

## TABLE OF CONTENTS

List of Tables and Figures .....	ii
11 VWPP Compliance Program .....	3
11.1 Inspections.....	3
11.1.1 Prioritization .....	3
11.1.2 Field Inspections .....	7
11.1.3 Desktop Audits.....	12
11.1.4 Timeliness .....	13
11.1.5 Inspection Documentation .....	13
11.2 Identifying Responsible Parties .....	14
11.3 Compliance Response.....	15
11.3.1 Process to Determine Points for VWP Permit Noncompliance .....	15
11.3.2 Other Factors in Assessing Points.....	17
11.3.3 Compliance Activities.....	18
11.4 Corrective Action .....	18
11.4.1 Administrative Noncompliance .....	18
11.4.2 Construction Special Conditions Non-compliance .....	19
11.4.3 Unauthorized Impacts .....	19
11.4.4 Functional Loss .....	24
11.4.5 Partial Loss of Function.....	24
11.5 Compliance Activity and Resolution Tracking .....	24
11.6 Compliance & Enforcement Tools.....	25
11.6.1 VWPP Compliance Program Tools .....	25
11.6.2 Enforcement Division Tools .....	26
11.7 Coordination with Other Agencies and Programs.....	27
11.7.1 Resolution of SPGP Noncompliance .....	29
11.8 Special Circumstances .....	29
11.8.1 Exclusions.....	29
11.8.2 Force Majeure.....	29
11.8.3 Virginia Stormwater Management Program Overlap.....	30
11.8.4 Preservation Instruments .....	30

11.8.5	Warrants .....	32
11.8.6	Emergency Situations .....	32
Appendix 11.A - Template Inspection Reports.....		33
Appendix 11.B – Points Matrix .....		34
Appendix 11.C – Template Observations & Legal Requirements .....		1
Appendix 11.D – Corrective Action Plan Requirements.....		7
Appendix 11.E – Sample Letter of Agreement .....		9
Appendix 11.F – Sample Affidavit .....		13

## LIST OF TABLES AND FIGURES

Table 11-1	Inspection Priority Matrix.....	6
Table 11-2	Preparation Checklist for Field Inspections .....	8
Table 11-3	Permit Changes Resulting from Unrestored Unauthorized Impacts .....	23
Table 11-4	Coordination with Other Agencies and Programs.....	28
Table 11-5	Enforcement Options for Preservation Instruments.....	31

## 11 VWPP COMPLIANCE PROGRAM

The primary goal of the Virginia Water Protection Permit (VWPP) Compliance Program is to secure prompt and continued compliance with the requirements of State Water Control Law (statute), VWPP 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 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<sup>1</sup> 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 inspected for compliance prior to issuing the permit action. If a field inspection cannot be completed, a desktop audit to determine current compliance status must be completed prior to issuance.
- **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](#) 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 solid waste or stormwater management programs) or another agency (such as the Virginia Marine Resources Commission (VMRC)) can be inspected less frequently by VWP 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)
<b>Construction Has Started</b>	<b>Inspection History During Construction</b>	Never inspected	Last inspection more than 1 year ago	Inspected 3-12 months ago	Inspected within past 3 months
	<b>Avoided surface waters</b>	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).
	<b>Mitigation Type/Status</b>	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
	<b>Compliance History</b>	Ongoing violations or pending enforcement case <b>OR</b> 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.)
	<b>Construction Status</b>	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
	<b>Expiration / Termination</b>	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 +

### *11.1.1.1 Establishing a regional inspection strategy*

On an annual or more frequent basis, using the criteria above and other criteria deemed appropriate by CO or RO 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 Logi 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 should 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.

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### 11.1.2 FIELD INSPECTIONS

Field inspections play a critical role in the VWPP 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.

#### *11.1.2.1 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, and [soil survey data](#) to familiarize themselves with site conditions prior to the inspection. For sites without permit coverage, staff should review aerial imagery, the [National Wetland Inventory](#), the [Wetland Condition Assessment Tool](#) (WetCAT), and [soil surveys](#), as well as 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" or "Corps") to determine if a JD or Corps permit exists for the site.

Table 11-2 Preparation Checklist for Field Inspections

Type of Inspection	Preparation	Supplies
<b>Permitted Sites</b>	<ul style="list-style-type: none"> <li>✓ Review VWP &amp; SPGP permits for any project-specific conditions in addition to standard permit conditions</li> <li>✓ Print final impact map or download on mobile device</li> <li>✓ Review compliance history and previous inspection reports</li> <li>✓ Determine if permittee is in compliance with administrative requirements of permit (compensation, construction notice, reporting, etc.)</li> <li>✓ Determine if pre-inspection notice to permittee is appropriate.</li> <li>✓ Ensure that property owner has provided permission for the inspection, either within JPA signature block or separately.</li> <li>✓ Determine if a VPDES construction stormwater general permit has been issued and review if appropriate</li> </ul>	<ul style="list-style-type: none"> <li>✓ Hardhat</li> <li>✓ High visibility safety vest</li> <li>✓ Steel-toed boots</li> <li>✓ GPS or other field-measurement tools such as measuring wheel</li> <li>✓ Flagging</li> <li>✓ Field notebook</li> <li>✓ Pens</li> <li>✓ Auger</li> <li>✓ Camera (do not use personal cell phone)</li> <li>✓ Tablet (if available)</li> <li>✓ Maps, plan sheets as needed</li> <li>✓ Inspection data sheets</li> <li>✓ Insect repellent</li> <li>✓ State ID &amp; business cards</li> <li>✓ Munsell book</li> <li>✓ Vegetation keys</li> </ul>
<b>Sites without permit coverage / Complaints</b>	<ul style="list-style-type: none"> <li>✓ Determine property ownership using local real estate data</li> <li>✓ Contact property owner (if appropriate) for permission and to schedule inspection</li> <li>✓ Coordinate with sister agencies as appropriate (<a href="#">See Section 11.7</a>)</li> <li>✓ Review aerial imagery and topographic maps*</li> <li>✓ Review soil surveys*</li> <li>✓ Review National Wetland Inventory / WETCAT maps*</li> <li>✓ Determine if a Corps JD or permit exists for the site.</li> </ul> <p>*print or download onto mobile device</p>	<ul style="list-style-type: none"> <li>✓ Hardhat (as applicable)</li> <li>✓ High visibility safety vest</li> <li>✓ Steel-toed boots (as applicable) or other boots</li> <li>✓ GPS</li> <li>✓ Flagging</li> <li>✓ Field notebook</li> <li>✓ Pens / markers</li> <li>✓ Auger</li> <li>✓ Camera (do not use personal cell phone)</li> <li>✓ Tablet (if available)</li> <li>✓ Maps, plan sheets as needed</li> <li>✓ Inspection data sheets</li> <li>✓ Insect repellent</li> <li>✓ State ID &amp; business cards</li> <li>✓ Munsell book</li> <li>✓ Vegetation keys</li> </ul>



