used to maintain statewide compliance program consistency. The points system provides the basis on which staff evaluate alleged violations and determine the appropriate level of compliance response. It is structured such that more serious instances of noncompliance receive a greater number of points. Points are assessed and assigned to each alleged violation based on factors such as the degree of environmental harm, effect on the VWP Permit Program, and the compliance history of a site.

### 11.3.1 Process to Determine Points for VWP Permit/Coverage Noncompliance

Staff must use the following procedure when assessing alleged VWP permit or coverage noncompliance and unauthorized activities:

1. Identify each instance of alleged permit noncompliance or unauthorized activity discovered during the site inspection or desktop audit.
2. Record each alleged violation in CEDS. CEDS will assign the “Raw points”, which represents the typical point value for each alleged violation. Some violations are assigned ranges of points as shown in Appendix 11.B. The Regional Manager may adjust the point value assigned by CEDS, within the range, based on site- or case-specific specific characteristics. The final, adjusted point value should be recorded in CEDS. In cases where points are adjusted outside of the range provided in Appendix 11.B, a justification for the adjustment should be included in the “Notes” line for the corresponding violation in CEDS.

Where multiple Point values are shown in Appendix 11.B (*e.g.,* 0.5, 1.0, 2.0), the first value (0.5) is assigned to the first documented occurrence of a new violation. When staff conducts another inspection and observes that the noncompliance has not been corrected within the approved timeframe, the violation should be re-recorded in CEDS and assigned the next point amount. Typically, points double for each instance that an unresolved violation is observed during a successive inspection. (Note that if a responsible party is working under a corrective action plan and is in compliance with interim deadlines in the plan, no points should be assigned for any noncompliance that is being corrected under the plan.) For infractions that involve ongoing impacts such as dredging, filling, or excavation, each day the infraction is observed or has been documented as occurring is considered a *separate incident*.

1. After compiling a comprehensive list of Points, Staff calculates the cumulative points for a permit at the time of the inspection or audit by summing:
	1. Total points for any unresolved noncompliance to date;
	2. Total points for the inspection at hand; and
	3. Total aggravating factor Points.
2. Staff may also consider and include points from violations within the last 12 months that were addressed via a No Action, Request for Corrective Action (RCA), or WL, even if they have been corrected. For example, multiple instances of missing construction status update, or multiple instances of unpermitted impacts over a 12-month period may have resulted in an RCA for the first infraction but then received a NOV for the latest infraction. Any new, non-compliance items should not be counted cumulatively with non-compliance items occurring during the previous 12 months, if the previous non-compliance items were addressed through an executed enforcement action (any action taken by the Division of Enforcement, such as a consent special order, special order, letter of agreement, or referral to the Attorney General, but not a dereferral of a case). If additional non-compliance items are discovered while the Enforcement program is negotiating an enforcement action (not executed), then staff should coordinate with their supervisor to determine the appropriate compliance response. Staff uses the sum of all Points calculated to determine the appropriate compliance response.
	1. Projects accumulating 1.9 Point or less are addressed through an RCA.
	2. Projects accumulating 2.0 Point or greater, but no more than 3.9 Points, receive a WL.
	3. Projects accumulating 4.0 Points or more receive an NOV and are referred to the Division of Enforcement.
3. A formal WL or RCA may not be necessary in cases where points total less than 4.0 and noncompliance has been quickly corrected with no or very little environmental harm. Any alleged violations and corresponding points should be documented in CEDS for tracking purposes.

6. Staff should *always* refer cases where the total final point value exceeds 4.0 points to the Division of Enforcement via issuance of an NOV.

Once a case has been referred to enforcement with an NOV, additional NOVs are not necessary for ongoing noncompliance unless requested by the Division of Enforcement. Any new noncompliance (including unpermitted activities of the same type but in new areas) that arises after issuance of the first NOV should be documented in a new NOV, however. Staff should only send multiple NOVs for uncorrected violations if the responsible party has failed to adequately respond to earlier NOVs, and after consulting with the Division of Enforcement.

Once a regulated party has signed an enforcement action, Staff should no longer issue new NOVs for violations addressed by that enforcement action.

### 11.3.2 Other Factors in Assessing Points

1. Multiple Occurrences

A single compliance inspection or audit may identify multiple incidents of the same type of infraction. These multiple incidents would generally not receive Points separately. For example, if Staff finds multiple locations of unauthorized fill during one inspection at a site, Staff sums the impacts to assign Points. Inspection reports should still indicate if more than one location is impacted and over how many days the discharge has occurred. This information is important for determining the severity of the infraction and for enforcement purposes.

1. Aggravating Factors

Staff can also assign additional Points based on other “aggravating factors” associated with unauthorized impacts or permit limits exceedances. Factors include, but are not limited to the following:

* presence of threatened, endangered, or rare species and habitats;
* compliance history;
* impacting wetlands avoided through permit negotiations;
* wetland or stream type and/or quality;
* landscape or regional considerations (amount of impact in comparison to size of watershed);
* whether the landowner was notified that a permit was required;
* whether a responsible party is familiar with the requirement to obtain a permit or permit modification from prior experience;
* substantial economic benefit; and/or
* if the construction plans indicate additional impacts are still required to complete the project.
1. Administrative Noncompliance

Timely discovery of administrative noncompliance, such as delinquent reports or notifications, is necessary to refer these infractions to the Division of Enforcement. The total Points calculated in a comprehensive compliance review includes only administrative noncompliance that occurred within the previous 12 months (i.e., the date of noncompliance is no more than 12 months prior to the date noncompliance was discovered). For the purpose of the Point Assessment Criteria calculations, the age of an administrative noncompliance Point is determined using the date of the noncompliance, not the date which Staff discovered the noncompliance.

1. Expired Permits

Unauthorized impacts or incomplete mitigation discovered within 12 months of permit expiration remain referable violations. Under these circumstances, staff should consult with the Division of Enforcement prior to issuing an NOV. Administrative or other minor construction violations (such as failure to flag) discovered after permit expiration should not receive compliance or enforcement action.

1. Self-Reporting

Permittees that self-report noncompliance is a benefit to DEQ. The VWP Permit Program managers, at their discretion and based on compliance history, environmental harm, timeliness, and other factors, may reduce the total point value for the noncompliance by *up to* 2.0.

### 11.3.3 Compliance Activities

The most recent template language/paragraphs for the [WLs](https://covgov.sharepoint.com/%3Aw%3A/r/sites/deqnet/_layouts/15/Doc.aspx?sourcedoc=%7BA15499A9-7EA8-4639-BF6E-521F57FD09B3%7D&file=2-2D-WarningLetterStandardParagraphs.docx&wdLOR=cA9574DED-8BF3-4A45-8CD9-AD0DAE328289&action=default&mobileredirect=true) (document 2-2D) and [NOVs](https://covgov.sharepoint.com/%3Aw%3A/r/sites/deqnet/_layouts/15/Doc.aspx?sourcedoc=%7B00642A01-92DE-4962-BA73-37D0A96B0CE8%7D&file=2-4E-NOVStandardParagraphs.docx&wdLOR=c9973FF99-7AE7-4A73-AE22-8B6B5C5A89D6&action=default&mobileredirect=true) (document 2-4E) are found as attachments to [Chapter 2-Templates-Attachments](https://covgov.sharepoint.com/sites/deqnet/Shared%20Documents/Forms/Name%20sort.aspx?RootFolder=%2Fsites%2Fdeqnet%2FShared%20Documents%2FEnforcement%2FEnforcement%20Manual%2FChapter2%20%2D%20TEMPLATES%2FAttachments) of the Enforcement Division Manual on DEQnet. Template observations and legal requirements specific to the VWP Permit Program are found in Appendix 11.C. Of these, only an RCA may be in the form of an email. WLs and NOVs should always be sent on DEQ letterhead. WLs/NOVs may be attached, but may not comprise, the body of an email.

