


**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER PLANNING DIVISION**

Subject: **Guidance Memo No. 18-2011**
Point Assessment Guidance for Alleged Noncompliance of the Groundwater and
Surface Water Withdrawal Permit Criteria for the Office of Water Supply

To: Office of Water Supply Staff

From: Jutta Schneider, Director 

Date: December 18, 2018

Copies: James Golden, Jeff Steers, Division Directors, Regional Directors, CO and
Regional VWP Program Managers

Summary:

This guidance document provides direction for evaluating alleged noncompliance with the Groundwater Withdrawal Regulations ([9VAC25-610-10 et seq.](#)), the Ground Water Management Act of 1992 ([Va. Code § 62.1-254 et seq.](#)), the Virginia Water Protection (VWP) Permit Program Regulation ([9VAC25-210-10 et seq.](#)) and the State Water Control Law ([Va. Code § 62.1-44.2 et seq.](#)) related to groundwater and surface water withdrawal activities. This document provides a point system for determining the appropriate compliance response, including when to refer cases to the Division of Enforcement. The point system allows the Office of Water Supply (OWS) to consistently assess and respond to alleged noncompliance.

This guidance supersedes the portions of Guidance Memo No. 02-2010, Water Compliance Auditing Manual, which refer to groundwater withdrawal activities. This guidance also supersedes the portions of Guidance Memo No. 10-2002, Virginia Water Protection Permit Program Noncompliance Determination and Enforcement Referral Guidance, which refer to surface water withdrawal activities. However, Guidance Memorandum No. 10-2002 will be applied for OWS related projects when alleged noncompliance is found that is not related to water withdrawals (i.e. unauthorized stream or wetland impacts, compensatory mitigation).

Electronic Copy:

An electronic copy of this guidance document in PDF format is available on DEQ's website at: <http://www.deq.virginia.gov/Programs/Water/Laws,Regulations,Guidance/Guidance/WaterSupplyGuidance.aspx>.

Contact Information:

Please contact the OWS Water Withdrawal Permitting & Compliance Manager with any questions regarding the application of this guidance.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate or prohibit any particular action not otherwise required or prohibited by law or regulation. If alternative proposals are made, such proposals will be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

POINT ASSESSMENT GUIDANCE FOR ALLEGED NONCOMPLIANCE OF THE GROUNDWATER AND SURFACE WATER WITHDRAWAL PERMIT CRITERIA FOR THE OFFICE OF WATER SUPPLY

I. PURPOSE

This guidance document provides direction for evaluating alleged noncompliance with the Groundwater Withdrawal Regulations ([9VAC25-610-10 et seq.](#)), the Ground Water Management Act of 1992 ([Va. Code § 62.1-254 et seq.](#)), the Virginia Water Protection (VWP) Permit Program Regulation ([9VAC25-210-10 et seq.](#)) and the State Water Control Law ([Va. Code § 62.1-44.2 et seq.](#)) related to groundwater and surface water withdrawal activities. This document provides a point system for determining the appropriate compliance response, including when to refer cases to the Division of Enforcement. The point system allows the Office of Water Supply (OWS) to consistently assess and respond to alleged noncompliance. This guidance finalizes the Point Assessment Criteria (PAC) for assessing noncompliance in OWS.

This guidance, in conjunction with the Office of Water Supply Compliance and Auditing Manual Guidance Memo No. 18-2010, supersedes the portions of Guidance Memo No. 02-2010, Water Compliance Auditing Manual, which refer to groundwater withdrawal activities. This guidance, in conjunction with the Office of Water Supply Compliance and Auditing Manual Guidance Memo No. 18-2010, also supersedes the portions of Guidance Memo No. 10-2002, Virginia Water Protection Permit Program Noncompliance Determination and Enforcement Referral Guidance, which refer to surface water withdrawal activities. However, Guidance Memorandum No. 10-2002 will be applied for OWS related projects when alleged noncompliance is found that is not related to water withdrawals (i.e. unauthorized stream or wetland impacts, compensatory mitigation).

II. AUTHORITY

DEQ's authority to conduct compliance investigations and inspections is provided for in the State Water Control Law ([Va. Code § 62.1-44.15 et seq.](#)), the Groundwater Management Act of 1992 ([Va. Code § 62.1-254 et seq.](#)), VWP Permit Program Regulation ([9VAC25-210-10 et seq.](#)), Groundwater Withdrawal Regulations ([9VAC25-610-10 et seq.](#)), and permit conditions.