### *11.1.2.2 Site access*

VWP permit compliance inspections for permitted sites are typically unannounced, although reasonable concerns for safety or site access may necessitate providing some advance notice to a permittee. The statute, regulation and permits require that a permittee provide DEQ staff access to the site and to records upon presentation of DEQ credentials and during normal business hours.

When an applicant applies for a permit, they have expressly signed a release in the Joint Permit Application allowing site access by DEQ staff. However, if the applicant or permittee is not the landowner, or does not have control over the property (such as via an executed lease), DEQ staff must obtain permission from the landowner to conduct the inspection prior to entering the site. The separate landowner owner permission oftentimes is accomplished during the application period via the VWP Permit Program Property Access Form. If not, the landowner name and contact information can be found using local land records. [Guidance Memo 1-2011 \(March 3, 2011\)](#) specifies additional requirements for site access.

Inspections of sites without permit coverage may require prior contact with the landowner 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 Corps or County staff).

Upon arrival at any site, staff should locate the property owner or authorized representative (such as site foreman) if available, present DEQ credentials (state i.d.) 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 Regulations). Inspections should be conducted only during regular business hours of DEQ. 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. [Guidance Memo 1-2011](#) has further steps to take in this situation. (See [Section 11.8.5](#) for information regarding administrative warrants.)

### *11.1.2.3 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, i.e. 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.

#### *11.1.2.4 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 VWPP 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)<sup>2</sup>. 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 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.

#### *11.1.2.5 Permitted Impact Site Compliance*

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

DEQ staff should perform a comprehensive field inspection of each permitted site at least once during active work in impact areas and, if appropriate and resources allow, at several times during different stages of construction. 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

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<sup>2</sup> 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.

- 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 and do not involve fill below OHW (such as riprap).
- self-inspections are occurring and documented. (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 permitted limits and quantities.
- temporary impacts have been restored.
- areas surrounding surface waters are stable such that sedimentation impacts are unlikely to occur.
- avoided waters have not been impacted

#### *11.1.2.6 Compensation Site Inspections*

Compensation site inspections will focus on the success of the permittee-responsible compensation site. Staff should 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. 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 warranted?

### *11.1.2.7 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 Corps to determine if a Corps permit or JD exists for the site. 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 coverage under a Corps Nationwide or Regional permit (that has §401 certification) has been issued, DEQ staff need not inspect the site. The matter may be referred to the Corps for follow-up under their permit authority. Please see Table 3 for additional information on compliance and enforcement responses with respect to Corps 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
- 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.

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### 11.1.3 DESKTOP AUDITS

Desktop audits should be a routine aspect of the compliance program. Logi 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 run monthly, or as frequently as resources allow, to determine if any compliance deliverables, such as status updates or monitoring reports are overdue.

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#### 11.1.4 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 contact the responsible party and their agent verbally or via email no later than **the next business day after the inspection** 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 or NOV) that requires supervisor signature should be submitted for review **within 10 days of the date of the inspection or audit**.

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#### 11.1.5 INSPECTION DOCUMENTATION

##### *11.1.5.1 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. 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
- 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.

Template inspection reports are included in Appendix A. Focused inspections, 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. Multiple photographs may be necessary.

More complex sites 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 should 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 or consent orders, have been fulfilled

#### **11.1.5.2 CEDS**

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

### **11.2 IDENTIFYING RESPONSIBLE PARTIES**

The VWPP Regulation states that no “person” can impact state waters without a VWP permit. The term “person” is defined within the VWPP 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; however, 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 and then sold the property, but neglected to transfer the permit to the new owner. 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 or if it should be modified to change the permittee to the person who has operational control. 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 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 enforcement or central office staff before deciding on a course of action.

### 11.3 COMPLIANCE RESPONSE

Like other water division programs, to maintain statewide compliance program consistency the VWP program has developed a “Points Assessment Criteria” (also known as the “points system”). 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 NONCOMPLIANCE

Staff must use the following procedure when assessing alleged VWP permit 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 points value for each alleged violation. Some violations are assigned ranges of points as shown in [Appendix B](#). The Regional Manager may adjust the points value assigned by CEDS, within the range, based on site- or case-specific characteristics. The final, adjusted points value should be recorded in CEDS. In cases where points are adjusted outside of the range provided in Appendix 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 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.

3. 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:
  - i) Total points for any unresolved noncompliance to date;
  - ii) Total points for the inspection at hand, and
  - iii) Total aggravating factor Points.

Staff may also consider and include points from repetitive similar violations within the last 12 months, even if they have been corrected. (For example, multiple instances of missing construction status update, or multiple instances of unpermitted impacts.)