## 11.4 Corrective Action

For most noncompliance, corrective action to resolve noncompliance comes in the form of direct correction of the issue of concern (i.e., reinstalling wetland flagging or performing maintenance on erosion and sediment controls). Resolution will ultimately depend on the type of violation that occurred, as well as the compliance history, whether or not a responsible party is acting in good faith to resolve the violation, and other site conditions.

### 11.4.1 Administrative Noncompliance

Resolving administrative noncompliance depends on the benefit of receiving the required documents.

Staff should not request delinquent documents if the document is past due and receiving the information would not provide any valuable compliance information. Preservation plats, proof of recordation of protective instruments, proof of credit purchase, or compensation monitoring reports must always be submitted to resolve related noncompliance.

If the permittee did not submit permittee-responsible compensation monitoring reports, DEQ staff may determine 1) that the monitoring period must start over, which may necessitate a permit extension or reissuance, 2) if it appears that the site is likely to be successful, DEQ may request a monitoring report documenting current conditions and then move on with the remaining monitoring as required by the permit, or 3) an alternative course of action appropriate for the situation. For example, if a permittee did not provide compensation monitoring reports for five years as required, and DEQ discovered the violation in Year 5, the permittee may be required to conduct five additional years of monitoring and reporting as required by the permit. However, if the responsible party can demonstrate that the compensation site has sustainably met or exceeded the required success criteria, DEQ may use discretion and allow the permittee to submit a final Year 5 monitoring report and discontinue monitoring. Site conditions and likelihood of long-term success will dictate the option chosen.

### 11.4.2 Construction Special Conditions Noncompliance

Most noncompliance with construction special conditions can be resolved quickly by correcting the item at hand (i.e., reinstalling non-impact areas flagging or repairing erosion and sediment controls). Corrective actions should be required within a short timeframe to ensure that no additional impacts or environmental harm occurs. If additional impacts or environmental harm are imminent without corrective action, staff should seek out and relay the suggested corrective actions to the site foreman or another responsible individual on the site before leaving, or if no one is available, call and email the agent and permittee upon return to the office.

In some situations, resolution of noncompliance with these conditions is more complex. For example, if a culvert has not been countersunk with a roadway already installed, or temporary impacts that have not been restored, the correction will require that permittee submit a corrective action plan and schedule for approval by DEQ.

### 11.4.3 Unauthorized Impacts

When noncompliance involves unauthorized impacts, resolution becomes more complex. For every unauthorized impact, the first priority should be restoration of the affected surface waters. Leaving an impact in place should be very rare, and should generally only be allowed when 1) the impact is very minor and removing the fill or restoring the area may cause more harm to the ecosystem, or 2) when the responsible party can demonstrate that the impact is necessary to meet the purpose and need of a project, and after avoidance, minimization and compensation have been evaluated by DEQ as stringently as they would be during the permitting process. Any unrestored impacts should also be considered with respect to any permit(s) that already exist for a given project. See Section 11.4.3.3 for more details.

Note that the VWP Permit Program does not issue VWP permits or coverages that authorize impacts after they have been taken because the authorization would not comply with the VWP Permit Program Regulations. Unauthorized impacts may be resolved through compliance or enforcement action.

Figure 11‑1: Flow Chart for Resolution of Unauthorized Impacts



#### 11.4.3.1 Restoration

Restoration of unauthorized impacts is always DEQ’s preferred resolution, except in the circumstances outlined above. Staff should require a restoration or other corrective action plan (CAP) to document the agreed-upon actions and schedule. Depending on the length of time needed for restoration and monitoring, a CAP can be memorialized in a compliance LOA, a formal enforcement action, or may stand alone. When a CAP is a response to an RCA or WL, the CAP should be approved in writing by compliance staff or the VWP Permit Manager, as appropriate. If the CAP is being required via a CO or other formal enforcement action, VWP compliance staff will review the CAP. Approval will typically come from Enforcement or VWP permit staff or management, depending on regional office structure. Appendix 11.D lists potential requirements of a corrective action plan. Many sites will not require the level of detail in Appendix 11.D, but all CAPs for unauthorized impacts should have the following basic requirements:

* current conditions summary, including but not limited to plan view drawings depicting agreed-upon limits of the unauthorized impacts;
* description of proposed corrective actions and how the actions will ensure that will meet the statutory requirement of no net loss of wetland acreage and surface water functions;
* schedule of proposed corrective actions with specific dates for completion and deliverables; and
* monitoring plan (as applicable) and reporting schedule with specific dates.

#### 11.4.3.2 Leaving Impacts in Place

Unauthorized impacts should only be left in place when the impact is very minor and removing the fill or restoring the area may cause more harm to the ecosystem. In some cases, the responsible party may demonstrate that the impact is necessary to meet the purpose and need of a project. Leaving impacts in place in these cases should only be allowed by DEQ after careful evaluation of avoidance and minimization of impacts, along with proposed compensation, as would be done during the permitting process (see Chapter 3). Responsible parties seeking to leave impacts in place must submit sufficient documentation to demonstrate why it is the better option.

#### 11.4.3.3 Compensation for Unauthorized Impacts

If, after thorough analysis of the applicant’s demonstration of avoidance and minimization, staff determines that leaving the impacts in place is justified, compensation for unauthorized impacts must be required as follows:

1. For sites with preexisting permits, compensation is required if cumulative project impacts (authorized + unauthorized) exceed reporting-only thresholds.
2. For sites without existing permits, compensation is required if unauthorized impacts are greater than reporting-only thresholds.

Compensation must be sufficient to meet no net loss of wetland acreage and no net loss of the functions of all surface waters and meet the requirements of [9VAC25-210-116](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section116/). Compensation requirements can be required via an informal resolution, LOA, CO, or any other mechanism for noncompliance resolution. A responsible party may choose to purchase compensation credits prior to reaching an executed CO to ensure that credits are available, demonstrate cooperation with DEQ, and reduce the temporal loss of function(s) for the associated impacts. This is at the responsible party’s own risk. The purchase of compensation credits is supported. However, staff should not require this purchase since the CO development is not complete until both DEQ and the Responsible Party have signed the CO, and the CO has been public noticed. The CO public notice process could result in comments on the impacts, compensation, and/or penalty(ies).

#### 11.4.3.4 Permit Changes

For sites that already have permit coverage, new unauthorized impacts that are not restored should be considered cumulatively with authorized impacts to determine if adjustments to the permit type, compensation and/or interagency coordination are necessary (See Table 11-4, below). Note that the VWP Permit Program does not issue VWP permits or coverages that authorize impacts after they have been taken because the authorization would not comply with the VWP Permit Program Regulations. Unauthorized impacts may be resolved through compliance or enforcement action. Impacts left in place may require changes to the SPGP authorization. Staff should consult Section 11.7.1 and the newest version of the SPGP Standard Operating Procedure for additional information.