Inspections

- **Code of Virginia § 62.1-44.15 (6)** authorizes the State Water Control Board: *“To make investigations and inspections, to ensure compliance with any certificates, standards, policies, rules, regulations, rulings and special orders which it may adopt, issue or establish and to furnish advice, recommendations, or instructions for the purpose of obtaining such compliance.”*
- **Code of Virginia § 62.1-44.20** states: *“Any duly authorized agent of the Board may, at reasonable times and under reasonable circumstances, enter any establishment or upon any*

property, public or private, for the purpose of obtaining information or conducting surveys or investigations necessary in the enforcement of the provisions of this chapter.”

- **Code of Virginia § 62.1-256.6** states: *“To enter at reasonable times and under reasonable circumstances, any establishment or upon any property, public or private, for the purposes of obtaining information, conducting surveys or inspections, or inspecting wells and springs, and to duly authorize agents to do the same, to ensure compliance with any permits, standards, policies, rules, regulations, rulings and special orders which it may adopt, issue or establish to carry out the provisions of this chapter.”*
- **9VAC25-210-90.D** **Inspection and Entry.** *“Upon presentation of credentials, the Permittee shall allow the Board or any duly authorized agent of the Board, at reasonable times and under reasonable circumstances, to conduct the actions listed in this section. For the purpose of this section, the time for inspection shall be deemed reasonable during regular business hours. Nothing contained herein shall make an inspection time unreasonable during an emergency.*
 1. *Enter upon any Permittee's property, public or private, and have access to, inspect and copy any records that must be kept as part of the VWP permit conditions;*
 2. *Inspect any facilities, operations or practices (including monitoring and control equipment) regulated or required under the VWP permit; and*
 3. *Sample or monitor any substance, parameter or activity for the purpose of ensuring compliance with the conditions of the VWP permit or as otherwise authorized by law.”*
- **9VAC25-610-390** **Statewide Right to Inspection and Entry.** *“Upon presentation of credentials the Board, or any duly authorized agent, shall have the power to enter, at reasonable times and under reasonable circumstances, any establishment or upon any property, public or private, located anywhere in the Commonwealth for the purposes of obtaining information, conducting surveys or inspections, or inspecting wells and springs to ensure compliance with any permits, standards, policies, rules, regulations, rulings and special orders which the Board or Department may adopt, issue or establish to carry out the provisions of the Ground Water Management Act of 1992 and this chapter.”*

Enforcement

- **Code of Virginia § 10.1-1186.9** states in part: *“Notwithstanding any other provision of law and to the extent consistent with federal requirements, following a proceeding as provided in § 2.2-4019, issue special orders to any person to comply with: (i) the provisions of any law administered by the Boards, the Director or the Department, (ii) any condition of a permit or a certification, (iii) any regulations of the Boards, or (iv) any case decision, as defined in § 2.2-4001, of the Boards or Director...”*
- **Code of Virginia § 62.1-269** states: *“Any person violating or failing, neglecting or refusing to obey any rule, regulation, order, standard or requirement of the Board pertaining to*

ground water, any provision of any ground water withdrawal permit issued by the Board, or any provision of this chapter may be compelled to obey same and to comply therewith in a proceeding instituted by the Board in any appropriate court for injunction, mandamus or other appropriate remedy. The Board shall be entitled to an award of reasonable attorneys' fees and costs in any action brought by the Board under this section in which it substantially prevails on the merits of the case, unless special circumstances would make an award unjust.”

- [9VAC25-210-500](#) Part VI. Enforcement. *“The board may enforce the provisions of this chapter utilizing all applicable procedures under the law and § 10.1-1186 of the Code of Virginia.”*
- [9VAC25-610-350](#) Part VII. Enforcement. *“The board may enforce the provisions of this chapter utilizing all applicable procedures under the Ground Water Management Act of 1992 or any other section of the Code of Virginia that may be applicable.”*

III. DEFINITIONS

Aggravating Factors: Fact or circumstances that increase the severity or culpability of a noncompliant act, often related to the potential or actual harm to human health or the environment, and resulting in applying additional points. Aggravating factors are applied after a determination of alleged noncompliance.

Alleged Noncompliance: Suspected failure to abide by requirements of permit conditions, regulations, or laws.

Beneficial Use: For groundwater, includes domestic (including public water supply), agricultural, commercial, and industrial uses. For surface water, includes both instream and offstream uses. Instream beneficial uses include but are not limited to protection of fish and wildlife habitat, maintenance of waste assimilation, recreation, navigation, and cultural and aesthetic values. Offstream beneficial uses include but are not limited to domestic (including public water supply), agricultural, electric power generation, commercial, and industrial uses.