4. Staff uses the sum of all Points calculated to determine the appropriate compliance response.
    - Projects accumulating 1.9 Point or less are addressed through a request for corrective action (RCA).
    - Projects accumulating 2.0 Point or greater, but no more than 3.9 Points, receive a WL.
    - Projects accumulating 4.0 Points or more receive an NOV and are referred to the Division of Enforcement.
  5. In cases where points total less than 4.0 and any noncompliance has been corrected, staff need not issue a formal WL or RCA. Any alleged violations and corresponding points should be documented in CEDS for tracking purposes, however.
- Staff should *always* refer cases where the total final points value exceeds 4.0 points to the Division of Enforcement via issuance of an NOV. The responsible party has a permit (the activity is not unpermitted);
  - No environmental harm resulted from the noncompliance (i.e. no impacts or fill to State waters);

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.



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## 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.

### 2. 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

### 3. 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.

### 4. 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.

## 5. Self-Reporting

When a permittee self-reports noncompliance, at their discretion based on compliance history, environmental harm, timeliness and other factors, the manager may reduce the total points value for the noncompliance by up to 0.5.

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### 11.3.3 COMPLIANCE ACTIVITIES

Templates for the WLs and NOVs) are found as attachments to Chapter 2 of the Enforcement Division Manual. Template observations and legal requirements specific to the VWPP Program are found in [Appendix 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.

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#### 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, or 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. 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 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.

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#### 11.4.2 CONSTRUCTION SPECIAL CONDITIONS NON-COMPLIANCE

Most noncompliance with construction special conditions can be resolved quickly by correcting the item at hand (i.e., reinstalling non-impact areas flagging). 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.

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#### 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 that authorize impacts after they have been taken because the authorization would not comply with the VWPP Permit Regulations. Unauthorized impacts may be resolved through compliance or enforcement action.

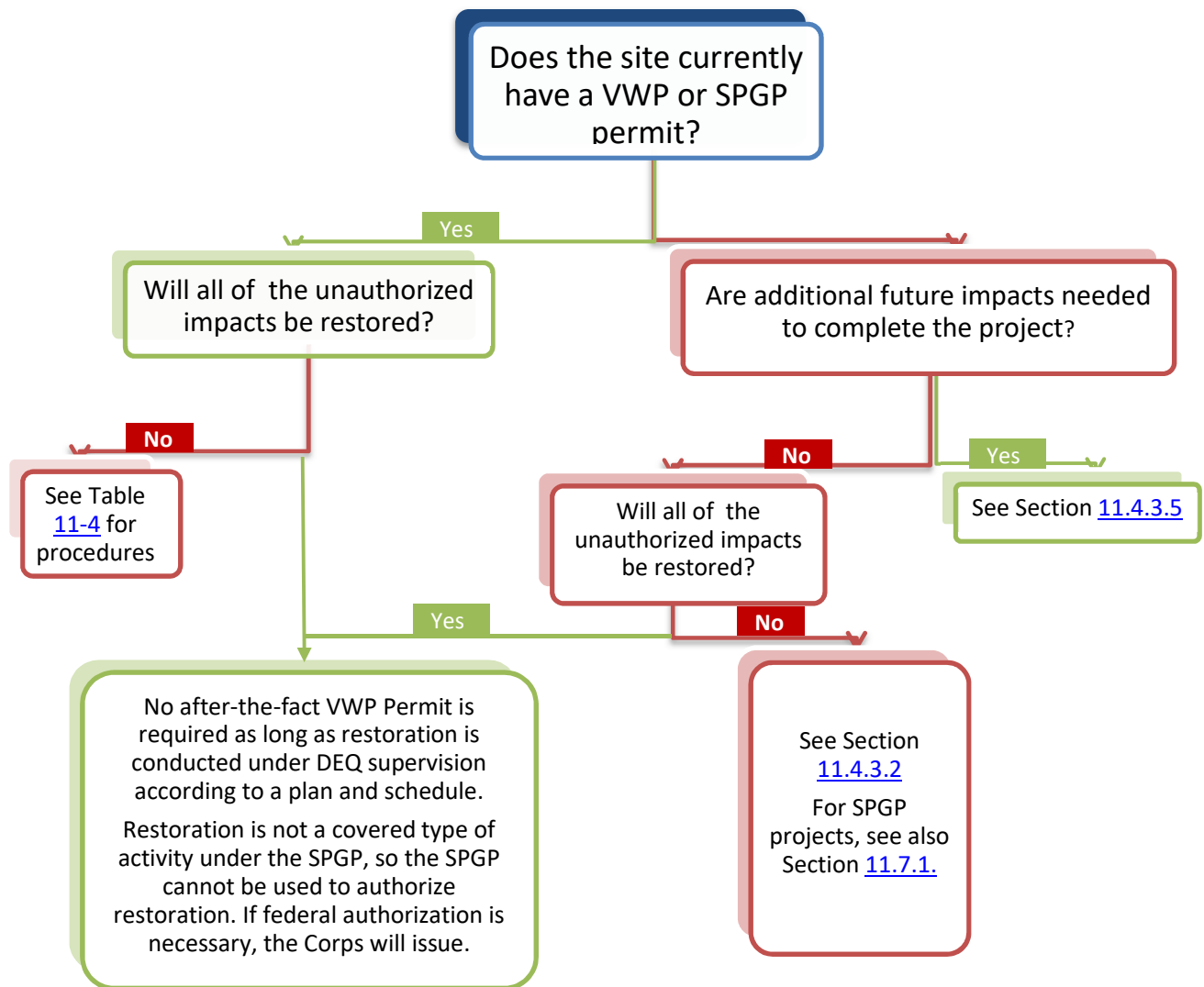


Figure 11-1: Flow Chart for Resolution of Unauthorized Impacts

### *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 letter of agreement, a formal enforcement action, or may stand alone. When a CAP is a response to a RCA or WL the CAP should be approved in writing by compliance staff or the VWP Manager, as appropriate. If the CAP is being required via a Consent Order or other formal enforcement action, VWP compliance staff will review the CAP. Approval will typically come from Enforcement or VWP staff or management, depending on regional office structure. [Appendix E](#) lists potential requirements of a corrective action plan. Many sites will not require the level of detail in Appendix E, 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
- ✓ 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 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 (See Chapter 3). Responsible parties seeking to leave impacts in place must submit sufficient documentation to demonstrate that one of the two circumstances above applies.