Table 11‑3: Permit Changes Resulting from Unrestored Unauthorized Impacts

| **Are all impacts authorized under the existing permit/coverage complete?**  | **Original Permit Type** | **Unrestored unauthorized Impact Quantities** | **Permittee Action** | **DEQ Action** |
| --- | --- | --- | --- | --- |
| Yes | Permittee submits termination request. Collect compensation for all cumulative surface water impacts through compliance or enforcement action. No permit action needed. |
| No | General permit | Do not exceed NOPC threshold or cause exceedance of general permit threshold. | No change request needed. | * No changes to VWP general permit coverage
* Compensation for unrestored unauthorized impacts required by a separate compliance or enforcement action
 |
| Exceed NOPC threshold or cause cumulative project impacts to exceed GP threshold. | * Submit application in accordance with [9VAC25-660-50](https://law.lis.virginia.gov/admincode/title9/agency25/chapter660/section50/).A.1; [9VAC25-670-50](https://law.lis.virginia.gov/admincode/title9/agency25/chapter670/section50/).A.1; [9VAC25-680-50](https://law.lis.virginia.gov/admincode/title9/agency25/chapter680/section50/).A.1 or -2;

[9VAC25-690-50](https://law.lis.virginia.gov/admincode/title9/agency25/chapter690/section50/).A.1 (for new general permit coverage) or [9VAC25-210-80](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section80/) (for new individual permit), including fee based on cumulative impacts.* Submit application for SPGP Verification.
* Request termination of current general permit coverage concurrently with issuance of new permit.
 | * Process application, collect fee and make VWP & SPGP decisions.
* Terminate original general permit coverage.
* Require compensation for unauthorized impacts in a separate compliance or enforcement action.
 |
| Reporting-Only general permit coverage | Do not exceed NOPC threshold and do not cause exceedance of reporting-only GP threshold. | No change request needed. | * No changes to VWP general permit coverage
 |
| Cause cumulative project impacts to exceed reporting-only thresholds but change is within NOPC thresholds.  | * Request NOPC. Submit all information required by 9VAC25-660-50.A.1; 9VAC25-670-50.A.1; 9VAC25-680-50.A.1 or -2; 9VAC25-690-50.A.1; or that was not provided in original application.
* Provide compensation for all authorized & unauthorized impacts.
* Pay appropriate fee based on cumulative impacts.
 | * Collect fee for general permit application.
* Process NOPC & SPGP. Require compensation required for all authorized impacts.
* Compensation for unrestored unauthorized impacts required by a separate compliance or enforcement action.
 |
| Individual Permit | Do not exceed minor modification thresholds | No change request needed. | * Compensation for unrestored unauthorized impacts required by a separate compliance or enforcement action.
 |
| Exceed minor modification thresholds. | * Request major modification (and SPGP if applicable)
* Pay fee based on cumulative impacts.
 | * Collect fee, process major modification request (and SPGP if applicable).
* Require compensation for unrestored unauthorized impacts in a separate compliance or enforcement action.
 |

#### 11.4.3.5 Future Impacts

For projects without a VWP general permit coverage or VWP individual permit, when additional impacts are needed to complete a project, the applicant should submit a JPA for the remaining impacts to surface waters. The JPA and any impact maps should identify the previous unauthorized impact areas separately from any new, proposed impact areas. An enforcement or compliance action will cover the previous unauthorized impacts, and the new VWP permit or coverage will cover proposed new impacts. Previous unauthorized impacts that are not restored are cumulative with any proposed impacts, and count toward permitting thresholds and fee amount. However, restoration may not be feasible in all situations, and permit staff may consider credit purchases to be the preferred compensatory mitigation mechanism, per the order of preference in Table 3 of Section 3.7.2 of Chapter 3. Previous uncompensated, unauthorized impacts should be noted in the fact sheet (or summary sheet) for clarity but should not be listed as an authorized impact anywhere in the individual permit cover page or general permit coverage letter, because these impacts are not being authorized.

Responsible parties should be notified that additional compliance or enforcement action might be taken if work in surfaces waters continues without a VWP permit or coverage.

### 11.4.4 Functional Loss

Regional enforcement staff and VWP Permit Program staff should discuss additional compensation requirements that may be necessary in order to account for temporal and/functional loss (e.g., conversion from palustrine forested wetland to scrub-shrub wetland or loss of unique or critical habitats).

### 11.4.5 Partial Loss of Function

Some unpermitted impacts will be temporal in nature. For example, in rare circumstances, sedimentation in a stream may be washed away before corrective action occurs. In this scenario, there was a loss of stream function for a period of time. The length of time and specific circumstances surrounding the loss should be considered when determining what corrective action or compensatory mitigation will be required.

## 11.5 Compliance Activity and Resolution Tracking

All alleged violations, compliance activities (WLs, NOVs, etc.), unauthorized impacts and compliance events should be tracked in CEDS to ensure a project is fully returned to compliance. The following protocols should be used:

Compliance Activity Closed Date: The date that all violations are resolved OR the date that a schedule of compliance is agreed upon, whichever occurs first. For example, the date that a CO is executed would be the NOV Closed date. The date DEQ and a responsible party agree on a schedule of compliance would be a WL or RCA closed date.

Violation Return to Compliance (RTC) Date: The date that the specific violation is completely returned to compliance. This is likely to be different than the compliance activity closed date. For example, a CO may be signed (closed date), but a large unauthorized impact may not be considered successfully restored until several months or years later, after monitoring is complete (RTC date).

Compliance Events can be added for each item that must be delivered to DEQ or completed to demonstrate return to compliance. Any Compliance Events should be linked to the specific RCA, WL, or NOV that it results from, and a due date should be included.

If unauthorized impacts are restored, this should be noted in the Notes section of the unauthorized impact record. A record of restoration should also added to the Compensation tab, as “Restoration”. The “Permitted” check box should be unchecked, and the notes of the compensation record should be updated to indicate that this was restoration of an unauthorized impact, as well as the date of the inspection when the impact was discovered. Once unauthorized impacts have been successfully restored, the compensation record Completed Date should be filled in.

## 11.6 Compliance and Enforcement Tools

After noncompliance is identified, DEQ uses various tools to ensure corrective action occurs. Certain tools require a referral to enforcement. The VWP Permit Program does not issue VWP permits or coverages that authorize impacts after they have been taken. Unauthorized impacts may be resolved through compliance or enforcement action.

### 11.6.1 Informal Return to Compliance

When noncompliance does not rise to the level of an enforcement referral, VWP permit staff is still responsible for ensuring that the site returns to compliance with VWP permit or coverage requirements. Generally, noncompliance with administrative and construction special conditions does not require work for staff beyond tracking the desired outcomes to allow a return to compliance, such as submittal of overdue documents, reviewing photos, or inspecting the corrected items, and communicating with the permittee.

An informal closure may be appropriate when corrective actions and any required monitoring will take less than 30 days to complete. This type of resolution may be appropriate for a construction special condition or administrative noncompliance that is not repetitive or substantial. It also may be appropriate for minor unauthorized impacts, whether they are restored or allowed to remain in place with appropriate compensatory mitigation. The agreed-upon informal resolution and any associated schedule should be documented in writing, either by letter, email, or the RCA section of the Inspection Report. If the resolution does not occur or is delinquent, DEQ staff should re-inspect the site (if needed), document the ongoing noncompliance, assess additional points, and issue a WL or NOV as appropriate.

Corrective action that is more complex, such as restoration, may require longer-term monitoring. If corrective action and monitoring will take longer than a year, staff should review the case again for enforcement referral.

### 11.6.2 Informal Compliance Letter of Agreement

A Letter of Agreement (LOA) is an informal compliance tool that represents an agreement between a Responsible Party and DEQ to return the Responsible Party to compliance within 12 months from the date of the letter. An LOA provides a clear record that the Responsible Party understands its responsibilities and agrees to corrective actions.

Civil charges cannot be assessed. LOAs do not discharge liability for alleged violations and cannot be used as a defense to federal or state enforcement action or to a citizens’ suit.

