

## Module 3: Administering an Erosion Program

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## Learning Objectives

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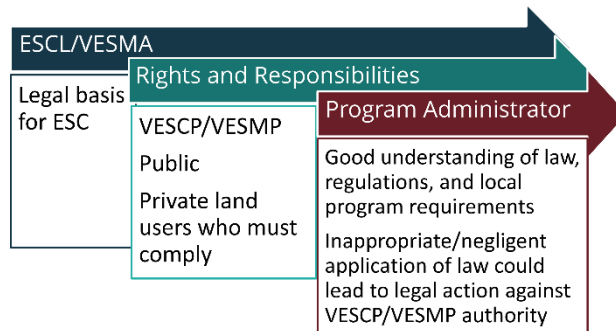
At the end of this module, you will be able to:

- Define a land-disturbing activity (LDA) and erosion impact area
- Explain and assess applicability of the Erosion and Sediment Control Law (ESC Law), the Virginia Erosion and Stormwater Management Act (VESMA) and Regulation to LDAs
- Describe the conditions under which a locality is authorized to adopt a more stringent ordinance
- Explain the various administrative aspects of plan review and approval including:
  - The necessary elements that make an erosion and sediment control (ESC) or erosion control and stormwater management (ESM) plan adequate
  - Plan review time limits and applicant notification requirements
  - The steps and process before plan approval and/or land disturbance can begin for a project
  - The options for multi-jurisdictional projects
- Explain the process and applicability of:
  - Variances
  - Securities for performance
- Recall the reporting requirements to the Department of Environmental Quality (DEQ) for a Virginia Erosion and Sediment Control Program (VESCP) or Virginia Erosion and Stormwater Management Program (VESMP)
- Summarize standards and specifications' approval, requirements, and enforcement
- Describe the requirements and provisions of an erosion inspection program
- Explain the enforcement paths and tools available for managing LDAs
- Summarize the main components of a DEQ program review, including frequency

### 3a. Regulating Land-Disturbing Activities

The Virginia Erosion and Stormwater Act (VESMA) authorizes the Virginia Erosion and Stormwater Management Program (VESMP). The ESC law (ESCL) for Localities Not Administering a VESMP authorizes the Virginia Erosion and Sediment Control Program (VЕСP). The Virginia Erosion and Stormwater Management (VESM) Regulation is the associated regulation for both programs and explains the technical, operational, and legal details necessary to implement an erosion program.

A good understanding of the law, regulation, and local program requirements is essential for a program administrator. Inappropriate or negligent application of the law could result in legal action against a VЕСP or VESMP authority.



<b>Administer VЕСP:</b> <ul style="list-style-type: none"> <li>Counties and cities <u>must</u></li> <li>Towns <u>may</u></li> </ul>	<b>Administer VESMP:</b> <ul style="list-style-type: none"> <li>MS4 permit localities <u>must</u></li> <li>Counties, cities, and towns <u>may</u></li> </ul>
<b>Locality VЕСP authority:</b> <u>May</u> enter into agreements or contracts with soil and water conservation districts, adjacent localities, or other public or private entities to carry out or assist with plan review, inspections, and enforcement.	<b>Locality VESMP authority:</b> <u>May</u> enter into agreements or contracts with DEQ, soil and water conservation districts, adjacent localities, planning district commissions, or other public or private entities to carry out or assist with plan review and inspections.
<b>Stormwater Management by DEQ</b>	<b>Stormwater Management by Locality</b>



The Virginia ESCL is § 62.1-44.15:51 through § 62.1-44.15:66 of the Code of Virginia, and VESMA is § 62.1-44.15:24 through § 62.1-44.15:50. The administrative portion of the programmatic regulations for a VESMP is 9VAC25-875-40 through 9VAC25-875-200 and for a VЕСP is 9VAC25-875-210 through 9VAC25-875-370.

<p>Administer VESCP:</p> <ul style="list-style-type: none"> <li>• § 62.1-44.15:51 - 66 Erosion and Sediment Control Law (ESCL)</li> <li>• 9VAC25-875 Virginia Erosion and Stormwater Management Regulation (VESMR)</li> </ul>	<p>Administer VESMP:</p> <ul style="list-style-type: none"> <li>• § 62.1-44.15:24 - 50 Virginia Erosion and Stormwater Management Act (VESMA)</li> <li>• 9VAC25-875 Virginia Erosion and Stormwater Management Regulation (VESMR)</li> </ul>
<p><b>Part III VESMR:</b></p> <ul style="list-style-type: none"> <li>• Definitions <b>9VAC25-875-20, 9VAC25-875-210</b></li> <li>• Purpose <b>9VAC25-875-220</b></li> <li>• Applicability <b>9VAC25-875-230</b></li> <li>• Criteria for determining status of land-disturbing activity <b>9VAC25-875-240</b></li> <li>• Regulated LDA <b>9VAC25-875-250</b></li> <li>• LDA in the Chesapeake Bay Preservation Areas <b>9VAC25-875-260</b></li> <li>• State Agency LDA <b>9VAC25-875-270</b></li> <li>• Activities not required to comply with ESCL <b>9VAC25-875-280</b></li> <li>• Criteria for programs operated by a VESCP <b>9VAC25-875-290</b></li> <li>• Plan review requirements <b>9VAC25-875-300</b></li> <li>• Plan review coordination for solar projects <b>9VAC25-875-310</b></li> <li>• Long-term maintenance of stormwater management facilities <b>9VAC25-875-320</b></li> <li>• Inspections <b>9VAC25-875-330</b></li> <li>• Enforcement <b>9VAC25-875-340</b></li> <li>• Variances <b>9VAC25-875-350</b></li> <li>• VESCP reporting and record keeping <b>9VAC25-875-360</b></li> <li>• Review and evaluation of VESCPs <b>9VAC25-875-370</b></li> <li>• Part II Criteria for a VSMP <b>9VAC25-875-200</b></li> </ul>	<p><b>Part II VESMR:</b></p> <ul style="list-style-type: none"> <li>• Definitions <b>9VAC25-875-20, 9VAC25-875-40</b></li> <li>• Purpose <b>9VAC25-875-50</b></li> <li>• Applicability <b>9VAC25-875-60</b></li> <li>• Regulated LDA <b>9VAC25-875-70</b></li> <li>• LDA in the Chesapeake Bay Preservation Areas <b>9VAC25-875-80</b></li> <li>• Activities not required to comply with VESMA <b>9VAC25-875-90</b></li> <li>• Criteria for programs operated by a VESMP <b>9VAC25-875-100</b></li> <li>• Plan review requirements <b>9VAC25-875-110</b></li> <li>• Plan review coordination with the Department (DEQ) <b>9VAC25-875-120</b></li> <li>• Long-term maintenance of stormwater management facilities <b>9VAC25-875-130</b></li> <li>• Inspections <b>9VAC25-875-140</b></li> <li>• Enforcement <b>9VAC25-875-150</b></li> <li>• Hearings <b>9VAC25-875-160</b></li> <li>• Variances and exceptions <b>9VAC25-875-170</b></li> <li>• VESMP reporting and record keeping <b>9VAC25-875-180</b></li> <li>• Review and evaluation of VESMPs <b>9VAC25-875-190</b></li> </ul>

## LAND-DISTURBING ACTIVITY

[\(§ 62.1-44.15:24, § 62.1-44.15:51\)](#) **NOTE: IN INSTANCES WHERE THERE ARE STATUTORY OR REGULATORY CITATIONS THAT DIFFER FROM A VESMP AND A VESCP AUTHORITY, THE VESMP CITATION WILL APPEAR FIRST.**

A *land-disturbing activity (LDA)* is defined as any man-made change to the land surface that may result in soil erosion from water or wind and the movement of sediments into state waters or onto lands in the Commonwealth, including, but not limited to, clearing, grading, excavating, transporting, and filling of land.

### Regulated land-disturbing activities

[\(§ 62.1-44.15:34.E; § 62.1-44.15:55.F.1\)](#)

LDAs equal to or greater than **10,000 square feet** are subject to the laws and regulation of the VESCP or VESMP. In a portion designated as a Chesapeake Bay Preservation Area according to the Chesapeake Bay Preservation Act, the regulated land disturbance threshold drops to **2,500 square feet**. LDAs of **an acre** or more in a VESCP locality are subject to the stormwater requirements of VESMA, which will be administered by DEQ as the Virginia Stormwater Management Program (VSMP) authority. LDAs of **an acre** or more in a VESMP locality are subject to the stormwater requirements of VESMA, which are administered by the VESMP.