### *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. Compensation requirements can be required via an informal resolution, letter of agreement, consent order or any other mechanism for noncompliance resolution.

#### 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 that authorize impacts after they have been taken because the authorization would not comply with the VWPP Permit 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 complete?	Original Permit Type	Unrestored unauthorized Impact Quantities	Permittee Action	DEQ Action
Yes	Terminate existing permit. Collect fee and 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 permit change request needed.	<ul style="list-style-type: none"> <li>No changes to VWP permit*</li> <li>Compensation for unrestored unauthorized impacts required by a separate compliance or enforcement action</li> </ul>
		Exceed NOPC threshold or cause cumulative project impacts to exceed GP threshold.	<ul style="list-style-type: none"> <li>Submit application in accordance with 9 VAC 25-6X0-50(A)(1) (for new general permit coverage) or 9 VAC 25-210-80 (for new individual permit), including fee based on cumulative impacts.</li> <li>Submit application for SPGP Verification.</li> <li>Request termination of current general permit coverage concurrently with issuance of new permit.</li> </ul>	<ul style="list-style-type: none"> <li>Process application, collect fee and make VWP &amp; SPGP permit decisions.</li> <li>Terminate original general permit.</li> <li>Require compensation for unauthorized impacts in a separate compliance or enforcement action.</li> </ul>
	Reporting-Only General permit	Do not exceed NOPC threshold and do not cause exceedance of reporting-only GP threshold.	No permit change request needed.	<ul style="list-style-type: none"> <li>No changes to VWP Permit*</li> </ul>
		Cause cumulative project impacts to exceed reporting-only thresholds but change is within NOPC thresholds.	<ul style="list-style-type: none"> <li>Request NOPC. Submit all information required by 9 VAC 25-6X0-50(A)(1) that was not provided in original application.</li> <li>Provide compensation for all authorized &amp; unauthorized impacts.</li> <li>Pay appropriate fee based on cumulative impacts.</li> </ul>	<ul style="list-style-type: none"> <li>Collect fee for general permit application.</li> <li>Process NOPC &amp; SPGP. Require compensation required for all authorized impacts.</li> <li>Compensation for unrestored unauthorized impacts required by a separate compliance or enforcement action.</li> </ul>
	Individual Permit	Do not exceed minor modification thresholds	No permit change request needed.	<ul style="list-style-type: none"> <li>Compensation for unrestored unauthorized impacts required by a separate compliance or enforcement action.</li> </ul>
		Exceed minor modification thresholds.	<ul style="list-style-type: none"> <li>Request major modification (and SPGP if applicable)</li> <li>Pay fee based on cumulative impacts.</li> </ul>	<ul style="list-style-type: none"> <li>Collect fee, process major modification request (and SPGP if applicable).</li> <li>Require compensation for unrestored unauthorized impacts in a separate compliance or enforcement action.</li> </ul>

\* An SPGP Permit action may be required. Refer to the most current SPGP Standard Operating Procedure.

#### 11.4.3.5 Future Impacts

For projects without VWP Permit coverage, 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 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. Previous unrestored, 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 permit or 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 surface waters continues without VWPP Permit Authorization.

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#### 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).

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#### 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 consent order 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 consent order 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 should be added for each item that must be delivered to DEQ or completed to demonstrate return to compliance. The Compliance Event 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 & ENFORCEMENT TOOLS

After noncompliance is identified, DEQ uses various tools to ensure corrective action occurs. Certain tools require a referral to enforcement, while others may be used within the VWPP compliance program.

### 11.6.1 VWPP COMPLIANCE PROGRAM TOOLS

When noncompliance does not rise to the level of an enforcement referral, VWP Permit Program staff is responsible for ensuring that the site returns to compliance with VWP Permit requirements. Generally, noncompliance with administrative and construction special conditions does not require work for staff beyond tracking the simple corrective action, such as submittal of overdue documents, reviewing photos, or inspecting the corrected items. Corrective action that is more complex, such as restoration, may require longer-term monitoring. Compliance has limited tools available to compel monitoring longer than one year. If corrective action and monitoring will take longer than a year, staff should review the case again for enforcement referral. **Note: The VWP Permit Program does not issue VWP permits that authorize impacts after they have been taken. Unauthorized impacts may be resolved through compliance or enforcement action.**

#### *11.6.1.1 Informal Return to Compliance*

An informal closure may be appropriate when corrective actions and any required monitoring will take less than 90 days to complete. This type of resolution may be appropriate for 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, with appropriate compensatory mitigation, allowed to remain in place. 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.

### *11.6.1.2 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. LOAs must cite the alleged violations and include a schedule to return to compliance by a specific date. An LOA is not meant to be a case decision and should not include a finding or determination of noncompliance. 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.

#### *Elements of a Letter of Agreement*

LOAs include reference to the governing statute, the background of the case, the agreed actions and schedule to return to compliance, an affirmative statement that the LOA is not a case decision, and signatures. They are effective from the date of the Responsible Party's signature. The agreed actions are numbered, and except for the 12-month limitation, the actions are similar to those in the schedule of compliance of a consent order. Since LOAs are not case decisions, they do not make a finding or determination that a violation has occurred. LOAs are not subject to public notice and comment.

A template Letter of Agreement may be found in [Appendix E](#).

#### *Monitoring and Terminating a Letter of Agreement*

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, 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.

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#### 11.6.2 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 Consent Order 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, VWPP Program 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 DCR or DGIF, as appropriate to evaluate any potential effects to threatened or endangered species. VWP 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 COORDINATION WITH OTHER AGENCIES AND PROGRAMS

As appropriate, staff should communicate compliance concerns to other relevant agencies or programs. In some instances, other DEQ programs, or external agencies may be the most efficient and successful at resolving impacts to surface waters. For example, in situations involving tidal wetlands or subaqueous bottom, it may be more beneficial to allow VMRC to take the lead. DEQ staff may monitor the outcome but should not independently pursue enforcement action unless circumstances make such action necessary.