VWP permit staff should contact the [DEQ Division of Enforcement](https://www.deq.virginia.gov/home/showpublisheddocument/22405/638422031938000000) for assistance in generating the LOA. See also Chapter 2 of the [DEQ Enforcement Manual](https://www.deq.virginia.gov/home/showpublisheddocument/22405/638422031938000000). The deliverables required by an LOA should be added to CEDS in the Compliance Events screen. If the Responsible Party satisfactorily completes the terms of the LOA, staff should acknowledge the completion via letter. If the Responsible Party fails to comply with the terms of an LOA, DEQ compliance staff may issue a new NOV or WL, as appropriate, citing the original violations that led to the LOA and any subsequent alleged violations. A new inspection may be warranted to document current site conditions. Failure to comply with an LOA’s terms is not a separate alleged violation and should not be included in the subsequent NOV. The fact that an LOA was signed may be added to the observations section of a WL or NOV to acknowledge that the RP understood the actions necessary to come into compliance.

### 11.6.3 Enforcement Division Tools

The Enforcement Division handles cases that receive an NOV. Enforcement staff may elect to informally close a case after return to compliance, may issue an LOA, may issue a CO or Executive Compliance Agreement with the consent of the responsible party, or may pursue additional unilateral administrative or judicial action. Enforcement staff may also de-refer a case that they believe has factual errors or should not be pursued due to technical or legal issues.

Once a case has been referred to the enforcement division, VWP permit staff serve in a support role, providing technical advice, evaluating CAPs or other settlement offers, reviewing monitoring reports, conducting follow-up inspections and other program- or region-specific duties. Oftentimes program staff will be asked to participate in meetings with the responsible party. Program staff are also responsible for coordinating with sister agencies, such as the Virginia Department of Wildlife Resources (DWR) or the Virginia Department of Conservation and Recreation (VDCR), as appropriate to evaluate any potential effects to threatened or endangered species. VWP permit staff should also be prepared to provide enforcement staff with a summary of avoided cost (application, delineation, permit fee) so that it may be included in economic advantage. If enforcement staff close a case, program staff may not reopen it to pursue compliance action without consultation with the enforcement division.

## 11.7 Coordinating Compliance with Other Agencies and Programs

As appropriate, staff should communicate compliance concerns to other relevant agencies or DEQ programs. In some instances, other DEQ programs or external agencies may be the most efficient and successful at resolving impacts to surface waters. Examples include: situations involving tidal wetlands or tidal bottomland where VMRC may be more appropriate lead, or observations of erosion or stormwater issues in surface waters where the DEQ Stormwater Program needs to be notified, such as those that may occur on linear projects.

Activities within or near surface waters may involve the following agencies:

Table 11‑4: Coordination with Other Agencies and Programs

| **Agency** | **Area of Potential Interest** |
| --- | --- |
| Locality | Chesapeake Bay Preservation Act (Resource Protection Areas / Resource Management Areas);Erosion & Sediment Control (in participating localities);Land Disturbance Permitting;Zoning;Construction Stormwater; andLocal Wetlands Board authorizations. |
| U.S. Army Corps of Engineers  | Authorities:§ 404 Clean Water Act (USACE may also make a referral to EPA if warranted) andSection 10 Rivers & Harbors Act.If, prior to beginning work in surface waters, a project obtained coverage under a Nationwide or Regional Permit with § 401 certification from DEQ, staff should refer noncompliance to the USACE for follow-up. If a project did not obtain coverage prior to work in surface waters but would likely have qualified for a non-reporting Nationwide or Regional permit (where no PCN is required), DEQ staff should refer the matter to the USACE for follow-up and typically should not initiate separate compliance action. DEQ staff may (but is not required to) allow the USACE to be the lead agency for violations on sites where the responsible party would likely have qualified for coverage under a Nationwide or Regional Permit that has § 401 certification. This does not apply when the District Engineer has waived the impact thresholds for the NWP or RP to allow more impacts than is typical. Note, DEQ may take independent compliance or enforcement action for any surface water impacts taken without prior authorization, regardless of whether the project might have qualified for an NWP or RP that has § 401 certification. An after-the-fact Nationwide or Regional permit, such as a Nationwide 32 (Completed Enforcement Actions) does not preclude independent compliance or enforcement action by DEQ. |
| VMRC | VMRC may be considered the lead agency for:Tidal Bottomland;Tidal Wetlands; andActivities in non-tidal waters that are not regulated by DEQ but are regulated by VMRC.DEQ may initiate its own enforcement action if a VMRC action will not address all DEQ concerns. |
| DEQ  | Construction Stormwater [All VWP permit staff: copy any inspection reports documenting potential sediment and erosion control or stormwater issues (with or without a measurable VWP discharge) to the regional Construction Stormwater Management Program Manager.];Solid/Hazardous Waste;Office of Water Supply; andTMDL. |
| VDCR/VDACS | Dam Safety and Natural Heritage (T-E plants/insects, invasive species) |
| USFWS/VDWR  | Threatened or Endangered Species Concerns |
| VDACS/USDA-NRCS | Agricultural Projects |
| VDOF | Forestry Projects |

*Resolution of SPGP Noncompliance*

Typically, requiring correction of administrative and construction noncompliance through the VWP Permit Program will also resolve noncompliance with the USACE SPGP. Noncompliance with conditions unique to the SPGP, however, must be referred to the USACE for resolution because DEQ does not have authority to directly enforce the SPGP. In addition, in cases with impact limits exceedances, the resolution of such noncompliance may require additional action on the part of VWP permit staff.

The SPGP standard operating procedures (SOP) set forth the actions required to resolve unauthorized impact exceedances for those sites that already have SPGP coverage prior to any noncompliance. If unauthorized impact exceedances will not be restored, VWP permit staff should follow the steps in the SPGP SOP to resolve the noncompliance. If unauthorized impacts will be restored, no action is necessary to modify or reissue the SPGP, because the impacts will not remain in place. Restoration is not an activity that is covered by the SPGP, so if the USACE determines that federal authorization is necessary, another type of federal permit must be used.

For projects that do not have any SPGP coverage prior to taking impacts, staff should notify the USACE of the noncompliance and copy the USACE on all compliance correspondence. The USACE will determine the type of federal authorization necessary (if any) for resolving the case. In most cases, DEQ will not issue after-the-fact SPGP authorization because there is not a corresponding VWP permit or coverage. Requests by the USACE for an after-the-fact SPGP authorization will be handled on a case-by-case basis.

## 11.8 Special Circumstances

### 11.8.1 Exclusions

When a responsible party claims that their activity is not subject to permit requirements under [9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/) (Exclusions), it is the burden of the person claiming the exclusion to prove that their activity qualifies. DEQ staff may request the information necessary to make a determination regarding exclusion applicability.

### 11.8.2 Force Majeure

Many water programs have regulatory provisions for impacts that may result from circumstances beyond a responsible party’s control, such as a hurricane, which could not be overcome by due diligence and which delays or prevents compliance. These provisions are often known as “bypass” or “upset” provisions, and only apply if a facility is otherwise in compliance with its permit and has proceeded with due diligence to avoid or prevent the discharge. The VWP Permit Program Regulation does not contain this language. If, for example, a dam fails due to excessive rains, a landowner or operator may be required to clean up any resulting sedimentation. The operator installed the dam and can be held liable for any impacts resulting from the dam or its failure.

### 11.8.3 Virginia Stormwater Management Program Overlap

Many impacts to state waters observed by VWP permit staff are due to runoff and sedimentation from construction sites. Even if sediment does not completely fill a stream channel or wetland, it is considered to be fill material, and it changes the physical, chemical, and biological properties of a surface water. Sedimentation can result in the immediate or gradual conversion of a wetland to upland; change the habitat type and quality of a surface water; kill the flora and fauna inhabiting the surface water; inhibit the nutrient absorption that occurs in streams and wetlands; and limit the flood attenuation functions of wetlands.