### Developments

[\(9VAC25-875-210, 550.D\)](#)

*Development* is defined as a tract or parcel of land developed, or to be developed, as a single unit under single ownership or unified control that is to be used for any business or industrial purpose or is to contain three or more residential dwelling units. The total amount of disturbed area associated with a development determines whether it is regulated, requiring an erosion and sediment control (ESC) plan, regardless of the phasing of construction.

## EXEMPTIONS

[\(§ 62.1-44.15:34, § 62.1-44.15:55\)](#)  [\(9VAC25-875-90, 9VAC25-875-280\)](#)

VESMA and the ESC law do not regulate some LDAs. All of the following activities are exempt from VESMA and ESC law and regulation but may be regulated by other agencies or regulations:

- Minor LDAs such as home gardens and individual home landscaping, repairs, and maintenance work;

- Installation, maintenance, or repair of any individual service connections;
- Installation, maintenance, or repair of any underground utility line when such activity occurs on an existing hard surfaced road, street, or sidewalk, provided the LDA is confined to the area of the road, street, or sidewalk that is hard surfaced;
- Installation, maintenance, or repair of any septic tank line or drainage field unless included in an overall plan for an LDA relating to construction of the building to be served by the septic tank system;
- Permitted surface or deep mining operations and projects, or oil and gas operations and projects conducted pursuant to Title 45.2;
- Clearing of lands specifically for bona fide agricultural purposes; the management, tilling, planting, or harvesting of agricultural, horticultural, or forest crops; livestock feedlot operations; agricultural engineering operations, including construction of terraces, terrace outlets, check dams, de-silting basins, dikes, ponds, ditches, strip cropping, lister furrowing, contour cultivating, contour furrowing, land drainage, and land irrigation; or as additionally set forth by the Board in regulations. However, this exception shall not apply to harvesting of forest crops unless the area on which harvesting occurs is reforested artificially or naturally in accordance with the provisions of Chapter 11 ([§ 10.1-1100 et seq.](#)) of Title 10.1 or is converted to bona fide agricultural or improved pasture use as described in subsection B of [§ 10.1-1163](#);
- Installation of fence and sign posts or telephone and electric poles and other kinds of posts or poles;
- Shoreline erosion control projects on tidal waters when all of the LDAs are within the regulatory authority of and approved by local wetlands boards, the Marine Resources Commission, or the United States Army Corps of Engineers; however, any associated land that is disturbed outside of this exempted area shall remain subject to the law and regulation;
- LDAs in response to a public emergency where the related work required immediate authorization to avoid imminent endangerment to human health or the environment. The VESMP or VESCP authority shall be advised within seven days of commencing the LDA, and compliance with the administrative requirements is required within 30 days.

- Discharges to a sanitary sewer or a combined sewer system that are not from an LDA; and
- Repair or rebuilding of the tracks, rights-of-way, bridges, communication facilities, and other related structures and facilities of a railroad company.

Additional exemptions for **VESMPs only** ([§ 62.1-44.15:34.G](#)), ([9VAC25-875-90.B](#)):

Notwithstanding any other provision of VESMA, the following activities are required to comply with the soil erosion control requirements but are *not* required to comply with the water quantity and water quality technical criteria, unless otherwise required by federal law:

1. Activities under a state or federal reclamation program to return an abandoned property to an agricultural or open land use;
2. Routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original construction of the project. The paving of an existing road with a compacted or impervious surface and reestablishment of existing associated ditches and shoulders shall be deemed routine maintenance if performed in accordance with this subsection; and
3. Discharges from an LDA to a sanitary sewer or a combined sewer system.

## **CRITERIA FOR DETERMINING STATUS OF LAND-DISTURBING ACTIVITY**

([9VAC25-875-70](#), [9VAC25-875-240](#))

The program administrator shall determine the validity of a claim of exempt status by a property owner who disturbs equal to or greater than 10,000 square feet, or 2,500 square feet or more in all areas of jurisdictions designated as subject to the Chesapeake Bay Preservation Area Designation and Management Regulations ([9VAC25-830](#)). As soon as a nonexempt status is determined, the requirements of VESMA or the ESC law shall be immediately enforced.



## MORE STRINGENT REGULATIONS OR ORDINANCES

[\(§ 62.1-44.15:33, § 62.1-44.15:65\)](#)

Localities are authorized to adopt ordinances that are more stringent than the minimum state requirements, when necessary, provided the more stringent ordinances are based upon factual findings of local or regional comprehensive watershed management studies or findings developed through the implementation of a Municipal Separate Storm Sewer System (MS4) permit or a locally adopted watershed management study.

Additionally, the more stringent ordinances may be necessary to:

- Prevent any further degradation to water resources,
- Address total maximum daily load (TMDL) requirements,
- Protect exceptional state waters, or
- Address specific existing water pollution including:
  - i) Nutrient and sediment loadings,
  - ii) Stream channel erosion,
  - iii) Depleted groundwater resources, or
  - iv) Excessive localized flooding within the watershed.

For example, a VESMP or VESCP authority may require the detention of larger storm events to address one of the issues listed earlier. Before adopting more stringent regulations or ordinances, a public hearing must be held after giving due notice. The VESMP or VESCP authority must report their more stringent regulations or ordinances to DEQ. This requirement does not apply if the authority reduces the threshold for regulated LDAs.

**NOTE:** Localities may adopt the Virginia Stormwater Management Handbook (VSWHB) by reference as part of their local ordinance.

## EROSION IMPACT AREA

[\(§ 62.1-44.15:24, § 62.1-44.15:51\)](#)

An *erosion impact area* is defined as an area of land **not associated** with a current LDA but subject to persistent soil erosion resulting in the delivery of sediment onto neighboring properties or into state waters. This definition shall not apply to any lot or parcel of land of 10,000 square feet or less used for residential purposes or to shorelines where the erosion results from wave action or other coastal processes. In order to prevent further erosion, a VESMP or VESCP authority may require approval of an ESC or erosion control and stormwater management (ESM) plan  [\(§ 62.1-44.15:34.C, § 62.1-44.15:55.D\)](#).

An example would be an old borrow pit generating sediment onto an adjacent property after every rain event. When the property owner complains to the VESMP or VESCP authority, the authority may require the borrow pit owner to submit an ESC or ESM plan for approval, in order to help remedy the off-site sedimentation.

### 3b. Local Ordinances for Chesapeake Bay Preservation Act LDAs

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#### CHESAPEAKE BAY ACT LAND-DISTURBING ACTIVITIES

[\(§62.1-44.15:24, :27, :34\)](#) (9VAC25-875-70, 80, 9VAC25-875-250, 260)

Chesapeake Bay Preservation Act land-disturbing activities (CBPA LDAs) are defined as LDAs ***in Chesapeake Bay Preservation Areas that result in a land disturbance greater than or equal to 2,500 ft.<sup>2</sup> and less than one acre.*** VESCP and VESMP localities subject to the provisions of the CBPA ([§62.1-44.15:67 et al](#)) must regulate CBPA LDAs.

**Chesapeake Bay Preservation Areas** are delineated by a local government within Tidewater Virginia that if improperly developed may result in substantial damage to the water quality of the Chesapeake Bay and its tributaries. A Chesapeake Bay Preservation Area includes a Resource Protection Area and a Resource Management Area ([§62.1-44.15:68, 9VAC25-830-40](#)).

However, localities may choose whether or not to require a full plan submittal for single-family residences that are separately built with a land disturbance greater than 2,500 square feet but less than one acre. In addition to compliance with the water quantity criteria (**9VAC25-875-600**), a locality may also require compliance with the water quality criteria (**9VAC25-875-580, 9VAC25-875-590**) for single-family residences that will disturb more than 2,500 square feet in the CBPA. Most localities will choose to accept an agreement in lieu of a plan (discussed in Module 3c) in these instances.