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	<p>Chesapeake Bay Preservation Act (Resource Protection Areas / Resource Management Areas)</p> <p>Erosion &amp; Sediment Control</p> <p>Land Disturbance Permitting</p> <p>Zoning</p> <p>Construction Stormwater</p> <p>Local Wetlands Board</p>
U.S. Army Corps of Engineers	<p>Authorities:</p> <p>§ 404 Clean Water Act *</p> <p>Section 10 Rivers &amp; Harbors Act</p> <p>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 Corps for follow-up.</p> <p>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 Corps for follow-up and typically should not initiate separate compliance action.</p> <p>DEQ staff may (but is not required to) allow the Corps 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.</p> <p>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 a 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.</p> <p>*The Corps may also make a referral to EPA if warranted.</p>
VMRC	<p>VMRC should be considered the lead agency for:</p> <p>Subaqueous Bottom (drainage areas &gt;5 sq. mi)</p> <p>Tidal Wetlands</p> <p>DEQ may initiate its own enforcement action if a VMRC action will not address all DEQ concerns.</p>
DEQ	<p>Construction Stormwater</p> <p>Solid/Hazardous Waste</p> <p>Office of Water Supply</p> <p>TMDL</p>
DCR	<p>Dam Safety</p> <p>Natural Heritage (T&amp;E plants, insects – for VDACS, invasives)</p>
US FWS / DGIF	<p>Threatened or Endangered Species Concerns</p>
VDACS/ NRCS	<p>Agricultural Projects</p>
VDOF	<p>Forestry Projects</p>

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### 11.7.1 RESOLUTION OF SPGP NONCOMPLIANCE

Typically, requiring correction of administrative and construction noncompliance through the VWPP Program will also resolve noncompliance with the Corps' SPGP. Noncompliance with conditions unique to the SPGP, however, must be referred to the Corps for resolution. In addition, in cases with impact limits exceedances, the resolution of such noncompliance may require additional action on the part of VWP Permit Program 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 Program staff should follow the steps in the SPGP SOP to resolve the noncompliance through the issuance of a new SPGP verification, assuming DEQ deems the impacts unavoidable and appropriate compensation is provided. 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 Corps 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 Corps of the noncompliance and copy the Corps on all compliance correspondence. The Corps will determine the type of federal authorization necessary (if any) for resolving the case. In most cases, DEQ will not issue after-the-face SPGP authorization because there is not a corresponding VWP Permit. Requests by the Corps for an after-the-fact SPGP authorization will be handled on a case-by-case basis.

## 11.8 SPECIAL CIRCUMSTANCES

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### 11.8.1 EXCLUSIONS

When a responsible party claims that their activity is not subject to permit requirements under (9VAC25-210-60 Exclusions), it is the burden of the person claiming the exclusion to prove that their activity qualifies (9VAC25-210-60). DEQ staff may request the information necessary to make a determination regarding exclusion applicability.

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### 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 VWPP 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.

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### 11.8.3 VIRGINIA STORMWATER MANAGEMENT PROGRAM OVERLAP

Many impacts to state waters observed by VWPP 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 a 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. Sedimentation impacts that occur due to noncompliance with the conditions of the VPDES Construction General Permit should be coordinated with the Regional Construction Stormwater Manager. In some cases, a compliance action by both programs may be warranted; however, under certain circumstances, the VWPP Program may take the only action. The VPDES Construction General Permit allows for intermittent failures of erosion and sediment control measures, provided that measures were installed correctly and maintained appropriately, the failures were documented and were 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 VWPP program.

VWP staff should not pursue compliance or enforcement action unless sediment has been discharged to the extent that it creates a measurable depth of fill. When this situation arises, staff should use the VWPP Program points matrix to evaluate how this fill should be addressed. 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 [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 impact to the resource. Compensation for functional losses may be required.

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### 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
<b>Surface waters</b>	<p>State Water Control Law and VWPP Regulations that prohibit work in surface waters without a permit.</p> <p>If permit is active, permit requirements can also be enforced.</p>	<p>Normal administrative enforcement process and options (WL/RCA/NOV)</p>	<p>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 (such as residential landscaping), administrative enforcement procedures cannot be used.</p>
	<p>Preservation Instrument</p>	<p>Enforcement of the terms of the preservation instrument through judicial action (court).</p>	<p>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.</p>
<b>Upland Preservation Area</b>	<p>If permit is expired –only the preservation instrument itself may be enforced</p>	<p>Enforcement of the terms of the preservation instrument through judicial action (court).</p>	<p>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.</p>
	<p>If permit is active, staff may be able to pursue potential violations of applicable permit conditions.</p>	<p>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.</p>	<p>This is only available when the permit is active.</p>

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### 11.8.5 WARRANTS

When a site owner refuses access to DEQ to inspect a property, staff should follow the procedures outlined in [Enforcement Guidance Memorandum 1-2011](#) to determine next steps. Further discussions between the landowner and the Regional VWP 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 staff and the Office of the Attorney General. Generally, administrative warrants require an affidavit from one or more DEQ staff. A sample affidavit is provided in [Appendix G](#). The affidavit(s) should clearly lay out the evidence in DEQ's possession that indicates that surface waters are present on a site and a violation of State Water Control Law has likely occurred. The affidavit must also indicate that DEQ has sought and was denied access to a property. Evidence that a violation has likely occurred on the site might include observations from neighboring properties; desktop resources, such as [NWI maps](#), [soil surveys](#) and aerial photography; and information received via an anonymous or identified complaint. The affidavit should present only a summary of the results of the investigation; however, the supporting record should be as thorough as possible. It is DEQ's burden to prove the likelihood of a violation. If the court requires additional detail, inspection reports and other evidence can be submitted, or staff can be required to testify. An example affidavit is in Appendix H. DEQ staff will also be asked to review the draft request for the warrant to be submitted by the OAG to the Circuit Court.

