COMMONWEALTH OF VIRGINIA

Department of Environmental Quality

Subject:	Guidance Memorandum No. 24-2005 - **Virginia Water Protection (VWP) Permit Program Manual Supplemental Guidance**
To:	Regional VWP Permit Program Managers, Regional Office Directors
From:	A. Scott Morris, DBA, PE, Director of Water
Date:	September 4, 2024
Copies:	VWP Permit Program Staff, Regional Water Compliance Managers

Summary:

In 2016, the Virginia Water Protection (VWP) Permit Program consolidated multiple agency guidance documents, instructional documents, program procedures, supporting technical and scientific information, external resource materials, and procedural examples into a living document, titled the Virginia Water Protection (VWP) Permit & Compliance Manual (or Manual). The Manual serves as the basis for process consistency across VWP Permit Program offices. The Manual is posted on DEQ's public website here: https://www.deq.virginia.gov/our-programs/water/wetlands-streams.

The Virginia Water Protection (VWP) Permit Program Manual Supplemental Guidance memorandum and attachment herein serves to replace Guidance Memorandum GM19-2003, saving approximately 172 pages of guidance documents. This replacement guidance establishes the program-related decisions that have been made on various topics over time, and while it informs the Manual, it is separate from the Manual. This guidance does not address processes and activities unique to surface water withdrawals (Part V of 9VAC25-210).

This guidance memorandum will be updated on an as-needed basis.

Please also refer to the relevant definitions in the Code of Virginia (Title § 62.1, Chapter 3.1) and the Virginia Water Protection Permit Program regulations (9VAC25-210 *et seq*.; 9VAC25-660 *et seq*.; 9VAC25-670 *et seq*.; 9VAC25-680 *et seq*.; and 9VAC25-690 *et seq*.).

Electronic Copy:
Once effective, an electronic copy of this guidance memorandum will be available on the Virginia Regulatory Town Hall under the Department of Environmental Quality (http://www.townhall.virginia.gov/L/gdocs.cfm?agencynumber=440)

Contact Information:
Please contact David L. Davis, Manager, Office of Wetlands and Stream Protection, with any questions regarding the application of this guidance at 804-698-4105 or dave.davis@deq.virginia.gov.

Certification:
As required by Subsection B of § 2.2-4002.1 of the APA, the agency certifies that this guidance document conforms to the definition of a guidance document in § 2.2-4101 of the Code of Virginia.

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.

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I. AUTHORITY

This Virginia Water Protection (VWP) Permit Program Manual Supplemental Guidance (hereafter Supplemental Guidance) is generally provided in accordance with § 62.1-44.15 of the Code of Virginia (effective July 1, 2024).

All or some of the following provisions may apply to a specific topic in this Supplemental Guidance:

Article XI, Section 1 Constitution of VA; Title 62.1 of the Code of Virginia; Chapter 3.1 of Title 62.1 of the Code of Virginia (§§ 62.1-44.2 through 62.1-44.34:33) [§ 62.1-44.2 through -44.6:1, § 62.1-44.15, § 62.1-44.15:01, § 62.1-44.15:4.1, § 62.1-44.15:5.1, § 62.1-44.15:5.2, § 62.1-44.15:20, § 62.1-44.15:21, § 62.1-44.15:24, § 62.1-44.15:25, § 62.1-44.15:28, § 62.1-44.15:28.1, § 62.1-44.15:31, § 62.1-44.15:34, § 62.1-44.15:40, § 62.1-44.15:50, § 62.1-44.15:52, Article 2.5 of Title 62.1 (§§ 62.1-44.15:67 through § 62.1-44.15:79), § 62.1-44.19:5]; § 10.1-400 *et seq.;* § 10.1-604 *et seq.;* § 10.1-1408.5; § 28.2-1300 *et seq.;* § 29.1-566 and -568; § 62.1-7; § 62.1-8; § 62.1-10; § 62.1-11; § 62.1-194 through -194.3; 9VAC25 - Preface (Agency Summary); 9VAC25-31 *et seq.;* 9VAC25-40 *et seq.;* 9VAC25-210 Sections 10 through 230 and 500; 9VAC25-260 *et seq.;* 9VAC25-380 *et seq.;* 9VAC25-401 *et seq.;* 9VAC25-410 and 415 *et seq.;* 9VAC25-630 *et seq.;* 9VAC25-660 *et seq.;* 9VAC25-670 *et seq.;* 9VAC25-680 *et seq.;* 9VAC25-690 *et seq.;* 9VAC25-720 *et seq.;* 9VAC25-820 *et seq.;* 9VAC25-830 *et seq.;* 9VAC25-875 *et seq;* 15 USC § 717f(c); 16 USC § 1531 *et seq*.; 33 USC § 403 *et seq*.; 33 USC § 1251 *et seq.;* 33 USC § 1313(d); 33 USC § 1315(b); 33 USC § 1317(a); 33 U.S.C § 1341 *et seq;* 33 U.S.C § 1344 *et seq.;* 33 USC § 1370; 33 CFR 325.5(c)(3); 33 CFR Part 330; 33 CFR Part 332; 40 CFR § 121 *et seq.;* 40 CFR § 130.7; 40 CFR § 131 *et seq.;* 40 CFR § 136 *et seq*.; 40 CFR § 230 *et seq*.; Public Law 95-217