Erosion and/or sedimentation impacts that are observed during VWP permit staff inspections should be coordinated with the regional Construction Stormwater Management Program (CSMP) Manager. Copy any inspection reports documenting these observations to the regional CSMP Manager. In some cases, a compliance action by both programs may be warranted; however, under certain circumstances, only the VWP Permit Program or the CSM Program may need to take action. For example, the VPDES Construction General Permit allows for intermittent failures of erosion and sediment control measures, provided that measures were installed correctly and maintained appropriately, and the failures were documented and corrected within the timeframes prescribed by the permit. Therefore, an operator may be in compliance with the VPDES Construction General Permit but still have a discharge of sediment that he or she is required to remove and restore under the VWP Permit Program.

VWP permit staff should pursue compliance or enforcement action when sediment has been discharged that creates a measurable depth of fill. When this situation arises, staff should use the VWP Permit Program points matrix to evaluate how this fill may be addressed. The following provides some general guidelines:

* Non-Compliance, Erosion and Sediment Control: typically less than 2-inches in depth = Minor, approximately 1 point or less depending on the scope.
* Non-Compliance, Erosion and Sediment Control: typically less than 2-inches in depth = Major, approximately 2 points or less depending on the scope.
* Non-Compliance, Erosion and Sediment Control: typically greater than 2-inches in depth = Minor or Major, approximately 1 to 4 points depending on the scope.

Regardless of the compliance action (RCA, WL, or NOV), staff should typically require hand removal of sediment to the extent practicable and correction of the deficiency that led to the discharge (see also Section 11.4.3.1). When sediment deposition is temporal or is allowed to be left in place consistent with Section 11.4.3.2, staff should assess the functional impacts to the resource. Compensation for functional losses may be required.

### 11.8.4 Preservation Instruments

DEQ is oftentimes a party to preservation instruments, such as declarations of restrictions or restrictive covenants. These instruments were put into place as part of compensation requirements, and sometimes were required as part of avoidance and minimization. The method used to enforce such instruments is case dependent (See Table 11-3). When a permit is not active, the purpose of the preservation, type of resource, and size of the preservation area must be carefully considered prior to initiating enforcement of the preservation instrument alone.

Table 11‑5: Enforcement Options for Preservation Instruments

| Type of Preserved Area Impacted Without Authorization | Legal Requirement  | Potential Enforcement Actions | Notes |
| --- | --- | --- | --- |
| Surface waters | State Water Control Law and VWP Permit Program Regulations that prohibit work in surface waters without a permit.If permit is active, permit requirements can also be enforced. | Normal administrative enforcement process and options (WL/RCA/NOV) | Using normal administrative procedures is the least resource-intensive enforcement method. However, if the activity in the preserved area is excluded from permit requirements by [9VAC25-210-60](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section60/) (such as residential landscaping), administrative enforcement procedures cannot be used. |
| Preservation Instrument | Enforcement of the terms of the preservation instrument through judicial action (court). | This can be used for enforcement of any of the terms of the instrument; however, it requires the Office of the Attorney General (OAG) to accept the case, requires testimony from staff, and is resource and time intensive. |
| Upland Preservation Area | If permit is expired –only the preservation instrument itself may be enforced | Enforcement of the terms of the preservation instrument through judicial action (court). | This can be used for enforcement of any of the terms of the instrument; however, it requires the Office of the Attorney General (OAG) to accept the case, requires testimony from staff, and is resource and time intensive. |
| If permit is active, staff may be able to pursue potential violations of applicable permit conditions. | Normal administrative enforcement process and options (WL/RCA/NOV). The WL, RCA or NOV may only cite the legal requirements of the permit. It cannot cite any requirements of the preservation instrument itself. | This is only available when the permit is active. |

### 11.8.5 Warrants

When a site owner refuses access to DEQ to inspect a property, staff should follow the procedures outlined in Chapter 7 of the [DEQ Enforcement Manual](https://www.deq.virginia.gov/home/showpublisheddocument/22405/638422031938000000), and/or contact the Enforcement Program, to determine next steps. Further discussions between the landowner and the Regional VWP Permit Program Manager or Regional Director may be successful in attaining permission. When discussions prove unsuccessful or an inspection is time-sensitive, an administrative warrant may be sought and obtained in consultation with Division of Enforcement (DE) staff and the Office of the Attorney General. Generally, administrative warrants require an affidavit from one or more DEQ staff.

It is DEQ’s burden to prove the likelihood of a violation. Evidence that a violation has likely occurred on the site might include observations from neighboring properties; desktop resources, such as [NWI maps](https://www.fws.gov/wetlands/data/mapper.html), [soil surveys](https://websoilsurvey.sc.egov.usda.gov/App/WebSoilSurvey.aspx), USGS topo maps, and aerial imagery; and information received via an anonymous or identified complaint. If the court requires additional detail, inspection reports and other evidence can be submitted, or staff can be required to testify.

### 11.8.6 Emergency Situations

DEQ has administrative and judicial tools available for use in emergency situations. An administrative order may be issued when circumstances require immediate action to abate imminent and substantial injury or damage, as in emergency situations. These orders are the administrative equivalent of judicial temporary injunctions. They are effective upon service and are issued without the consent of the Responsible Party. A prompt formal hearing must be held after reasonable notice to the Responsible Party, to affirm, modify, amend, or cancel the administrative order.

For more information regarding administrative orders or judicial actions that may be issued in exigent circumstances, refer to [Chapter 4](https://covgov.sharepoint.com/%3Aw%3A/r/sites/deqnet/Shared%20Documents/Enforcement/Enforcement%20Manual/Chapter%204%20-%20Civil%20Charges%20and%20Civil%20Penalties%20-%202016%20Version.docx?d=w0bfe2786a7064770b4fb95b81ac190f1&csf=1&web=1&e=1PxUlH) of DEQ’s [Enforcement Manual](https://www.deq.virginia.gov/home/showpublisheddocument/22405/638422031938000000).

# APPENDIX 11.A – TEMPLATE INSPECTION REPORTS [see Templates folder attached to this chapter]

# APPENDIX 11.B – POINTS MATRIX

***Definitions:***

**Major Exceedance:** Permitted project where unauthorized activity typically exceeds the minor modification/notice of planned change thresholds (For specific thresholds, see [9VAC25-210-­180](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section180/), [9VAC25-660-80](https://law.lis.virginia.gov/admincode/title9/agency25/chapter660/section80/), [9VAC25-670-80](https://law.lis.virginia.gov/admincode/title9/agency25/chapter670/section80/), [9VAC25-680-80](https://law.lis.virginia.gov/admincode/title9/agency25/chapter680/section80/), and [9VAC25-690-80](https://law.lis.virginia.gov/admincode/title9/agency25/chapter690/section80/)). Major exceedance can be more or less than the thresholds, depending on additional factors, such as harm to human health or the environment, the effects on the regulatory program, the size of the exceedance relative to the amount of permitted impacts, or the willingness of the permittee to provide compensation or perform restoration.

**Major Unpermitted Impacts:** Applies to projects where no permit was obtained in advance of unpermitted impacts requiring compensatory mitigation (e.g., typically unpermitted impacts exceeding 0.10 acre of wetland or open water, or exceeding 300 linear feet of stream bed). Major unpermitted impacts could be more or less than the thresholds indicated depending on additional factors, such as harm to human health or the environment and the effects on the regulatory program.

**Minor Exceedance:** Permitted project where unauthorized activity is typically less than or equal to minor modification/notice of planned change thresholds (For specific thresholds, see [9VAC25-210-180](https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/section180/), [9VAC25-660-80](https://law.lis.virginia.gov/admincode/title9/agency25/chapter660/section80/), [9VAC25-670-80](https://law.lis.virginia.gov/admincode/title9/agency25/chapter670/section80/), [9VAC25-680-80](https://law.lis.virginia.gov/admincode/title9/agency25/chapter680/section80/), [9VAC25-690-80](https://law.lis.virginia.gov/admincode/title9/agency25/chapter690/section80/)). Minor exceedance can be more or less than the thresholds, depending on additional factors, such as harm to human health or the environment, the effects on the regulatory program, the size of the exceedance relative to the amount of permitted impacts, or the willingness of the permittee to provide compensation or perform restoration.