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### 11.8.6 EMERGENCY SITUATIONS

DEQ has administrative and judicial tools available for use in emergency situations. An administrative emergency order may be issued by the State Water Control Board when circumstances require immediate action to abate imminent and substantial injury or damage. Emergency 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 in front of the State Water Control Board must be held after reasonable notice to the Responsible Party, to affirm, modify, amend, or cancel the emergency order.

For more information regarding emergency administrative orders or judicial actions that may be issued in exigent circumstances, refer to [DEQ's Civil Enforcement Chapter](#).







## **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](#), [9VAC25-660-80](#), [9VAC25-670-80](#), [9VAC25-680-80](#), [9VAC25-690-80](#)). For surface water withdrawals only (e.g. Does not include fill and/or excavation in surface waters), a major exceedance is typically considered a major surface water withdrawal, which is an unauthorized withdrawal of 90 million gallons per month or greater that Does not otherwise qualify for a permit exclusion (see [9VAC25-210-10](#) and [9VAC25-210-60](#)). 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 300 linear feet of streambed impact). For surface water withdrawals, a major unpermitted impact applies to a withdrawal that is greater than or equal to 90 million gallons per month. 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](#), [9VAC25-660-80](#), [9VAC25-670-80](#), [9VAC25-680-80](#), [9VAC25-690-80](#)). For surface water withdrawals only (e.g. does not include fill and/or excavation in surface waters), a minor exceedance is typically considered a minor surface water withdrawal, which is an unauthorized withdrawal of less than 90 million gallons per month that does not otherwise qualify for a permit exclusion (see [9VAC25-210-10](#) and [9VAC25-210-60](#)). 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 less than 0.10 acre of wetland or open water, or 300 linear feet of streambed impact and no special resources, such as threatened and endangered species, exist within the project area). For surface water withdrawals, a minor unpermitted impact applies to a withdrawal that is less than 90 million gallons per month. 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 1. Non-Administrative (Onsite) Violations**

Infraction	Points			Notes
	1st	2nd	Additional Occurrence	
Unpermitted				<p>For unpermitted activity, assess Points for this infraction only. Do not use any of the other onsite infractions listed.</p> <p>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.</p> <p>Major Unpermitted Impact: Generally, impacts that exceed 0.10 acre of wetland or open water, or 300 linear feet of streambed, and water withdrawals greater than or equal to 90 million gallons per month 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.</p> <p>Minor Unpermitted Impacts: Generally, impacts to less</p>
Failure to obtain coverage under a VWPP General or Individual Permit prior to commencing activity:				
<p>Major Unpermitted Impacts</p> <p>Minor Unpermitted Impacts</p>	<p>4</p> <p>2</p>	<p>4</p> <p>2</p>	<p>4</p> <p>2</p>	

**Table 1. Non-Administrative (Onsite) Violations**

Infraction	Points			Notes
	1st	2nd	Additional Occurrence	
Exceeding Permitted Impacts				<p>Minor Exceedance: below minor modification/notice of planned change thresholds</p> <p>Major Exceedance: above minor modification/notice of planned change thresholds</p> <p>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</p> <p>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</p>
Major Exceedance	1-4	1-4	4	
Minor Exceedance	1-2	1-2	4	

**Table 1. Non-Administrative (Onsite) Violations**

Infraction	Points			Notes
	1st	2nd	Additional Occurrence	
<b>Compensatory Mitigation</b>				<p>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</p> <p>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)</p>
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	
Failure to purchase bank credits, contribute to in-lieu fee fund, record preservation deed restrictions, etc.	4	4	4	
Late purchase of bank credits, contribution to in-lieu fee fund, 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	
<b>Construction Special Conditions</b>				<p>If the activity results in a measurable impact, then the activity should also be accounted for in the first section of this table</p>
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	
With Minor Impacts	1	1	2	
With No Impact	0.5	0.5	1	

**Table 1. Non-Administrative (Onsite) Violations**

Infraction	Points			Notes
	1st	2nd	Additional Occurrence	
Water Withdrawals				If the activity results in a measurable impact, then the activity should also be accounted for in the first section of this table
Intake modification without notification/permit	2	4	4	
Build or replace dam without notification/permit for construction and/or increased withdrawal	2	4	4	
“Grandfathered” users increase withdrawal without first obtaining a permit	2	4	4	
Corrective Action				Where 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	2	2	2	
Failure to undertake required corrective action resulting in failure to meet success criteria	4	4	4	
Failure to conduct required water quality	2	4	4	
Any activity resulting in a fish kill; failing to report a fish kill, fuel, or oil spill	4	4	4	

**Table 2. Administrative Violations**

Infraction	Points			Notes
	1st	2nd	Additional Occurrence	
<b>Construction Monitoring</b>				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
Failure to submit construction monitoring report within the required timeframe Report does not include required information and/or contains omissions or errors so great as to prevent a determination of compliance	0.5	1	1.5	
	0.5	0.5	1	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 2 <sup>nd</sup> or additional occurrence unless the permittee has been notified and does not respond
<b>Compensation Monitoring</b>				Deed restriction has been recorded, but notice was not provided to DEQ  Credit purchased or trust fund payment was made, but notice was not provided to DEQ
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	
Failure to provide proof of credit purchase or trust fund payment within the required timeframe	0.5	1	1	
Failure to submit a complete final mitigation plan within the required timeframe	1	2	2	