VESCP localities that are subject to the Chesapeake Bay Preservation Act must adopt an ordinance that meets the same requirements as a VESMP for CBPA LDAs in accordance with (**9VAC25-875-80**):

- After June 30, 2014, such LDAs shall not require completion of a registration statement or require coverage under the General VPDES Permit for Discharges of Stormwater from Construction Activities (**9VAC25-880 et seq.**) but shall be subject to the technical criteria and program and administrative requirements set out in **9VAC25-875-740**.
- A local land disturbance approval, as applicable, shall be provided for the LDA.
- The locality shall regulate such LDAs in compliance with the:
  - i) Program requirements in **9VAC25-875-100**;

- ii) Plan review requirements in **9VAC25-875-110**, with the exception of subsection D of **9VAC25-875-110** or as allowed in subsection A of **9VAC25-875-750**;
  - iii) Enforcement components of **9VAC25-875-150**;
  - iv) Hearing procedures in effect in the locality;
  - v) Exception conditions of **9VAC25-875-170**, excluding subsection A of **9VAC25-875-170**, which is not applicable; and
  - vi) Reporting and recordkeeping requirements of **9VAC25-875-180**, with the exception of subdivision B 3 of **9VAC25-875-180**.
- As authorized by [§ 62.1-44.15:28](#) of the Code of Virginia, a locality may collect a fee as specified in **9VAC25-875-1400**.
  - Inspection requirements of **9VAC25-875-140**, with the exception of subdivisions A 3 and A 4 of **9VAC25-875-140**.
  - Long-term stormwater management facility requirements of **9VAC25-875-130**.

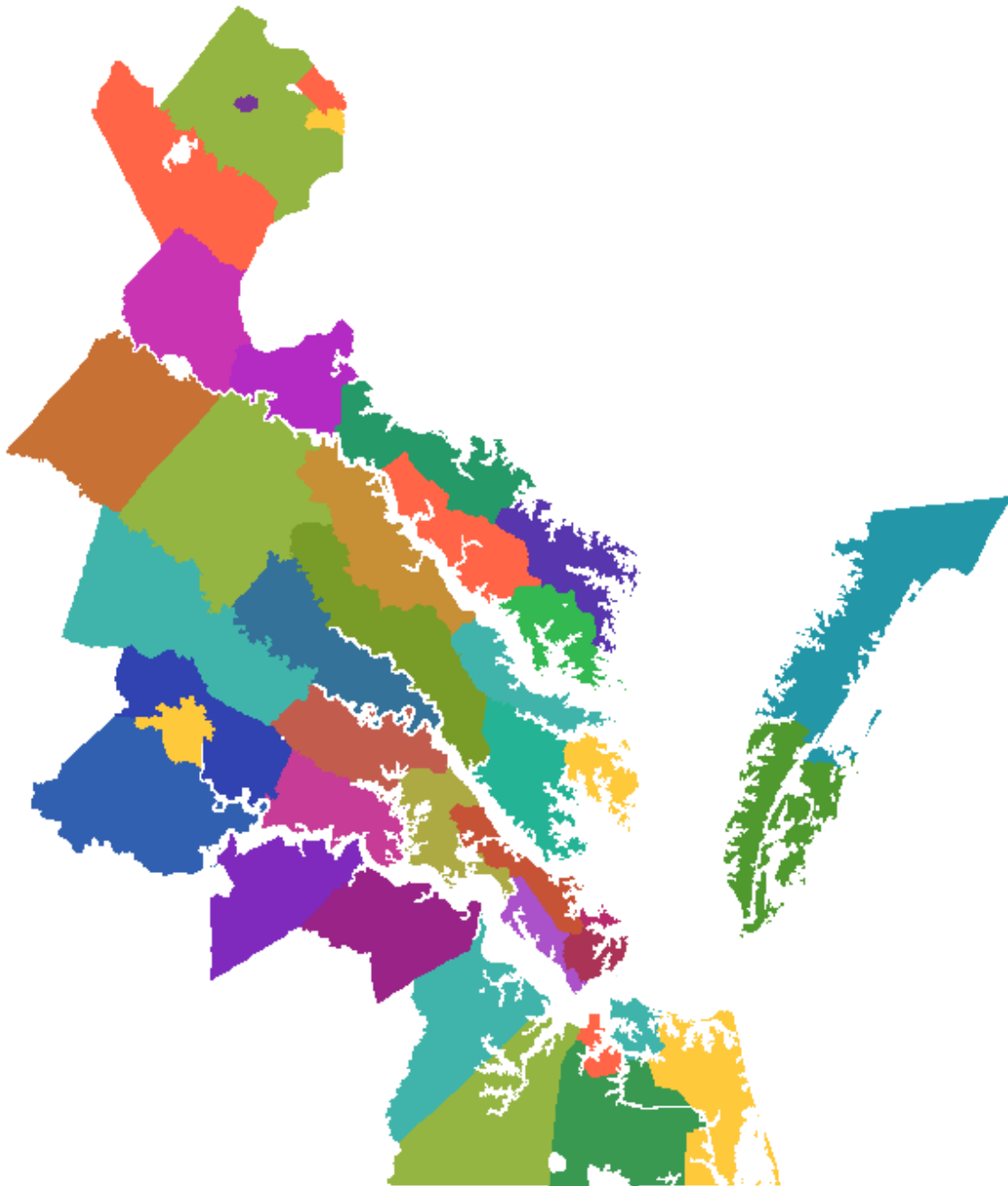
**NOTE:** At the discretion of the authority, recorded long-term maintenance agreements need not be required for Post-Construction Best Management Practices (P-BMPs) designed to treat stormwater runoff primarily from an **individual residential lot**. It must be demonstrated to the satisfaction of the authority that future maintenance of such P-BMPs will be addressed through an enforceable mechanism.

Such a strategy may include periodic inspections, homeowner outreach and education, or other methods targeted at promoting the long-term maintenance of such P-BMPs. Such facilities shall not be subject to the requirement for an inspection to be conducted by the authority.

Additionally, the authority may choose whether or not to require construction record drawings for P-BMPs not required to have maintenance agreements.

**Reminder:** For VESCPs, DEQ would review the Stormwater Management (SWM) plan and Construction General Permit (CGP) coverage would be required when the LDA  $\geq 1$  acre. VESCPs in the CPBA must follow the requirements of a VESMP on LDAs between 2,500SF to <1 acre due to their proximity to the Bay.

**Localities subject to the Chesapeake Bay Preservation Act**



## Localities subject to the Chesapeake Bay Preservation Act

### Counties

Accomack	Isle of Wight	Northumberland
Arlington	James City	Prince George
Caroline	King & Queen	Prince William
Charles City	King George	Richmond
Chesterfield	King William	Spotsylvania
Essex	Lancaster	Stafford
Fairfax	Mathews	Surry
Gloucester	Middlesex	Westmoreland
Hanover	New Kent	York
Henrico	Northampton	

### Cities

Alexandria	Hampton	Portsmouth
Chesapeake	Hopewell	Richmond
Colonial Heights	Newport News	Suffolk
Fairfax	Norfolk	Virginia Beach
Falls Church	Petersburg	Williamsburg
Fredericksburg	Poquoson	

### Towns

Ashland	Nassawadox
Belle Haven	Occoquan
Bloxom	Onancock
Bowling Green	Onley
Cape Charles	Painter
Cheriton	Parksley
Claremont	Port Royal
Clifton	Quantico
Colonial Beach	Saxis
Dumfries	Smithfield
Eastville	Surry
Exmore	Tangier
Hallwood	Tappahannock
Haymarket	Urbanna
Herndon	Vienna
Irvington	Warsaw
Kilmarnock	West Point
Melfa	White Stone
Montross	Windsor

### 3c. Plan Submission, Review, and Approval

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#### SUBMISSION

(9VAC25-875-20)

An ESC or ESM plan describes the potential of and methods for controlling soil erosion and sedimentation during an LDA. The plan also describes the structural and non-structural practices for minimizing erosion and containing sediment during construction. **NOTE:** There are additional components to an ESM plan related to stormwater management that are discussed in our Stormwater Certification courses.

The VSWHB contains the specifications for the installation and maintenance of the Construction Best Management Practices (C-BMPs). The Minimum Standards state when and where the C-BMPs must be used. See Modules 4 and 5 for more information.

#### Agreement in lieu of a plan

(9VAC25-875-20, 9VAC25-875-210)

An *agreement in lieu of a plan* is a contract between the VESMP or VESCP authority and the owner that specifies conservation measures that must be implemented in the construction of a (i) single-family detached residential structure or (ii) farm building or structure on a parcel of land with a total impervious cover percentage, including the impervious cover from the farm building or structure to be constructed, of less than 5.0%. This contract may be executed by the VESMP or VESCP authority in lieu of a formal site plan.