II. APPLICANTS / APPLICATIONS

The regulation requires that an application include the *legal name* of the *applicant (person)* (9VAC25-210-10). A complete application for a VWP individual permit or general permit coverage, at a minimum, consists of the following information, if applicable to the project: a. The applicant's legal name, mailing address, telephone number, and if applicable, electronic mail address and fax number. b. If different from applicant, legal name, mailing address, telephone number, and if applicable, electronic mail address and fax number of property owner. c. If applicable, the authorized agent's name, mailing address, telephone number, and if applicable, fax number and electronic mail address. …" (9VAC25-210-80.B.1.a through c, and 9VAC25-[660, 670, 680, and 690]-60.B.1-3)

A VWP individual permit or general permit coverage, if issued, is issued to a person – the legal entity. However, the legal entity may not be required to be registered with the Virginia State Corporation Commission (SCC) – a number of exemptions exist, such as places of worship and government agencies. Furthermore, denial of a VWP permit or coverage, based solely on the lack of having registered with the Virginia SCC, is not supported by the State Water Control Law or program regulations.

A Joint Permit Application (JPA) is the current form of application accepted by the DEQ-VWP Permit Program, except that the Virginia Department of Transportation (VDOT) may use its Interagency Coordination Meeting (IACM) process as well. VWP Permit Program staff review applications received with a tracking number assigned by the Virginia Marine Resources Commission, Habitat Division (VMRC). While courtesy copies may be received by DEQ, VWP staff review does not begin until the VMRC number-assigned application is received by DEQ from VMRC. Days required by regulations or by the Code of Virginia are counted beginning with the day after the item is received or a specific action is required. *'Days' mean calendar days unless otherwise specified*. Normal business hours are 8:00 AM to 5:00 PM Eastern Standard Time (EST), Monday through Friday, excluding holidays.

III. DELINEATIONS

All state surface water boundaries and impacts should be identified and quantified for VWP Permit Program complete application and compensatory mitigation purposes. The VWP Permit Program consults in part the *Implementation Procedures for VWP Preliminary Jurisdictional Determinations (PJDs), Approved Jurisdictional Determinations (AJDs), and State Surface Waters Determinations (SSWDs)* (WAT-PER-003, December 2021).

A. Federal jurisdiction

The VWP Permit Program accepts Preliminary Jurisdictional Determinations (PJD) of waters boundaries verified by the USACE, provided that all surface water boundaries are included. If only federally jurisdictional surface waters are verified, then applicants should contact DEQ-VWP Permit Program for a State Surface Waters Determination (SSWD) of all surface water boundaries on the proposed project site. While a SSWD, provided by DEQ to an applicant, may be relied upon for DEQ permitting purposes, the USACE and other state or federal agencies may or may not accept the SSWD for their permitting purposes.

The VWP Permit Program accepts Approved Jurisdictional Determinations (AJD) of federally jurisdictional waters boundaries verified by the USACE. Applicants should contact DEQ-VWP Permit Program for a State Surface Waters Determination (SSWD) of all surface water boundaries on the proposed project site.

The VWP Permit Program accepts delineations of surface waters other than wetlands, provided they are in accordance with USACE and/or DEQ policy or guidance, regardless of who conducts the delineation. An example may be stream channels having an ordinary high water mark, if present. The VWP Permit Program requires use of the Unified Stream Methodology for identifying and quantifying any required compensatory mitigation for permanent, unavoidable stream bed impacts.

B. State jurisdiction

The VWP Permit Program staff is authorized to conduct a State Surface Waters Determination (SSWD) of all surface water boundaries (wetlands, open waters, and stream

bed) on the proposed project site in accordance with specified federal protocols where applicable (9VAC25-210-45) and via desktop and/or on-site evaluation.