Enforcement Action: Means any action taken by the Division of Enforcement, including but not limited to a Consent Special Order, a Special Order issued after a formal or informal hearing, a Letter of Agreement, or a referral to the Office of the Attorney General. The term Enforcement Action does not include deferral of a case. (See DEQ Enforcement Manual - Effective December 1, 2016, Chapter 2, Page 25 *“Administrative Case Closures and Deferral”*)

Points: Values assigned to alleged noncompliance based on the potential for harm to the environment and/or to the regulatory program. The Program determines the appropriate method to address alleged noncompliance based on the number of points accumulated.

Unpermitted Activity: Activities occurring without a required permit, such as but not limited to water withdrawals, beneficial use, filling, excavating, dredging, mechanized land clearing,

ditching, or activities otherwise affecting the physical, chemical, or biological properties of State waters.

Unpermitted Water Withdrawal: Groundwater and/or surface water withdrawal occurring without the required permit and not otherwise excluded from permitting requirements by statute or regulation.

Water Withdrawal: Removal or diversion of surface or ground water in Virginia or from the Potomac River for consumptive or non-consumptive use

IV. POINTS ASSESSMENT FOR ALLEGED NONCOMPLIANCE OF THE GROUNDWATER AND SURFACE WATER WITHDRAWAL PERMIT REGULATIONS AND LAW

Alleged noncompliance activities will be evaluated in accordance with the Water Withdrawal Compliance Manual Guidance Memo No. 18-2010 and using the point assessment procedure for the groundwater and surface water withdrawal permit regulations and law. See Attachment A, Table 1 - Point Assessment Criteria (PAC).

The point assessment procedure and associated PAC provide a mechanism for determining the level of response to alleged noncompliance, or a referral to the Division of Enforcement. Points assessed are dependent upon factors such as the severity of environmental harm, the effect on the Program, and the compliance history. The PAC is structured such that more serious instances of alleged noncompliance receive more points.

The point assessment procedure is a two-step process: The first step is determining the nature of the alleged noncompliance. The second step is determining the potential or actual harm to human health or the environment.

The point assessment procedure should be implemented as follows:

- Points will be assessed when alleged noncompliance is first discovered based on an inspection, file review, or other observation.
- For each incident of alleged noncompliance, points will be assessed and calculated and/or accumulated and the appropriate action will be determined after the assessment has been made.
- A total points value less than 2 points warrants a Request for Corrective Action (RCA); a total points value greater than or equal to 2 and less than 4 points warrants a Warning Letter (WL); a points value greater than or equal to 4 points warrants a Notice of Violation (NOV). NOV referral to the Division of Enforcement will occur via the Water Planning Division Director.

- Additional points will be assessed if the Responsible Party (RP) has not corrected alleged noncompliance or has not provided an adequate response (i.e., appropriate or no response or a schedule of corrective action that is to take place or may have already taken place) within the timeframes given by the written notice.
- For repeat occurrences of the same infraction(s) or other occurrence of different infraction(s) within a 12-month rolling period, points will continue to be accumulated over the 12-month rolling period and the appropriate action will be determined.
- A 12-month rolling period for an alleged noncompliance issue begins on the date of discovery. Example: If an alleged noncompliant issue is discovered on January 1, the points assessed for this infraction will drop off January 1 of the following year. Then the point or points are no longer accumulated or used by the DEQ when determining future compliance actions.
- Compliance determinations are based on the individual facility, using the permit issued to the specific facility, and the conditions/requirements of that permit. Points assessed for a specific facility/permit do not transfer to different facility no matter how many facilities a RP may oversee.

This process results in a pragmatic and straightforward approach for compliance auditing and allows the Department staff to more accurately categorize and identify Responsible Parties (RPs).

ATTACHMENT A

Table 1 - Point Assessment Criteria (PAC)

Type of Violation	Points	Notes
1. Unpermitted water withdrawal or activity (9VAC25-210-50 ; 9VAC25-610-40)	4	Assessed for facilities that have failed to obtain the required groundwater and/or surface water withdrawal permit coverage and are not otherwise exempted or excluded by statute or regulation.
2. Exceeding a water withdrawal limit or failing to meet an instream flow requirement. (9VAC25-210-50 ; 9VAC25-610-130.A ; 9VAC25-610-140.B) a. Daily (for permits with daily limits) b. Monthly c. Yearly	.033 1 3	In the event that one or more of these limits are violated, staff should evaluate the points corresponding to the longest reporting period only.
3. Failure to install and/or maintain monitoring equipment (9VAC25-210-110.D ; 9VAC25-610-140)	1	Assessed where a permit has required that equipment is installed and maintained during the permit term. For example, failure to maintain/repair/replace flow meters, water level meters, etc.
4. Failure to comply with withdrawal device construction conditions (9VAC25-610-140)	1	Assessed where a groundwater well or surface water intake is not constructed as required by permit conditions.
5. Failure to implement a Water Conservation and Management Plan (9VAC25-610-100)	1-2	Assessed when a facility fails to follow requirements stated in the Water Conservation & Management Plan submitted by the facility and approved by the DEQ.
6. Agency failed to receive a report (9VAC25-210-90.F ; 9VAC25-610-130.F)	2	A report is considered “not received” if DEQ did not receive the report in the month due specified in a regulation or