**Table 2. Administrative Violations**

Infraction	Points			Notes
	1st	2nd	Additional Occurrence	
Water Withdrawal Monitoring				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
Failure to submit water withdrawal monitoring report within the required timeframe	0.5	1	1.5	
Report does not include required information and/or contains omissions or errors so great	0.5	0.5	1	
Notification				Where several distinct impacts occur at different times, separate notification may be necessary and each would be assessed additional Points
Failure to provide required notice prior to commencing or completing construction or compensation	1	1	1	
Failure to submit plans and specifications for permitted areas prior to initiating	0.5	0.5	1	
Other Violations Not Listed Above				Major Harm: Alleged violation related to a documented substantial adverse environmental impact, or presents substantial risk, or has a substantial adverse affect on the regulatory program  Minor Harm: Alleged violation presents little or no risk of environmental impact, or has little or no adverse effect on the regulatory program
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	0.5	0.5	1	
Information is not required in order to				

**Table 3. Aggravating Factors**

**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.**

Infraction	Points			Notes
	1st	2nd	Additional Occurrence	
<p>Staff can also assign Points for additional factors associated with unpermitted impacts or permit exceedances. Factors include but are not limited to:</p> <p>Adverse environmental impact, loss of beneficial use, or presenting an imminent and substantial danger to human health or the environment</p>	4	4	4	<p>Adverse environmental impact, loss of beneficial use, or imminent danger must be documented</p> <p>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</p>
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,
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
Suspected falsification	4	4	4	
Suspected willful violation	4	4	4	
Site Access Violations				

Warning Letter No:  
[Project Name]  
Page 2 of 60

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	
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## APPENDIX 11.C – TEMPLATE OBSERVATIONS & LEGAL REQUIREMENTS

Note: This template covers only 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](#)

[Failure to Flag](#)

[Failure to Compensate](#)

[Failure to Countersink Culverts](#)

[ESC Failure With Impacts](#)

## 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."

**Va. Code §62.1-44.15:20 (A)** 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.”

OR

(2006 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 contours, and planting or seeding with appropriate wetland vegetation according to cover type (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 original contours within 30 days following the construction at that stream segment, and the banks seeded or planted with the same vegetation cover type originally present along the streambanks, including supplemental erosion control grasses if necessary, except for invasive species identified on DCR's Invasive Alien Plant Species of Virginia list.”

#### 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 Va. Code § 62.1-44.15:23 (A) 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 II A 1. states, in part, “...Additional permit requirements as stipulated by the board 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, I.C.5 states, “Erosion and sediment controls shall be designed in accordance with the Virginia Sediment and Control Handbook, Third Edition, 1992 ... 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."

**Va. Code §62.1-44.15:20 (A)** 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."



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 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, and acreage of each vegetation type proposed;
- ✓ 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 Department of Conservation and Recreation's Invasive Alien Plant Species of Virginia 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;
- ✓ The mechanism for permanent preservation of any restored areas, if appropriate.
- ✓ Financial assurance instrument proposed language and cost estimates.



[date]

[Contact Person], [Title]  
[Corporation name]  
[Address]  
[City State Zip]

VIA EMAIL & USPS  
RETURN RECEIPT REQUESTED

Re: **Letter of Agreement to Resolve [Request for Corrective Action / Warning Letter] No. [XXXX]**  
**[Project Name], VWP [General Permit Authorization No / Permit No] [XX-XXXX]**  
**[Locality], Virginia**

Dear [Mr./Mrs. Last Name],

This Letter of Agreement between [**Responsible Party**] and the Department of Environmental Quality (“DEQ”) sets forth the actions required to address alleged violations of Virginia environmental statutes and regulations. By signing both originals and returning one signed and notarized original to this office within 14 days of the date of this letter, you accept and agree to the terms of this Letter of Agreement.

Described below are the events leading up to this Letter of Agreement.

On [Date], staff from the DEQ Piedmont Regional Office conducted an inspection of site referenced above. [Insert observation – example: DEQ staff discovered that approximately 0.15 acre of forested wetlands had been cleared and grubbed during installation of a sanitary sewer line.]

[Insert legal requirement. Example: [VWP General Permit Authorization No. WP4-08-0360 did not authorize these impacts. Va. Code §62.1-44.15:20 A and 9VAC25-210-50 A state that no person shall dredge or fill surface waters unless in compliance with a Virginia Water Protection Permit.]

DEQ met with you on [date] to discuss these observations and determine appropriate corrective action.

Accordingly, you agree to complete and abide by the following schedule of corrective action:

*[The schedule can be tailored depending on case circumstances, but it should be clear and provide specified dates for each action item.]*

1. **[Responsible Party]** shall restore the Cleared Wetland Area to a forested condition by planting the area with native tree species. The "Cleared Wetland Area" referred to in this Letter of Agreement is the area outlined in red on the attached Figure 1.
2. **No later than [date]**, submit a plant species list to DEQ for review and approval. Trees selected for planting must be rated facultative (FAC) or wetter, native to the project area and shall not be invasive. **[Optional: Examples of acceptable species are green ash (*Fraxinus pennsylvanica*), black gum (*Nyssa sylvatica*), river birch (*Betula nigra*), and American beech (*Fagus grandiflora*). Do not plant red maple (*Acer rubrum*), sweet gum (*Liquidambar styraciflua*), and loblolly pine (*Pinus taeda*).]**
3. Between **[Date 1 and Date 2]**, plant at least **[#]** of individual trees in the Cleared Wetland Area. Plant material shall be in containers at least 1 gallon in size, and on the DEQ approved plant list.
4. Within 15 days of planting, take photographs of the planted area, at minimum from a photostation established in each of the corners of the Cleared Wetland Area (four or more photostations total).
5. Submit all photographs taken in accordance with Item 4 to DEQ by **[date]**. Number each photo and include a sketch showing where the photos were taken from, with an arrow showing the direction of the photos.
6. Take additional photographs of the restoration area from the same established photo stations and in the same direction, in **[month & year] and [month & year]**, and submit them to DEQ no later than **[due date] and [due date]**, respectively.
7. Any dead or damaged planted tree shall be replaced with an individual on the plant list approved by DEQ.
8. Within 30 days following receipt of photographs required by Item 6 above, DEQ will notify you if any additional remedial actions will be required, and you shall implement such remedial actions in accordance with the schedule provided in the notification.
9. Unless otherwise indicated, all submittals to DEQ shall be sent to:

**[Inspector Name, address, phone & email]**

DEQ expects that you will complete all of these items according to the schedule set forth in this agreement. DEQ may take other enforcement action in the event that you do not act in accordance with this agreement, or new information or circumstances suggest that other measures are required to ensure compliance with Virginia statutes and regulations or to protect human health and the environment. This Letter of Agreement is neither a case decision under the Virginia Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, nor an adjudication.