**Minor Unpermitted Impacts:** Applies to projects where no permit was obtained in advance of unpermitted impacts that do not require compensatory mitigation, when permitted (e.g., typically unpermitted impacts 0.10 acre or less of wetland or open water, or 300 linear feet or less of stream bed impact and no special resources, such as threatened and endangered species, exist within the project area). Minor unpermitted impacts could be more or less than the thresholds indicated depending on additional factors, such as harm to human health or the environment and the effects on the regulatory program.

**Unpermitted Activity**: Activities occurring without a required permit, such as filling, excavating, dredging, mechanized land clearing, ditching, or activities otherwise affecting the physical, chemical, or biological properties of wetlands, streams, or other State waters.

Table 11.B.1: Non-Administrative (Onsite) Violations

| **Table 11.B.1: Non-Administrative (Onsite) Violations** |
| --- |
| **Infraction** | **Points** | **Notes** |
| **1st Occurrence** | **2nd Occurrence** | **Additional Occurrences** |
| 1. **Unpermitted** For unpermitted activity, assess Points for this infraction only. Do not use any of the other onsite infractions listed. Impact areas in multiple locations over a given time period are summed to determine if the impact is considered major or minor. Individual impacts are generally not assigned Points separately. Inspection reports should still indicate if more than one State water is impacted and over how many days the discharge has occurred. *Failure to obtain coverage under a VWP General Permit or VWP Individual Permit prior to commencing activity:*
 |
| Major Unpermitted Impacts | 4 | 4 | 4 | Major Unpermitted Impact: Generally, impacts that exceed 0.10 acre of wetland or open water, or 300 linear feet of stream bed are considered major and should require a NOV. However, these acreage and linear feet impact thresholds serve only as a guide for assessing alleged noncompliance. The facts of the case must be considered carefully regardless of the size of impacts. Smaller impacts to more significant aquatic resource functions may also be considered major. |
| Minor Unpermitted Impacts | 2 | 2 | 2 | Minor Unpermitted Impacts: Generally, impacts 0.10 acre or less of wetland or open water, or impacts 300 linear feet or less of stream bed can be considered minor based on the particular facts of the case. |
| 1. **Exceeding Permitted Impacts** Impact areas in multiple locations over a given time period are summed to determine if the impact is considered major or minor; individual impacts are not assigned Points separately. Impact thresholds serve only as a guide for assessing alleged noncompliance; the facts of the case must be considered carefully regardless of the size of impacts; smaller impacts to more significant aquatic resource functions may also be considered major, whereas larger impacts in context with a larger permitted impacts may be considered minor.
 |
| Major Exceedance | 1-4 | 1-4 | 4 | Major Exceedance: above minor modification/notice of planned change thresholds. |
| Minor Exceedance | 1-2 | 1-2 | 4 | Minor Exceedance: below minor modification/notice of planned change thresholds. |
| 1. **Compensatory Mitigation** *Failure to conduct compensatory mitigation in accordance with approved mitigation plan as follows:*
 |
| Onsite or off-site creation, restoration, or enhancement not initiated. | 4 | 4 | 4 | If compensation work was not performed in accordance with the approved plan or was not completed, the Points allocated for this infraction should be assigned after considering the degree of variance from the approved compensation plan, extent of fulfillment of “no net loss” requirements, and the level of cooperation demonstrated by the permittee in regards to corrective action; for example, a compensation site at the end of its period is found to be a PEM wetland instead of a PFO wetland, as designed, and the permittee refuses to complete the required corrective action – this infraction should be assigned a higher Point value (4.0 Points) than an infraction in which the required number of groundwater monitoring wells have not been installed at a compensation site (1.0 to 2.0 Points) |
| Failure to purchase bank or in-lieu fee program credits, record preservation deed restrictions, etc. | 4 | 4 | 4 |
| Late purchase of bank or in-lieu fee program credits, recordation of preservation deed restrictions, etc. | 2 | 2 | 2 |
| Compensation work not performed in accordance with approved plan or not completed | 1-4 | 1-4 | 1-4 |
| 1. **Construction Special Conditions** *Failure to comply with required construction special conditions (such as stormwater management, E&S controls, flagging non-impact areas, restoring temporary impacts, working in the dry, time of year restrictions, minimum stream flow, sidecasting in streams, operating equipment in streams, discharge of concrete to waters, etc.):*
 |
| With Major Impact to Surface Waters | 2 | 4 | 4 | If the activity results in a measurable impact, then the activity should also be accounted for in the first section of this table. |
| With Minor Impacts | 1 | 1 | 2 |
| With No Impact | 0.5 | 0.5 | 1 |
| 1. **Corrective Action**
 |
| *Failure to undertake required corrective action* | 2 | 2 | 2 | Where the permittee has been notified of alleged noncompliance and Staff has requested corrective actions in writing that have not been implemented by the permittee. |
| *Failure to undertake required corrective action resulting in failure to meet success criteria* | 4 | 4 | 4 |
| *Failure to conduct required water quality monitoring* | 2 | 4 | 4 |  |
| Any activity resulting in a fish kill; failing to report a fish kill, fuel, or oil spill | 4 | 4 | 4 |  |

Table 11.B.2: Administrative Violations

| **Table 11.B.2: Administrative Violations** |
| --- |
| **Infraction** | **Points** | **Notes** |
| **1st Occurrence** | **2nd Occurrence** | **Additional Occurrences** |
| 1. **Construction Monitoring**
 |
| Failure to submit construction monitoring report within the required timeframe | 0.5 | 1 | 1.5 | Permittee must be notified of the initial late submittal and Points assessed; if the required submittal is not received within the period requested, then the violation would be assessed additional Points using the Point level for the next occurrence; this repeats until the case is referred to the Division of Enforcement.Each report required is assigned Points and tracked separately; for example, if 3 monthly CMR’s were required, failure to submit each would be considered a violation and would receive 0.5 Points for a total of 1.5 Points; however, the Point values are not elevated to the 2nd or additional occurrence unless the permittee has been notified and does not respond. |
| Report does not include required information and/or contains omissions or errors so great as to prevent a determination of compliance | 0.5 | 0.5 | 1 |
| 1. **Compensation Monitoring**
 |
| *Failure to submit compensation monitoring report within the required timeframe* | 1 | 2 | 2 |  |
| Report does not include required information and/or contains omissions or errors so great as to prevent a determination of compliance | 0.5 | 0.5 | 1 |  |
| *Failure to provide copies of conservation easements or preservation plats within the required timeframe* | 0.5 | 1 | 1 | Deed restriction has been recorded, but notice was not provided to DEQ |
| *Failure to provide proof of credit purchase within the required timeframe* | 0.5 | 1 | 1 | Credit purchased, but notice was not provided to DEQ |
| *Failure to submit a complete final mitigation plan within the required timeframe* | 1 | 2 | 2 |  |
| 1. **Notification**
 |
| *Failure to provide required notice prior to commencing or completing construction or compensation* | 1 | 1 | 1 | Where several distinct impacts occur at different times, separate notification may be necessary, and each would be assessed additional Points |
| *Failure to submit plans and specifications for permitted areas prior to initiating construction* | 0.5 | 0.5 | 1 |  |
| 1. **Other Violations Not Listed Above**
 |
| *Failure to record conservation easements not required as compensation, include certification statements, submit as-built surveys, provide permit transfer notification, etc.* | 1-3 | 1-3 | 4 |  |
| *Failure to submit required information so as to prevent a determination of compliance or violation resulting in Major Harm* | 1-3 | 1-3 | 4 | Major Harm: Alleged violation related to a documented substantial adverse environmental impact, or presents substantial risk, or has a substantial adverse effect on the regulatory program. |
| Information is not required in order to determine compliance or, violation resulting in Minor Harm or no environmental harm | 0.5 | 0.5 | 1 | Minor Harm: Alleged violation presents little or no risk of environmental impact or has little or no adverse effect on the regulatory program. |