Agents acting on behalf of applicants and who are conducting surface water body delineations are encouraged to become certified through the Virginia State Waters Delineation Certification Program developed by DEQ and the Virginia Department of Professional and Occupational Regulation (DPOR) in 2023. Staff procedures for reviewing delineations conducted by certified delineators is detailed in the Program Overview & Requirements document. More information can be found here: https://www.deq.virginia.gov/permits/water/wetlands-streams-vwp.

IV. TEMPORARY IMPACTS

Temporary impacts must be avoided and minimized to maximum extent practicable and restored to preconstruction elevations and contours, as required by VWP Permit Program regulations (Sections 70, 80, and 100 of each VWP general permit regulation; Sections 10, 60, and 180 of 9VAC25-210).

For (i) large (greater than one acre) proposed temporary forested wetland impacts; (ii) impacts to forested wetland communities that provide unique or high-value functions that cannot be readily replaced; or (iii) temporary impacts that will remain in place for a long period of time (more than six months[1]), *the temporal loss of functions in a vegetated community affected by a temporary impact shall be compensated to the satisfaction of DEQ*. (§ 62.1-44.15:21; 33 CFR 332)

More recent program decisions include application of certain thresholds of impacts related to commonly conducted utility activities, as captured in the Linear Utility Project Quick Reference Table (September 2021) in Chapter 2-Appendix A of the VWP Permit & Compliance Manual. Depending upon the activities, certain timelines dictate the permanent or temporary status of impacts, among other guidelines. Particularly for temporary matting in wetlands, the program sees the potential for considering the 'less than six months' timeline to apply to other activities, such as solar projects or timbering operations.

When new temporary impacts occur on a permitted project, but the previously identified and permitted temporary impacts have not yet occurred, add the new temporary impacts to the previous temporary impacts and adjust the individual permit or general permit coverage as necessary. This may mean the project no longer qualifies for general permit coverage. Applicants and permittees should strive to reduce all temporary impacts to the maximum extent practicable, per program regulations and to avoid the need for a change of this nature after the project has started.

[1] State Water Control Board comments on Nationwide Permits (NWP) to Colonel R.C. Johns, USACE-Norfolk District, June 26, 1991. Norfolk District NWP General Conditions (2007) used three months for removal of side-cast material in WOTUS, with allowance for six-month extension of time by District Engineer. Norfolk District NWP Regional Conditions (2022) use 12 months to restore temporary impacts.

When new temporary impacts occur on a permitted project, but the previously permitted temporary impacts have already been restored, and thus the permit requirements met, do not add the new temporary impacts cumulatively with the restored temporary impacts. Adjust the individual permit or general permit coverage as necessary. Monitor the project self-inspection reports for trends of continuous identification of new temporary impacts after previously identified temporary impacts are restored. This may indicate that a permittee, agent, or contractor is attempting to piece-meal impacts to avoid DEQ's application of cumulative impact provisions.

Temporary vegetation impacts should be restored to previous vegetation cover type to the maximum extent possible with any deviations being approved by DEQ prior to implementation. Use of invasive plant species and/or seeds is prohibited without prior approval by DEQ unless such approval cannot be obtained within reason during an emergency restoration activity. Applicants and staff should consult the most recent Department of Conservation and Recreation Virginia Invasive Plant Species List if uncertain about a plant or seed status. As a result of the 2024 Virginia General Assembly, DEQ was asked to assist with getting the message out regarding avoidance and minimization in using any invasive plant or seed species for activities authorized under its respective programs, including updating program materials such as the VWP Permit and Compliance Manual.

V. SINGLE AND COMPLETE PROJECTS

A. Assessing Projects

Portions of a phased development project or a renewable energy project like a solar farm that depend upon other phases of the project are not single and complete and would not pass the independent utility test. Portions of these types of projects that would be constructed even if the other portions or phases were not built can be considered as separate single complete projects with independent public and economic utility. Even where phases of a project may be conducted by separate or different owners, or their agents, each phase may be considered single and complete if it has independent utility – in the absence of having independent utility, the phases would be considered cumulative.

The state policy (§ 62.1-11. B of the Code of Virginia) and the State Water Control Law (§ 62.1-44.15:20 of the Code of Virginia) requires the proper development, wise use, conservation, and protection of water resources by protecting their physical, chemical, or biological properties. In the event of any ambiguity of terminology, the interpretation that most favors the state policy and is in accordance with the State Water Control Law should take precedence. When individual phases of a project do not qualify as "single and complete" and do not have "independent utility", individual phases should be evaluated cumulatively as part of a larger project purpose meeting the criteria.