*Farm building or structure* means a building or structure not used for residential purposes, located on property where farming operations take place, including any building or structure used for agritourism activity and any related impervious surfaces, including roads, driveways, and parking areas; and used primarily for any of the following uses or combination thereof:

1. Storage, handling, production, display, sampling, or sale of agricultural, horticultural, floricultural, or silvicultural products produced in the farm;
2. Sheltering, raising, handling, processing, or sale of agricultural animals or agricultural animal products;
3. Business or office uses relating to the farm operations;

4. Use of farm machinery or equipment or maintenance or storage of vehicles, machinery, or equipment on the farm;
5. Storage or use of supplies and materials used on the farm; or
6. Implementation of best management practices associated with farm operations.

*Agritourism activity* means any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, wineries, ranching, horseback riding, historical, cultural, harvest-your-own activities, or natural activities and attractions. An activity is an agritourism activity whether or not the participant paid to participate in the activity.

An example would be a winery of 50 acres using 2 acres to build a tasting room and parking lot. As long as the existing impervious on site and the new impervious is less than 5% (in this example 2.5 acres) then an agreement in lieu of a plan would be applicable.

The *applicant* is defined as any person submitting an ESC or ESM plan, or an agreement in lieu of a plan, for approval in order to obtain authorization for LDAs to commence. This allows the contractor of a project to pursue the land disturbance approval. However, the responsibility for plan preparation, submission, and obtaining approval belongs to the **owner** of the project ([§ 62.1-44.15:34.A](#), [§ 62.1-44.15:55.E](#)).

## PLAN REVIEW

([§ 62.1-44.15:34](#), [§ 62.1-44.15:55](#))

**Before** land disturbance can begin on a project, the VESCP or VESMP authority must review and approve an ESC or ESM plan or execute an agreement in lieu of an ESC or ESM plan for the construction of a single-family residence or a qualifying farm building or structure. If no action is taken by the VESCP authority within the times specified, the plan is deemed approved, and the applicant is authorized to proceed with the proposed activity.



## Adequate plans

[\(§ 62.1-44.15:34, § 62.1-44.15:55\)](#)

For an ESC or ESM plan to be considered adequate, it must:

- Meet the requirements of VESMA or ESC law and regulation;
- Satisfy the minimum standards of the VESM Regulation;
- Comply with more stringent standards, as required by the locality;
- Include the applicable BMPs from the VSWHB (titled and numbered);
- Contain sufficient information to assure the plan-approving authority that potential problems of erosion and sedimentation have been adequately addressed; and
- Include a plan review checklist, if required by the locality, but is required by DEQ.

### NOTE

New and/or proprietary practices may also be used to address potential erosion and sedimentation issues; however, these practices need to be thoroughly described to the satisfaction of the plan-approving authority.

Applicants in a VESCP locality must also certify that they will comply with the ESC law and that the C-BMPs included on the plan will be properly executed. Applicants in a VESMP locality must also certify that they will comply with VESMA and that the C-BMPs included on the plan will be properly executed. A sample plan review checklist is included in Module 4.

The VESCP or VESMP authority must review an adequate ESC or ESM plan and grant written approval within **60 days**.

## Incomplete ESM plans

[\(§ 62.1-44.15:34\)](#)

The VESMP must review an ESM plan within **15 days** to determine completeness. If an ESM plan is determined to be incomplete, the VESMP must provide written notice of incompleteness, including the items needed that will allow for the plan to be determined complete, and eligible for a full review within **60 days** of notification of a complete plan.

## **Inadequate ESC plans**

[\(§ 62.1-44.15:55\)](#)

The VESCP authority must review an inadequate ESC plan within **45 days** and provide written notice of disapproval, stating the specific reason(s) for disapproval, including the modifications, terms, and conditions that will allow approval of the plan.

## **Resubmitted ESC or ESM plans**

[\(§ 62.1-44.15:34, § 62.1-44.15:55\)](#)

When a previously disapproved plan is resubmitted, the VESCP authority has **45 days** to review the revised ESC plan and approve it, if adequate.

When a previously disapproved plan is resubmitted, the VESMP authority has **15 days** to review for completion and **45 days** from receipt to review.

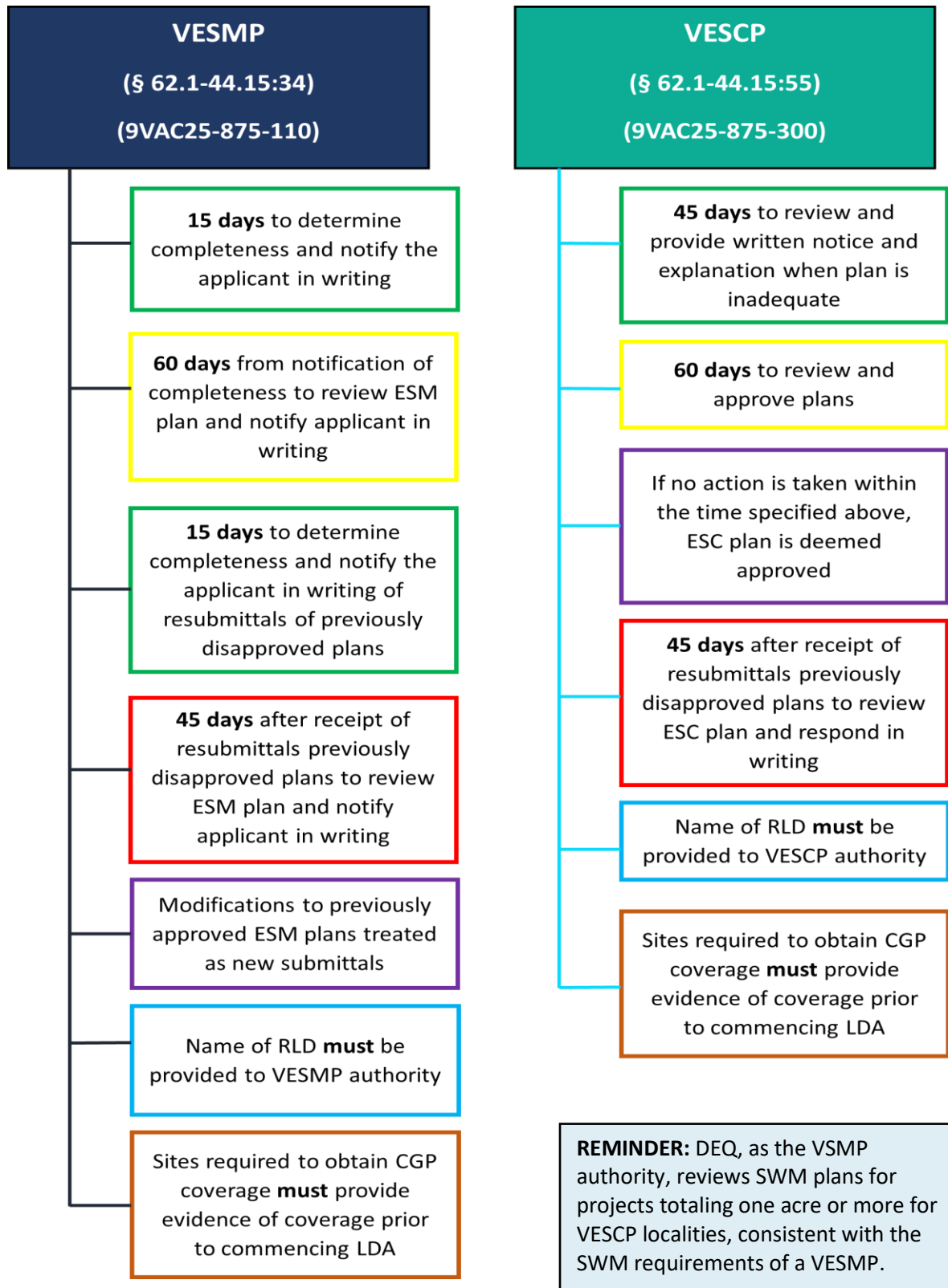
## **Multi-jurisdictional projects**

[\(§ 62.1-44.15:34.D, § 62.1-44.15:55.A\)](#)

A VESCP authority may enter into an agreement with an adjacent VESCP or VESMP authority regarding the administration of multi-jurisdictional projects specifying who shall be responsible for all or part of the administrative procedures. Should adjacent authorities fail to come to such an agreement, each shall be responsible for administering the area of the multi-jurisdictional project that lies within its jurisdiction.

A VESMP authority may only enter into agreements with another adjacent VESMP authority.