Table 11.B.3: Aggravating Factors

| **Table 11.B.3: Aggravating Factors** |
| --- |
| **Infraction** | **Points** | **Notes** |
| **1st Occurrence** | **2nd Occurrence** | **Additional Occurrences** |
| **Notwithstanding the above, any infraction with the following characteristics may be considered an aggravating factor. This should be determined on a case-by-case basis and in consultation with the Division of Enforcement.** |
| 1. **Staff can also assign Points for additional factors associated with unpermitted impacts or permit exceedances. Factors include but are not limited to, adverse environmental impact, loss of beneficial use, or presenting an imminent and substantial danger to human health or the environment.**
 | 4 | 4 | 4 | Adverse environmental impact, loss of beneficial use, or imminent danger must be documented. Typical factors include impacts to threatened, endangered, or rare species and habitats, compliance history, impacting wetlands avoided through permit negotiations, wetland type and/or quality, landscape, or regional considerations (amount of impact in comparison to watershed), landowner notification of permit requirement, substantial economic benefit, and additional impacts required to complete the project; other factors may also be considered (*see* Section VI.A). |
| 1. **Potential for adverse impact or loss of beneficial use**
 | 2 | 2 | 2 | Potential for secondary effects to cause adverse impact(s) to beneficial uses; impact is expected but has not occurred yet; for example, presence of or potential impacts to threatened, endangered, or rare species and habitats. |
| 1. **Violations resulting in exceedance of water quality standards**
 | 2 | 2 | 2 | For example, use of improper E&S controls within stream channels may result in impounding water or impeding flow, effecting temperature, pH, and/or dissolved oxygen levels. |
| 1. **Suspected falsification**
 | 4 | 4 | 4 |  |
| 1. **Suspected willful violation**
 | 4 | 4 | 4 |  |
| 1. **Site Access Violations:** *Failure to provide reasonable access otherwise required by statute or permit to any facilities where there is adverse environmental impact or an imminent and substantial danger*
 | 4 | 4 | 4 |  |

# APPENDIX 11.C – TEMPLATE OBSERVATIONS & LEGAL REQUIREMENTS

Note: This template only provides examples for citing statutory, regulatory, and general permit conditions. If an individual permit is involved, legal requirements should contain the special conditions specific to that permit. The template does not cover all potential noncompliance scenarios; only those most frequently encountered.

Unauthorized Impacts

*Observations*: Approximately **[X linear feet of stream channel and X acre[s] of forested wetlands]** **[has/have]** been impacted by **[clearing / filling / excavation / flooding/ etc.]**. DEQ has not issued a VWP Permit for these impacts.

***Legal Requirements*: [*As applicable:* The Coverage Letter for VWP General Permit WP4, issued on [Date], states, “This coverage authorizes the permanent impact of no more than 0.13 acre of emergent wetland and 0.35 acre of forested wetland. Impacts shall be as depicted on the drawing entitled “Exhibit 8: Overall Wetlands and Waters of the U.S. (WOTUS) Impact Map, dated July 2018, revised August 20, 2018, received by DEQ on August 30, 2018, and drawn by ABC Consultant, Inc.”]**

**9VAC25-210-50 A states, "Except in compliance with a VWP permit, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters, withdraw surface water, otherwise alter the physical, chemical or biological properties of surface waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses; excavate in wetlands or on or after October 1, 2001, conduct the following activities in a wetland: 1. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; 2. Filling or dumping; 3. Permanent flooding or impounding; or 4. New activities that cause significant alteration or degradation of existing wetland acreage or functions."**

**§ 62.1-44.15:20 A of the Code of Virginia states, "Except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to: 1. Excavate in a wetland; 2. On or after October 1, 2001, conduct the following in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or function; b. Filling or dumping; c. Permanent flooding or impounding; or d. New activities that cause significant alteration or degradation of existing wetland acreage or functions; or 3. Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board."**

Failure to Flag

***Observation:*** *Boundary flagging to mark nonimpacted surface waters within 50 feet of permitted activities and within the project or right-of-way-limits is missing and/or damaged.*

**Legal Requirements: VWP General Permit WP4, Part I C 10 states, “All nonimpacted surface waters and compensatory mitigation areas within 50 feet of any permitted activities and within the project or right-of-way limits shall be clearly flagged or marked for the life of the construction activity at that location to preclude any unauthorized disturbances to these surface waters during construction. The permittee shall notify all contractors that these marked areas are surface waters where no activities are to occur.”**

Failure to restore temporary impacts

***Observation:*** *The temporary sanitary sewer crossing at* ***[Impact No]*** *has not been restored to preconstruction conditions. Construction has been complete in this area for greater than 30 days.*

***Legal Requirements:*** *(2016 general permit)* **VWP General Permit WP4, Part I C 11 states, “Temporary disturbances to surface waters during construction shall be avoided and minimized to the maximum extent practicable. All temporarily disturbed wetland areas shall be restored to preexisting conditions within 30 days of completing work at each respective temporary impact area, which shall include reestablishing preconstruction elevations and contours with topsoil from the impact area where practicable and planting or seeding with appropriate wetland vegetation according to cover type (i.e., emergent, scrub-shrub, or forested). The permittee shall take all appropriate measures to promote and maintain revegetation of temporarily disturbed wetland areas with wetland vegetation through the second year post-disturbance. All temporarily impacted streams and streambanks shall be restored to their preconstruction elevations and contours with topsoil from the impact area where practicable within 30 days following the construction at that stream segment. Streambanks shall be seeded or planted with the same vegetation cover type originally present, including any necessary supplemental erosion control grasses. Invasive species identified on the Department of Conservation and Recreation's Virginia Invasive Plant Species List shall not be used to the maximum extent practicable or without prior approval from the Department of Environmental Quality.”**

**[unlikely that these older GPCs are still valid/active]**

Failure to submit compensation documentation

***Observations:*** *DEQ has not received documentation of the purchase of compensatory mitigation bank credits for the project. Construction activities in permitted impact areas have commenced.*

***Legal Requirements*: The Coverage Letter for VWP General Permit WP4 Authorization No. [WP4-XX-XXXX] states, “Compensation for permanent wetland impacts shall be provided through the purchase of 0.83 wetland credits from a DEQ approved mitigation bank that meets the requirements of § 62.1-44.15:23 A of the Code of Virginia and 9VAC25-690-70.”**

*(2016 general permit)* **VWP General Permit WP4, Part II A 4 states, “For compensation involving the purchase of mitigation bank credits or the purchase of in-lieu fee program credits, the permittee shall not initiate work in permitted impact areas until documentation of the mitigation bank credit purchase or of the in-lieu fee program credit purchase has been submitted to and received by the Department of Environmental Quality.”**

*(2016 general permit)* **VWP General Permit WP4, Part I A 1** **states, in part, “…Additional permit requirements as stipulated by the department in the coverage letter, if any, shall be enforceable conditions of this permit.”**

*(2006 general permit)* **VWP General Permit WP4, Part II A 4 states, “For compensation involving the purchase or use of mitigation bank credits or a contribution to an in-lieu fee fund, the permittee shall not initiate work in permitted impact areas until documentation of the mitigation bank credit purchase or usage or of the fund contribution has been submitted to and received by DEQ.”**

Failure to countersink

***Observation****: The culvert at Impact* ***[#]*** *has not been countersunk, is not maintaining the low flow condition, and is disrupting the movement of aquatic life.*