Thank you for your cooperation. Please address any questions you have about this Letter of Agreement to **[Inspector Name]** at **[Phone]** or **[Email]**.

Sincerely,

[Name]

VWP Permit Manager

Cc: Corps Rep

Seen and agreed:

\_\_\_\_\_

Date

\_\_\_\_\_

[Responsible Party signature]

Commonwealth of Virginia

County of \_\_\_\_\_

The foregoing document was signed and acknowledged before me this \_\_\_\_ day of

\_\_\_\_\_, 2016, by \_\_\_\_\_ and \_\_\_\_\_.

\_\_\_\_\_

Notary Public

My commission expires: \_\_\_\_\_





VIRGINIA:

IN THE CIRCUIT COURT OF **POWHATAN** COUNTY

DAVID K. PAYLOR, Director of the  
Department of Environmental Quality

Petitioner

IN RE AN INSPECTION WARRANT FOR:

[street address]

[city] ([county name]), VIRGINIA

**AFFIDAVIT**

I, [Name], am the Virginia Water Protection Permit Program Manager for the [Region] Regional Office of the Virginia Department of Environmental Quality (DEQ, or the Agency). My duties include conducting and overseeing inspection of locations to evaluate conformity with the State Water Control Law, Chapter 3.1 of Title 62.1 of the *Code of Virginia*, including the Virginia Water Protection Permit laws and regulations, including but not limited to the protection of surface waters, including wetlands.

2. **John Rolfe (Owner)** owns a **17.827-acre** parcel located at **123 Main Street, Jefferson, Virginia in Powhatan County, Virginia** (Property). The Property is identified as **Powhatan County Tax Map Parcel # 1234-56-7890**, and lies **on the north line of Main Street**. It is the same property conveyed to Owner by deed from

**Pocahontas Rolfe**, dated **November 20, 2014** and recorded in **Deed Book 1234, page 5678**, in the Clerk's Office of the Circuit Court of **Powhatan** County.

3. The Property is subject to a Declaration of Restrictions (Declaration) recorded in **Deed Book 1234, page 567**, on **[date]**, in the Clerk's Office of the Circuit Court of **Powhatan** County. The Declaration identifies wetlands on the property, and prohibits wetland destruction or alterations, building construction, additional of fill material, cultivation, pruning, tree harvesting in this area. The Declaration states that the covenants run with the land, and are enforceable by the Agency.

3. On **[date]**, DEQ received notification from Powhatan County Code Compliance Staff that the Property had been logged, and Owner was adding fill material, demolition debris, vehicles, a mobile home, and other miscellaneous items to the property, within the wetland boundaries subject to the Declaration. On **[date]**, DEQ staff inspected the Property. Access to the Property was blocked by a fence, mobile home, and various vehicles and outbuildings. "No Trespassing" signs were present. Guard dog(s) appearing to be pitbulls were roaming the property, unchained and unfenced. DEQ staff observed that the property appeared to have been logged, and a gravel fill material appeared to have been placed within the wetlands subject to the Declaration.

4. On **[date]**, in coordination with DEQ staff, staff of the U.S. Army Corps of Engineers (USACOE) sent an email to Owner, requesting a site visit. Owner's attorney, Mr. John Smith, contacted USACOE staff on **[date]**, and requested a copy of the letter sent to Owner. USACOE staff emailed Mr. Smith the site visit request letter on **[date]**. No response was received. USACOE staff emailed Mr. Smith again on **[date]** to request a site visit. No response was received. DEQ staff contacted Mr. Smith on **[date]**. Mr. Smith responded to USACOE and DEQ staff on **[date]**, and an inspection was scheduled for **[date]**. This inspection was cancelled on **[date]** by Mr. Smith. On **[date]**, DEQ emailed Mr. Smith a request to reschedule the inspection. No response was received.

5. On **[date]**, DEQ staff sent a letter via certified mail to Owner and Mr. Smith tentatively scheduling a site visit for **[date]** at 10 a.m. The letter was also sent via email to Mr. Smith. The letter asked for a response and stated that "[a] lack of response...will be considered denial of permission for DEQ staff to enter upon the [P]roperty". The certified mail receipt was received by DEQ from Mr. Smith on **[date]**. No other response was received.

6. On [date], DEQ staff arrived at the Property at 9:50 a.m. DEQ staff knocked on the doors of the mobile home and the recreational vehicle, with no response. DEQ staff called Owner and left a voicemail message at 10:20 a.m. No response was received. DEQ staff made observations from the Property driveway, Ashcake Road, and a neighboring property to the south. DEQ staff remained within sight of the Property until 10:40 a.m. Neither Owner nor any representatives of the Owner arrived at the Property.

7. DEQ staff observed that the areas on the Property designated by the Restriction had been logged, and vehicles, dog pens, and debris had been placed within these areas. Gravel fill had also been placed to form a road within the wetlands. DEQ staff observed that undisturbed forested areas on the neighboring property adjacent to the logged areas exhibited the vegetation, soils and hydrology of a wetland.

8. DEQ staff traveled to Owner's place of business, Smith's Garage, located at 567 Main Street, Jefferson, Virginia, and arrived at 11:00 a.m. Owner was not present at the business. An employee on site indicated that Owner could be reached by phone using the same phone number that DEQ staff had already called.

\_\_\_\_\_  
[NAME]

Commonwealth of Virginia

City/County of \_\_\_\_\_, to wit:

Sworn and subscribed to before me on this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

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Notary Public

My commission expires: \_\_\_\_\_