## Comparison of VESMP and VESCP plan approval timelines



## **Variances**

(9VAC25-875-170, 9VAC25-875-350)

The VESMP or VESCP authority may waive or modify any of the requirements that are deemed inappropriate or too restrictive for site conditions by granting a variance. Variance requests must be considered judiciously, and the VESMP or VESCP authority should take a conservative and responsible approach, keeping in mind the need to protect downstream properties and the environment from damage due to soil erosion, sediment deposition, and non-agricultural runoff. Variances should only be approved when they are reasonable and supported by site-specific rationale.

A *variance* may be granted under these two conditions:

1. At time of plan submission, an applicant can request a variance to become a part of the approved ESC or ESM plan.
  - Applicant explains reasoning to the VESMP or VESCP authority in writing.
  - The VESMP or VESCP authority approves or disapproves the variance and documents the variance on plans.
2. During construction, the person responsible for implementing the approved plan can request a variance.
  - Request is made in writing to the VESMP or VESCP authority.
  - The VESMP or VESCP authority approves or disapproves the request in writing.
  - If no response from the VESMP or VESCP authority within 10 days, the request is disapproved.
  - Applicant may resubmit a variance request with additional documentation.

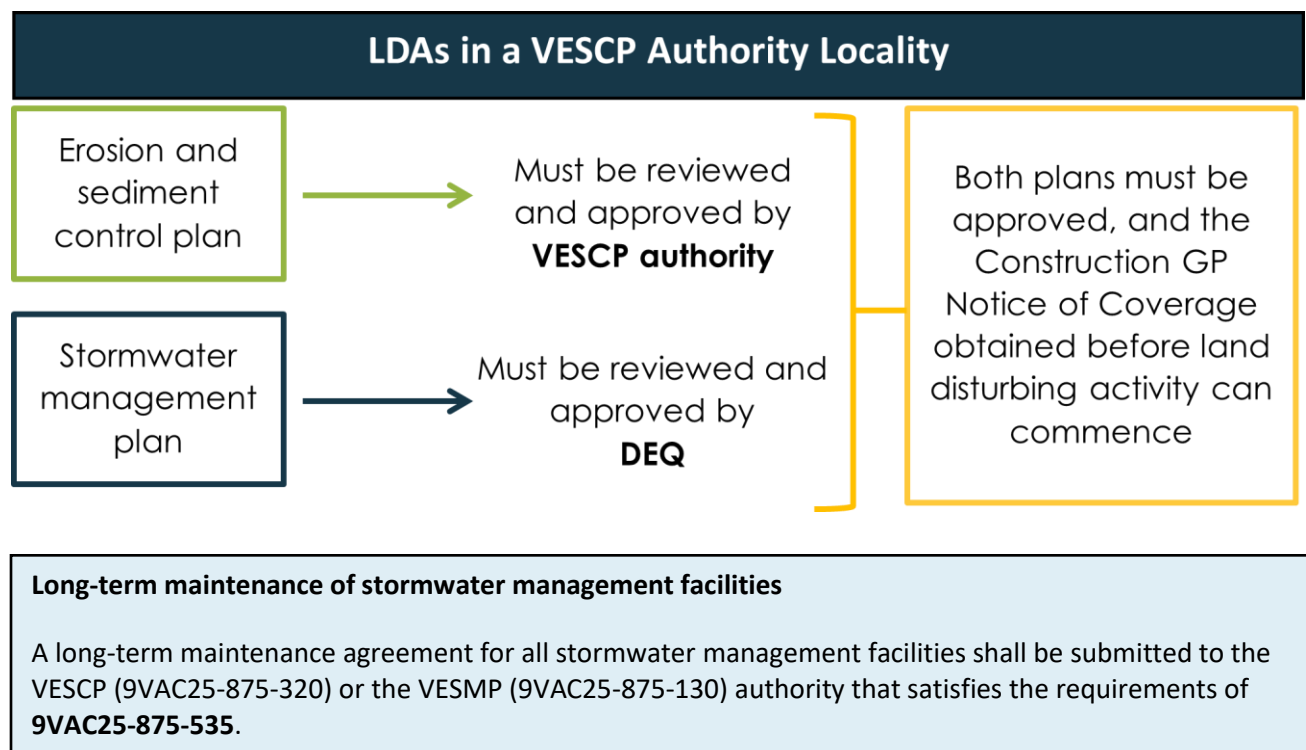
## APPROVAL

[\(§ 62.1-44.15:34.A, § 62.1-44.15:55.A\)](#)

For LDAs in a VESCP authority locality: Before any activities involving LDAs regulated under the ESC law can commence, the applicant must have submitted an ESC plan that has been reviewed and approved, as well as certification that the plan will be followed. If the LDA is subject to VESMA, the applicant must also have a SWM plan approved by DEQ and CGP coverage, if required, before LDAs can begin.

For LDAs in a VESMP authority locality: Before any activities involving LDAs regulated under VESMA can commence, the applicant must have an approved ESM plan and authority land-disturbance approval has been issued. If the LDA is subject to the stormwater requirements of VESMA, the applicant must have an approved plan and CGP coverage, if required, before LDAs can begin.

For example, when a contractor applies for a building permit with a locality's code compliance department, the contractor will need to submit proof of approved ESC (VESCP) and SWM plans (DEQ) or ESM (VESMP) plans and permit coverage, where applicable, before the building permit can be issued.



## LDAs in a VESMP Authority Locality



### Security for performance

[§ 62.1-44.15:34.A.4, § 62.1-44.15:57](#)

Before issuing any permit (grading, building, etc.), the permit issuing agency may require an applicant to submit a reasonable performance bond to ensure that measures could be taken by the agency, at the applicant's expense, should the applicant fail to initiate or maintain appropriate conservation action (included on the approved ESC or ESM plan), as a result of the LDA. The bond or surety for a VESCP can include a reasonable allowance for estimated administrative costs and inflation, which shall not exceed **25 percent** of the estimated cost. If the authority takes corrective action using the bond or surety and it costs more than the security held, the authority can collect the difference from the permittee.

#### Refund of security

Within 60 days of achieving **adequate stabilization** on any project or section of project, the unexpended or unobligated portion must be refunded to the applicant or terminated, based upon the percentage of project completed.

#### As a program administrator...

It is important to work with your plan reviewer and inspector to calculate the appropriate surety. The inspector should also be involved in reducing or releasing any sureties.

## **Responsible land disturber**

[\(§ 62.1-44.15:34.A, § 62.1-44.15:55.B\)](#)

Before land disturbance can begin, the name of the responsible land disturber (RLD) must be provided to the VESMP or VESCP authority. *RLD* is defined as an individual holding a certificate issued by DEQ who is responsible for carrying out the LDA in accordance with the approved ESC or ESM plan. The RLD may be the owner, applicant, permittee, designer, superintendent, project manager, contractor, or any other project or development team member (**9VAC25-875-20**). Failure to provide the name of the RLD to the VESCP or VESMP authority before starting land disturbance may result in the revocation of the approved ESC plan or land disturbance approval, and the owner shall be subject to the penalties outlined in the ESC Law or VESMA.

The VESCP or VESMP authority may waive the RLD requirement for an agreement in lieu of a plan. If a violation occurs during the LDA, then the owner shall correct the violation and provide the name of the individual holding a Responsible Land Disturber certificate.

## **Changes to an approved plan**

[\(§ 62.1-44.15:34.B, § 62.1-44.15:55.C\)](#)

The VESCP or VESMP authority may require revisions to an approved ESC or ESM plan when:

- Inspections show the plan is inadequate or
- Circumstances on the LDA have changed and the approved ESC or ESM plan cannot be carried out. The VESCP authority and the person responsible for carrying out the plan must agree upon the changes. The VESMP authority and the owner must agree upon the changes.

## **Reporting to DEQ**

(§ 62.1-44.15:59) (9VAC25-875-180, 9VAC25-875-360)

On a monthly basis, each VESCP authority shall report to DEQ a listing of each LDA for which an ESC plan has been approved.

On a fiscal year basis (July 1 to June 30), a VESMP authority shall report to DEQ by October 1 of each year. The information to be provided shall include the following:

1. Information, not previously reported through other reporting requirements, on each permanent stormwater management facility completed during the fiscal year to include:
  - type of stormwater management facility,
  - geographic coordinates,
  - acres treated, and
  - the surface waters or karst features into which the stormwater management facility will discharge;
2. A listing of each LDA for which a plan has been approved by the VESMP authority;
3. Number and type of enforcement actions during the fiscal year; and
4. Number of exceptions granted during the fiscal year.