		<p>permit condition. For the purposes here, “report” includes, but is not limited to, Construction Monitoring, Water Withdrawals, and audits.</p> <p>Includes a failure to provide required notices, or plans and specification for permitted activities (Water Conservation and Management Plans, Operation and Maintenance Plans, Monitoring Plans, etc.).</p>
7. Past due/late, or incomplete report(s)	0.5	<p>A report is considered “past due or late” if DEQ receives a report after the date specified in a regulation or permit condition.</p> <p>An “incomplete” report is a report that does not include required information and/or contains omissions or errors that prevent a determination of compliance.</p>
8. Failure to maintain facility records (9VAC25-210-90.F ; 9VAC25-610-130.F)	0.5	“Facility records” includes all monitoring information, including all calibration, maintenance records and notifications.
9. Failure to respond to a Request For Information (9VAC25-210-90.E ; 9VAC25-610-130.E ; 9VAC25-610-380)	1	Assessed when a Request for Information letter has been sent to a Responsible Party and no response was received in the time allowed.
10. Other noncompliance of a permit or special condition NOT listed above (per occurrence)	1	
Aggravating Factors		
1. Exceeding water withdrawal limits by more than 10% (9VAC25-610-140.A.7)	1	Points applied if a permitted surface water or groundwater withdrawal is found to exceed its permit limits by more than 10%.
2. Failure to meet an instream flow permit requirement by $\geq 10\%$	1	Applied when a permitted surface water withdrawal or release from an impoundment results in a stream flow \geq

		10% below the instream flow permit requirement. Also applied when an impoundment release is $\geq 10\%$ below the permit requirement.
<p>3. Alleged adverse environmental impact, loss of drinking water supply, loss of beneficial use, or presenting an imminent and substantial danger to human health or the environment</p> <p>a. Minor/Marginal – alleged violation presents little or no risk of adverse environmental impact</p> <p>b. Moderate (for example any alleged violation resulting in exceedances of water quality standards in accordance with the DEQ Water Quality Assessment Guidance Manual, or any activity impacting a watershed or aquifer identified as stressed based upon State Water Resources Plan, USGS data, or other scientific reference)</p> <p>c. Major/Serious – alleged violation related to a documented substantial adverse environmental impact (for example any alleged violation resulting in a fish kill)</p>	<p>1-2</p> <p>2-3</p> <p>4</p>	<p>Any allegation of adverse environmental impact, loss of drinking water supply, loss of beneficial use, or imminent danger must be reported to the enforcement staff with documentation that shall conclude that either there was or was not an adverse impact. These aggravating factors should only apply to unpermitted withdrawals or permitted withdrawals otherwise out of compliance with withdrawal limits or other permit requirements.</p> <p><u>Groundwater Withdrawals</u> Typical impacts include, but are not limited to, substantial interference with other groundwater withdrawals, loss of groundwater supply, groundwater contamination (e.g., saltwater intrusion as a result of the withdrawal), and critical cell infractions.</p> <p><u>Surface Water Withdrawals</u> Typical factors include, but are not limited to, impacts to waters containing rare, threatened or endangered species and habitats, impacts previously avoided through permit negotiations, or withdrawal $\geq 25^{\text{th}}$ percentile instream flow at the intake (metric for Cumulative Impact Analysis from 2015 State Water Resources Plan).</p>
4. Potential for adverse environmental impact or loss of beneficial use	2	Impact is expected but has not occurred yet. For example, potential impacts to waters containing rare, threatened or endangered species and habitats.
5. Suspected falsification	4	
6. Suspected willful violation	4	

7. 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 (9VAC25-210-90.D ; (9VAC25-610-130.D))	2-4	Staff should refer to DEQ Enforcement Guidance No. 1-2011 or other DEQ-approved guidance or policy related to site access when applying this aggravating factor.
Compliance History		
1. Compliance History (accumulated points for previous rolling 12 months)	Varies	The accumulated points for the previous rolling 12 months will be used in determining what type of compliance actions will be taken by DEQ.