***Legal Requirement*:** *(2016 general permit)* **VWP General Permit WP4, Part I B 2 states, “No activity may substantially disrupt the movement of aquatic life indigenous to the water body, including those species which normally migrate through the area, unless the primary purpose of the activity is to impound water. Pipes and culverts placed in streams must be installed to maintain low flow conditions and shall be countersunk at both inlet and outlet ends of the pipe or culvert, unless otherwise specifically approved by the Department of Environmental Quality on a case-by-case basis, and as follows: The requirement to countersink does not apply to extensions or maintenance of existing pipes and culverts that are not countersunk, floodplain pipes and culverts being placed above ordinary high water, pipes and culverts being placed on bedrock, or pipes and culverts required to be placed on slopes 5.0% or greater. Bedrock encountered during construction must be identified and approved in advance of a design change where the countersunk condition cannot be met. Pipes and culverts 24 inches or less in diameter shall be countersunk three inches below the natural stream bed elevations, and pipes and culverts greater than 24 inches shall be countersunk at least six inches below the natural stream bed elevations. Hydraulic capacity shall be determined based on the reduced capacity due to the countersunk position. In all stream crossings appropriate measures shall be implemented to minimize any disruption of aquatic life movement.”**

*(2006 general permit)* **VWP General Permit WP4, Part I B 2 states, “No activity may substantially disrupt the movement of aquatic life indigenous to the water body, including those species which normally migrate through the area, unless the primary purpose of the activity is to impound water. Culverts placed in streams must be installed to maintain low flow conditions. The requirement to countersink does not apply to extensions or maintenance of existing culverts that are not countersunk, floodplain culverts being placed above ordinary high water, culverts being placed on bedrock, or culverts required to be placed on slopes 5.0% or greater. No activity may cause more than minimal adverse effect on navigation. Furthermore the activity must not impede the passage of normal or expected high flows and the structure or discharge must withstand expected high flows.”**

E&S Failure with Impact

***Observation***: *Erosion and sediment controls* ***[have failed / were not maintained / were not installed correctly]*** *near Impact Area* ***[#]****, resulting in up to* ***[#]*** *inches of fill deposited within approximately* ***[[#] linear feet of stream channel and [#] acres of [forested/scrub-shrub/emergent] wetlands].***

***IF CAUSE IS UNCERTAIN: During a site inspection on XXX, staff observed up to [#] inches of fill deposited within [[#] linear feet of stream channel and [#] acres of [forested/scrub-shrub/emergent] wetlands]. The fill material appeared to be sediment deposited from adjacent construction activities on the property.***

***(if applicable) Legal Requirement:* VWP General Permit WP4, Part I C 5 states, “Erosion and sediment controls shall be designed in accordance with the Virginia Stormwater Management Handbook …[[3]](#footnote-3) These controls shall be placed prior to clearing and grading and maintained in good working order to minimize impacts to state waters. These controls shall remain in place until the area is stabilized and shall then be removed.”**

**9VAC25-210-50 A states, "Except in compliance with a VWP permit, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters, withdraw surface water, otherwise alter the physical, chemical or biological properties of surface waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses; excavate in wetlands or on or after October 1, 2001, conduct the following activities in a wetland: 1. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; 2. Filling or dumping; 3. Permanent flooding or impounding; or 4. New activities that cause significant alteration or degradation of existing wetland acreage or functions."**

**§ 62.1-44.15:20 A of the Code of Virginia states, "Except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to: 1. Excavate in a wetland; 2. On or after October 1, 2001, conduct the following in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or function; b. Filling or dumping; c. Permanent flooding or impounding; or d. New activities that cause significant alteration or degradation of existing wetland acreage or functions; or 3. Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board."**

Failure to Report Impact

***Legal Requirements*: WP4 Permit, Part II E 10 states, “The permittee shall notify the Department of Environmental Quality no later than the end of the third business day following the discovery of additional impacts to surface waters including wetlands, stream channels, and open water that are not authorized by the Department of Environmental Quality or to any required preservation areas. The notification shall include photographs, estimated acreage or linear footage of impacts, and a description of the impacts.**

# APPENDIX 11.D – CORRECTIVE ACTION PLAN REQUIREMENTS

A Corrective Action Plan may include the following technical requirements as applicable. This list is not exhaustive, nor are all components required for every site.

* The goals and objectives of the plan in terms of restoration of functions and water quality benefits;
* A location map, including latitude and longitude (to the nearest second) at the center of each restoration area;
* An evaluation, discussion, and plan sketches of existing conditions of proposed areas, including the identification of functional and physical deficiencies for which the measures are proposed;
* For streams, a summary of stream geomorphologic measurements (e.g., stream width, entrenchment ratio, width-depth ratio, sinuosity, slope, substrate, etc.);
* For streams, plan view sketch depicting the pattern and all restoration measures being employed, a profile sketch, and cross-section sketches of each he stream restoration reach(es).
* For wetlands, a grading plan with existing and proposed elevations at one-foot or less contours;
* Schedule for restoration, including sequence of events with specific dates of completion;
* For wetlands, a hydrologic analysis, including a water budget based on expected monthly inputs and outputs that will project water level elevations for a typical year, a wet year, and a dry year;
* For wetlands, groundwater elevation data for the site, or the location of groundwater monitoring wells to collect these data, and groundwater data for reference wetlands, if applicable;
* For wetlands, design of water control structures;
* For streams, detailed design information for the proposed restoration measures, including geomorphological measurements and reference reach information as appropriate;
* Planting scheme and schedule, indicating species, [wetland indicator status ranking](http://wetland-plants.usace.army.mil/nwpl_static/v33/home/home.html) (<http://wetland-plants.usace.army.mil/nwpl_static/v33/home/home.html>), and acreage of each vegetation/species type proposed. Check that no invasive plants or seeds are being used as identified on the most recent VDCR Invasive Plant Species List.;
* Livestock access limiting measures;
* A site access plan;
* An erosion and sedimentation control plan, if appropriate;
* An abatement and control plan covering all undesirable plant species, listed on the most recent VDCR Invasive Plant Species List, that includes the conditions that trigger control activities, procedures for notifying DEQ of their presence, methods for removal, and the control of such species;
* A monitoring plan, including a monitoring and reporting schedule with specific report due dates; monitoring design and methodologies to evaluate the success of the proposed restoration measures, allowing comparison from year to year; proposed success criteria for restoration; location of all monitoring stations including photo stations, vegetation sampling points, survey points, bank pins, scour chains, and reference areas;
* For each year of monitoring, an assessment of climatic conditions prior to and during the monitoring data collection period using the procedures described in the appropriate regional supplement. For each year of monitoring, make an onsite determination of growing season start date based on the Regional Supplement;
* Reference site information to include full description of soils to include horizons, color, texture, redoximorphic features, permeability rates or any other hydric soil indicators; for vegetation, a plant list and percent cover of each plant species and wetland indicator status; also any wetland hydrology indicators. The plan should also include a summary of hydrologic calculations and/or hydrograph and indicate whether the hydrologic regime of the wetland is driven by groundwater or surface water and provide supporting data (including a copies of the supporting data sheets)
* Adaptive Management Section;
* The mechanism for permanent preservation of any restored areas, if appropriate;
* Financial assurance instrument proposed language and cost estimates.
1. Note that most GPS systems available to DEQ are only accurate to a certain degree. If possible, the responsible party should be required to survey- or field locate the boundaries using sub-meter GPS. [↑](#footnote-ref-1)
2. See most recent VDCR Invasive Plant Species List. [↑](#footnote-ref-2)
3. The new document is titled Virginia Erosion and Stormwater Management Handbook. Amendments to this reference in regulations is expected by 2026. [↑](#footnote-ref-3)