## **Inactive LDAs (VESCP localities only)**

(9VAC25-875-240.B)

If an LDA does not begin during the 180-day period following plan approval or ceases for more than 180 days, the VESCP authority may evaluate the existing approved ESC plan to determine whether the plan still satisfies local and state erosion and sediment control criteria and to verify that all design factors are still valid. If the VESCP authority finds the previously filed plan to be inadequate, a modified plan shall be submitted and approved prior to the resumption of the LDA.

This regulation allows VESCP authorities the ability to re-evaluate project plans after ordinance changes take effect, in case applicants rushed to get plans approved under old criteria.



### 3d. Standards and Specifications

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[\(§ 62.1-44.15:31\)](#)

Certain entities that perform a significant amount of land disturbance, through multiple jurisdictions on a regular basis, have the ability to file with DEQ, general erosion control and stormwater management standards and specifications that describe how LDAs will be conducted.

The Virginia Department of Transportation (VDOT) **must**, and any other state agency **may**, submit standards and specifications. Linear ventures, such as electric, natural gas, and telephone utility companies; interstate and intrastate natural gas pipeline companies; and railroad companies, **may** submit standards and specifications to DEQ for review and approval. Federal entities and authorities created pursuant to [§ 15.2-5102](#) (ex. water and sewer authorities) **may** submit standards and specifications. Wetland mitigation or stream restoration bank projects **may** submit standards and specifications.

Standards and specifications must be consistent with VESMA and the associated regulation. Approval of standards and specifications by DEQ does not relieve the owner or operator of the duty to comply with any other applicable local ordinances or regulations. Standards and specifications shall be updated **periodically** as required by DEQ, and DEQ has **60 days** to comment.

The entity responsible for the LDA must ensure compliance with the approved plan. DEQ shall provide project oversight and enforcement as necessary.

Entities with DEQ-approved standards and specifications must provide provisions for certified program administrators, inspectors, and plan reviewers, in order to fulfill the requirements of their standards and specifications.

### 3e. Inspections

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[\(§ 62.1-44.15:27, § 62.1-44.15:58\)](#) (9VAC25-875-140, 9VAC25-875-330)

Regular inspections during every phase of an LDA are important for ensuring that all C-BMPs on the approved plan are installed and maintained correctly.

In accordance with the VESM Regulation, the VESCP or VESMP authority must either:

1. Provide for an inspection:
  - during, or immediately following, initial installation of erosion and sediment controls;
  - at least once in every two-week period and within 48 hours following any runoff producing storm event; and
  - at the completion of the project, prior to the release of any performance bonds; or
2. Establish an alternative inspection program that ensures compliance with the approved ESC plan. Any alternative inspection program shall be:
  - a. Approved by DEQ prior to implementation;
  - b. Established in writing;
  - c. Based on a system of priorities that, at a minimum, address the amount of disturbed project area, site conditions, and stage of construction; and
  - d. Documented by inspection records.

**NOTE:** For a VESMP authority, there are additional inspection requirements in **9VAC-25-875-140** related to the installation of P-BMPs and SWPPP documentation. These items are covered in the Stormwater Certification courses.

Inspection documentation is a critical component of any compliance program. Documentation, such as an inspection report, can prove or support an inspector's claims of alleged violations.

## **RIGHT OF ENTRY**

[\(§ 62.1-44.15:39, § 62.1-44.15:60\)](#)

DEQ, the VESCP, or the VESMP authority, or any authorized agent of DEQ, the VESCP, or the VESMP authority has the right to enter any property to conduct inspections of the regulated LDA at reasonable times and under reasonable circumstances.

In accordance with a performance bond with surety, cash escrow, letter of credit, any combination thereof, or other legal arrangement, a VESCP or VESMP authority may also enter any establishment or upon any property for the purpose of initiating or maintaining appropriate actions that are required by the conditions associated with a regulated LDA. This is only applicable when an owner, after proper notice, has failed to take acceptable action within the time specified.

## **MONITORING AND REPORTS**

[\(§ 62.1-44.15:27.H.3, § 62.1-44.15:58.A\)](#)

The VESCP or VESMP authority may require monitoring and reports from the person responsible for carrying out the approved plan to determine whether the measures required in the plan are effective in controlling erosion and sediment.

The RLD is a requirement specifically for compliance with VESMA and ESC Law. If the project is covered under the CGP, in addition to an RLD, the operator is required to have a person who meets the criteria for qualified personnel as defined by the CGP (who maybe the same as the RLD) conduct inspections and create inspection reports to be kept in the SWPPP documentation.

### 3f. Enforcement

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#### NOTICE TO COMPLY

[\(§ 62.1-44.15:37.A, § 62.1-44.15:58.A\)](#)

After conducting inspections, if DEQ, the VESCP authority, or the VESMP authority determine that there is a failure to comply with the approved ESC or ESM plan, a minimum standard, the permit conditions, or failure to properly install or maintain C-BMPs specified by inspection reports, a notice to comply may be served upon the owner, permittee, or person responsible for carrying out the plan.

#### Options to serve a notice to comply:

- Electronically
- Mail with confirmation of delivery to the address specified in the plan, application, or locality's land records
- Deliver at the site to the agent or employee identified by the owner to the authority

#### Notice to comply must include:

- Measures needed to comply with the approved ESC plan, ESM plan, or CGP conditions
- Time within which such corrective measures shall be completed

#### If failure to comply within time specified in notice to comply:

- The VESCP authority local land disturbance approval or plan approval may be revoked
- VESCP authority, VESMP authority, or DEQ may pursue enforcement action:
  - Penalties, injunctions, or other legal actions ([§ 62.1-44.15:48.B](#), [§ 62.1-44.15:63](#))
  - The enforcement options available to a VESCP authority will depend on whether the VESCP authority has adopted an ordinance providing for civil penalties. A VESMP authority is required to adopt such an ordinance.
- A stop work order may be issued

## STOP WORK ORDER

[\(§ 62.1-44.15:37, § 62.1-44.15:58.C\)](#)

A stop work order may be issued by the VESCP authority, the VESMP authority, or DEQ in the following three scenarios after an inspection report denotes a violation of [§ 62.1-44.15:34](#), [:55](#), or [:58](#):

- Scenario 1: Failure to comply with an ESC or ESM plan (documented in inspection reports), followed by issuance of a notice to comply, then failure to implement corrective measures within the timeframe stated in the notice to comply
- Scenario 2: LDA started without an approved ESC or ESM plan or required permits
- Scenario 3: Alleged noncompliance is causing, or is in imminent danger of causing, harmful erosion of lands or sediment deposition in waters within the watersheds of the Commonwealth

As explained below, different procedural steps are required to issue stop work orders for each of these scenarios.

### Steps for issuing a stop work order:

#### Scenario 1: (VESCPs or VESMPs)

For an LDA where there is an approved ESC or ESM plan and a failure to implement corrective measures within the timeframe stated in the notice to comply, the following steps must be taken to issue a stop work order:

1. After writing an initial inspection report and completing a follow-up inspection, if there is a failure to meet the original deadline, issue a notice to comply, with deadline.
2. After conducting a follow-up notice to comply inspection, if there is a failure to comply with the notice to comply, issue a stop work order.
3. When issuing the stop work order, follow the same three options as for delivering a notice to comply.

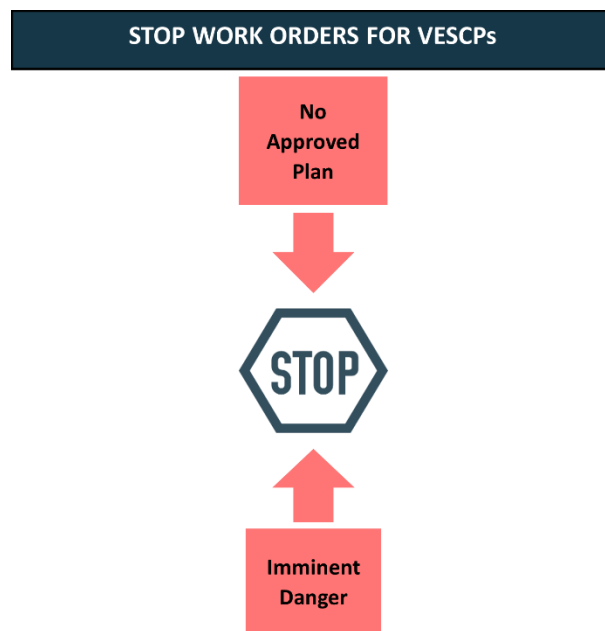
For a VESCP authority-issued or DEQ-issued stop work order, the LDA must stop on **all or part** of the site. For a VESMP authority that has issued a stop work order, the LDA must stop on **all** of the site, until specific corrective measures listed in the notice to comply are taken. The stop

work order remains in effect for seven (7) days from the date of service in a VESCP authority. In a VESMP authority, the stop work order remains in effect until the violations cease. If corrective actions are completed sooner, the stop work order may be lifted.



### Scenario 2: (VESCP)

In a VESCP authority, when the LDA has started without an approved ESC plan or required approvals, a notice to comply is not required prior to issuing a stop work order. The stop work order must be transmitted electronically **or** mailed with confirmation of delivery to the address specified in the land records of the locality **and** posted on the site where the disturbance is occurring. The LDA must stop on the entire site, and the order remains in effect until an ESC plan is approved and required approvals are obtained. In a VESMP authority, LDAs under scenario 2 would be addressed by the procedures in either scenario 1 or 3, based on the determination by the authority of whether imminent danger is present.



### Scenario 3: (VESCPs or VESMPs)

When the alleged noncompliance is causing, or is in imminent danger of causing, harmful erosion of lands or sediment deposition in waters within the watersheds of the Commonwealth, a notice to comply is not required prior to issuing a stop work order. The stop work order remains in effect for seven (7) days from the date of service in VESCP localities. The stop work order remains in effect until a hearing can be offered for the person to whom the order was issued to affirm, modify, amend, or cancel such an order in VESMP localities. If corrective actions are completed sooner, the stop work order may be lifted.

## STOP WORK ORDERS FOR VESMPs



Any person violating, failing, neglecting, or refusing to obey a stop work order may be compelled, in a proceeding instituted in the circuit court of the jurisdiction wherein the violation was alleged to have occurred or other appropriate court, to obey the stop work order. The person is required to comply therewith by injunction, mandamus, or other appropriate remedy.

In cases of imminent danger, DEQ may issue an emergency stop work order without advanced notice or hearing. After issuing an emergency stop work order, DEQ must provide an opportunity for a hearing, after reasonable notice as to the time and place thereof, to such person, to affirm, modify, amend, or cancel such emergency order.

### **Appealing a stop work order**

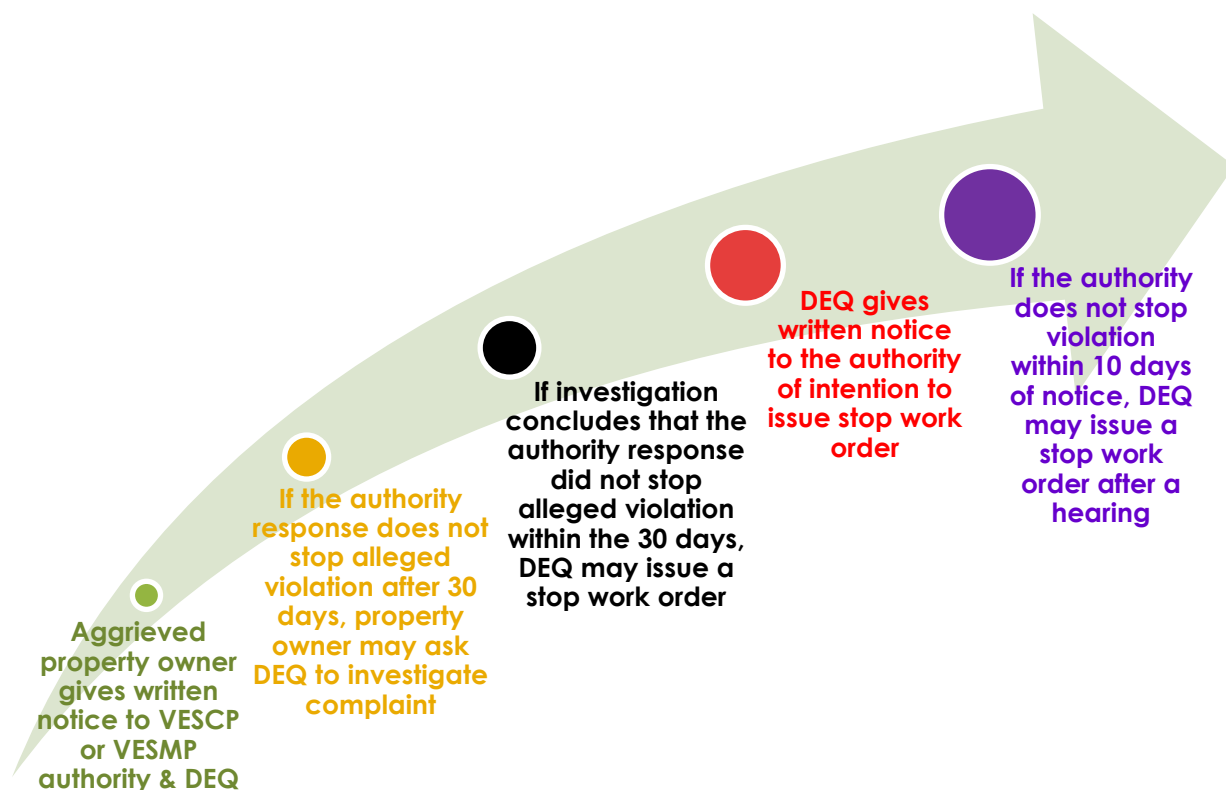
The property owner may appeal the issuance of a stop work order to the circuit court of the jurisdiction wherein the violation was alleged to have occurred or other appropriate court.

## Stop work order process when owner of damaged property contacts DEQ

[\(§ 62.1-44.15:37, § 62.1-44.15:64\)](#)

The graphic below outlines the procedure that aggrieved property owners need to follow if seeking a stop work order from DEQ for an alleged violation.

### Process for Aggrieved Property Owners



If a person who has been issued an order or emergency order is not complying with the terms, DEQ may institute a proceeding in the appropriate circuit court, compelling the person to comply with such order. If the person still does not comply, the person shall be subject, in the discretion of the court, to a civil penalty not to exceed \$2,000 for each violation. Since the state (DEQ) is undertaking the enforcement, any civil penalties assessed by a court are paid into the state treasury  [\(§ 62.1-44.15:64.F,G\)](#).



## Injunctive relief

[\(§ 62.1-44.15:48.C, § 62.1-44.15:63.B\)](#)

In a VESCP: the authority, DEQ, or owner of the property that has sustained damage, or which is in imminent danger of being damaged, may apply for injunctive relief to the circuit court wherein the land lies or other appropriate court.

**Injunctive relief** is a court order requiring a person to do or cease a specific action.

Before applying for injunctive relief, the property owner must notify the following people/entities, in writing, that a violation of the erosion program has caused, or creates a probability of causing, damage to their property:

- The person who has allegedly violated the erosion program,
- DEQ, and
- The VESCP authority.

Additionally, before the aggrieved property owner applies for injunctive relief, neither the person who has allegedly violated the erosion program, DEQ, nor the VESCP authority must have taken corrective action within **15 days** to eliminate the conditions that have caused, or create the probability of causing, damage to their property.

In a VESMP: the authority may apply for injunctive relief to the circuit court wherein the land lies when a violation or an imminent violation of the provisions of a local ordinance or order or the conditions of a local land disturbance approval have occurred or may potentially occur.

## Judicial appeals

[\(§ 62.1-44.15:46, § 62.1-44.15:62\)](#)

A final decision by a county, city, or town, when serving as a VESCP or VESMP authority, is subject to judicial review, if an appeal is filed within **30 days** from the date of any written decision adversely affecting the rights, duties, or privileges of the person engaging in or proposing to engage in land-disturbing activities.

Final decisions of DEQ shall be subject to judicial review in accordance with the provisions of the Administrative Process Act  [\(§ 2.2-4000 et seq.\)](#).

## ADOPTING CIVIL PENALTIES

### Civil penalties for a VESMP authority

[\(§ 62.1-44.15:48.B\)](#)

For land-disturbance greater than 10,000 square feet but less than an acre, civil penalties can be assessed by the VESMP authority for any violation of the following:

- VESMA,
- VESM Regulation,
- Program requirements, or
- Land disturbance approval.

Penalty requirements:

- Civil penalty for one violation not to exceed \$5,000,
- Each day of violation is a separate offense, and
- Total for a series of specified violations arising from the same operative set of facts cannot exceed \$50,000.

In addition to stop work orders and civil penalties, the responsible party for a regulated LDA in a VESMP locality where the responsible party for the LDA either knowingly, willingly, or negligently violates VESMA and/or regulation, may be subject to criminal prosecution of a felony in accordance with [§ 62.1-44.32](#).

**Note:** For LDAs  $\geq 1$  acre or for CPBA LDAs in a VESMP authority, [§ 62.1-44.15:48](#) contains additional civil penalty requirements. These requirements are discussed in our Stormwater Certification courses.

Civil Penalties in a VESMP		
LDAs greater than 10,000 sq. ft. and less than 1 acre		
Behavior	Assessing Penalty	Penalty
<p>Violated, failed, neglected, or refused to obey any of the following:</p> <p>VESMA</p> <p>VESM Regulations</p> <p>Local VESMP authority ordinance, order, notice, or requirement</p> <p>DEQ order, notice, or requirement</p> <p>Land disturbance Approval</p>	<p>Civil penalty up to \$5,000 per day, with a maximum of \$50,000 per violation(s)</p>	<p>In accordance with VESMP authority schedule of civil penalties, if adopted (Subsection B of <a href="#">§ 62.1-44.15:48</a>, discussed above)</p> <p>Penalties assessed by court paid into treasury of locality where project located</p> <p>If locality or its agent is the violator, penalties paid into state treasury</p>

### Civil penalties for a VESCP authority

[\(§ 62.1-44.15:54.G\)](#)

Civil penalties can be assigned by the VESCP authority for any violation of the following:

- ESC law,
- VESM Regulation,
- Program requirements, or
- Land disturbance approval conditions.

Penalty requirements:

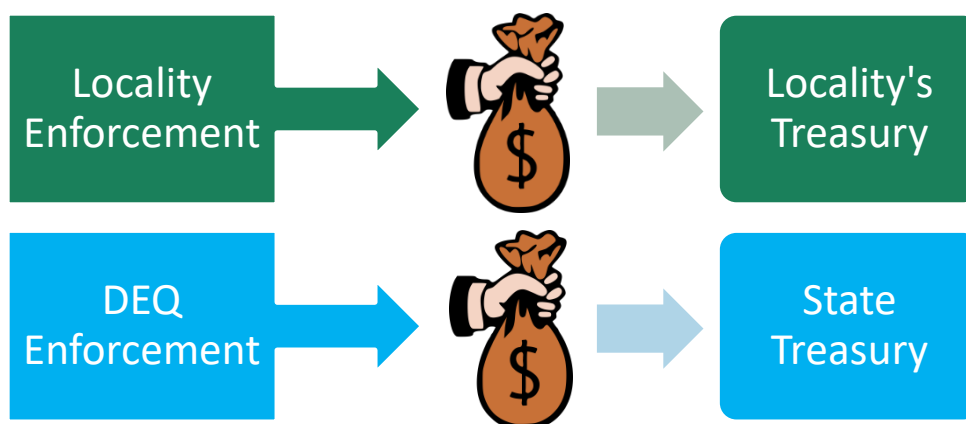
- Civil penalty for one violation must be between \$100 and \$1,000;
- Each day of violation is a separate offense;
- Total for a series of specified violations arising from the same operative set of facts cannot exceed \$10,000; and
- When there is a regulated LDA without an approved plan, the maximum penalty is \$10,000.

Regulated LDAs in a VESCP are also subject to other enforcement tools like Notices to Comply and Stop Work Orders.

Civil Penalties in a VESCP		
Behavior	Assessing Penalty	Penalty
<p>Violated, failed, neglected, or refused to obey any of the following:</p> <p>ESC Law</p> <p>VESM Regulations</p> <p>Local VESCP authority ordinance, order, notice, or requirement</p> <p>DEQ order, notice, or requirement</p> <p>Land disturbance Approval</p>	<p>Civil penalty = \$100 to \$1,000 per day, with a maximum of \$10,000 per violation(s)</p> <p>Court assesses civil penalty (\$2,000/day)</p>	<p>In accordance with VESCP authority schedule of civil penalties, if adopted (Subsection G of <a href="#">§ 62.1-44.15:54</a>, discussed above)</p> <p>Penalties assessed by court paid into treasury of locality where project located</p> <p>If locality or its agent is the violator, penalties paid into state treasury</p>

### Civil penalty payments

Any civil penalties assessed by a court shall be paid into the treasury of the locality wherein the land lies. If the violator is the locality itself, its agent, or where the penalties are assessed as the result of an enforcement action brought by DEQ, the court shall direct the penalty to be paid into the state treasury.



## **COMMONWEALTH ATTORNEY/ATTORNEY GENERAL**

[\(§ 62.1-44.15:63.G\)](#)

Upon request of a VESCP authority, the attorney for the Commonwealth shall take legal action to enforce the provisions of this article. Upon request of DEQ, the Attorney General shall take appropriate legal action on behalf of DEQ to enforce the provisions of this article.

### 3g. DEQ Compliance Review

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#### REQUIREMENTS

[\(§ 62.1-44.15\(19\), § 62.1-44.15:52.D: :54\)](#) (9VAC25-875-190, 9VAC25-875-370)

DEQ is required to conduct a program compliance review every five years, or on a more frequent basis if deemed necessary by DEQ. To avoid redundancy and overlap, the review can be coordinated with the authority's other program reviews such as the Chesapeake Bay Program.

The review will consist of the following:

- Consultation with the VESCP/VESMP administrator or designee
- Review of the local ordinance(s) and other applicable documents
- Review of a subset of the plans approved by the VESCP authority for consistency of application, including variances granted
- Review of a subset of the plans approved by the VESMP authority for consistency of application, including exceptions granted and calculations or other documentation that demonstrates that required nutrient reductions are achieved using appropriate onsite and off-site compliance options
- Review of inspections of regulated activities
- Review of enforcement actions by the VESCP authority
- Review of enforcement actions and an accounting of amounts recovered through enforcement actions, where applicable, by the VESMP authority

If DEQ finds areas that need corrective actions, it will provide a checklist and develop a corrective action agreement for the authority to come into compliance.

#### **As a VESCP administrator...**

It is important to know that the VESCP authority must maintain a copy of the approved plan, a record of inspections, and a record of enforcement actions for each active LDA. Some VESCP authorities may retain documents for longer.





**As a VESMP administrator...**

It is important to know that the VESMP authority must maintain a copy of the approved plan, a record of inspections, a record of enforcement actions, construction record drawings, and all registration statements in accordance with the requirements of **9VAC25-875-180**.

## Summary

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This module provides a VESCP or VESMP administrator with the information and processes needed to:

- Assist in the identification of LDAs and erosion impact areas
- Determine and explain how and when to regulate LDAs under VESMA or ESCL and VESM Regulation
- Recommend and explain the legal rationale for more stringent ordinance requirements
- Ensure reporting requirements to DEQ are met
- Support the inspection program and plan review process within the VESCP or VESMP, including administrative functions
- Assist program staff and the regulated community by explaining and supporting basic program requirements and enforcement options
- Participate in the program review process, as required.



## Knowledge Check Questions

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1. LDAs subject to VESMA must have what approved before a VESCP authority can authorize the start of land disturbance?
  - a. Agreement in lieu of an ESC plan
  - b. Standards and specifications
  - c. Responsible land disturber
  - d. Stormwater management plan
2. Localities may adopt ordinances that are more stringent if they are necessary to address TMDL requirements.
  - a. True
  - b. False
3. How long does the VESCP authority have to review an ESC plan?
  - a. 30 days from submission for inadequate plans
  - b. 40 days for resubmitted plans
  - c. 45 days before the bond is posted
  - d. 60 days from submission for adequate plans
4. What must the VESCP authority do after conducting an inspection where it determined there was a failure to comply with the approved ESC plan?
  - a. Revoke the permit
  - b. Require the ESC plan to be resubmitted
  - c. Serve notice upon the permittee or person responsible for carrying out the plan
  - d. Assess a civil penalty

5. Under the ESC law, what is the maximum civil penalty per day that can be issued by a VESCP authority for a violation of the local ESC ordinance?
  - a. \$2,000
  - b. \$32,500
  - c. \$1,000
  - d. \$10,000
6. A stop work order issued by a VESCP authority on a LDA with an approved plan remains in effect for how many days?
  - a. 1
  - b. 3
  - c. 7
  - d. Until compliance