B. Linear Project Considerations

Case-by-case adjustments may be necessary.

Each single and complete crossing could qualify for a separate VWP general permit coverage – in other words, several of the same-type VWP general permit coverages for the same linear project (e.g., multiple WP3s). From an administrative perspective, tracking multiple coverages for the same linear project, under unique JPA numbers, is time consuming and confusing.

Permanent and temporary impacts are tallied for each single and complete crossing as if each were a separate coverage (not cumulatively). Any secondary impacts require that the applicant minimize the impacts to the maximum extent practicable and quantify and compensate for unavoidable impacts.

Fees are determined for each single and complete crossing separately. If a crossing incurs one-tenth acre or less of wetlands/open water impacts or 300 linear feet or less of stream bed impacts, no VWP application fee applies to that crossing.

Compensation is determined for each single and complete crossing as if each crossing was receiving a separate VWP general permit coverage, including the requirement for a wetlands functional assessment per 9VAC25-210-80.C, and adhering to the bank credit provisions of § 62.1-44.15:23.B. If a crossing incurs one-tenth acre or less of permanent wetlands/open water impacts, or 300 linear feet or less of permanent stream bed impacts, compensation is not typically required, except that the Virginia Department of Transportation (VDOT) has a policy to mitigate all permanent impacts. Other mitigation requirements may apply as well, such as accepting voluntary habitat mitigation or applying resource agency recommendations.

Compliance and enforcement actions for each single and complete crossings may accrue the full compliance allowances for points and are not cumulative towards any necessary Warning Letter (WL) or Notice of Violation (NOV) (i.e., each WL or NOV applies to each single and complete crossing). This pathway assumes that there is nothing about ANY crossing in the linear project that would preclude use of a VWP general permit.

If one or more single and complete crossing(s) require(s) the application to be considered for a VWP individual permit, then the linear project as a whole is reviewed and assessed as one project, similarly to all other projects that qualify for a VWP individual permit. Therefore, the single and complete concept would not apply in the case of multiple projects that each require a VWP individual permit versus one or more VWP general permit coverages.

1. Impacts: calculated cumulatively across all impact areas within the project boundary.
2. Fees: calculated cumulatively across all impacts.
3. Compensation: calculated cumulatively across all crossings for all permanent impacts; includes the requirement for a wetlands functional assessment per 9VAC25-210-80.C and the bank credit purchase provisions of § 62.1-44.15:23.B; other mitigation requirements that apply, such as accepting voluntary habitat mitigation or applying resource agency recommendations.

4. Compliance: same as for any other VWP individual permit.

Reasons that a VWP individual permit pathway may be necessary for multiple single and complete crossings in one linear project include:

1. Any one single and complete crossing exceeds the applicable VWP general permit threshold;
2. When the activity may be a significant contributor to pollution per 9VAC25-210-130;
3. If cumulative impacts cause significant impairment per subsection 60 (Application) of each VWP General Permit regulation;
4. When aquatic threatened or endangered (T-E) concerns are documented after coordination with relevant resource agencies (9VAC25-210-10);
5. When the linear project does not have independent utility and is considered cumulatively with other projects; or
6. When any activity is prohibited from coverage under a VWP general permit per subsection 40 of each VWP general permit regulation.

C. Functions Analysis

A functional analysis may be required as part of a complete application for single and complete projects, per 9VAC25-210-80.C.

D. SPGP Verifications

A similar grouping of multiple single and complete crossings is permissible when VWP permit staff process 22-SPGP-RCIR and 22-SPGP-LT verifications, provided the terms and conditions of the applicable SPGP are met. See details at the U.S. Army Corps of Engineers website: https://www.nao.usace.army.mil/Missions/Regulatory/RBregional/.

E. Natural gas transmission pipelines

See § 62.1-44.15:20, § 62.1-44.15:21, §§ 62.1-44.15:80 through -:84, and 9VAC25-210-50 for applicable provisions specific to these projects.

VI. RIPARIAN PROPERTY OWNER NOTIFICATIONS

Riparian landowner notification has not changed substantially in law since 1997. (§ 62.1-44.15:4.D) The practice by the VWP Permit Program of providing riparian landowner notifications upstream and downstream of a proposed project has been part of the VWP individual permit process since at least 2000.

Riparian landowner notification can provide transparency to the public on proposed projects that may affect state surface waters on or near their property and is often beneficial in identifying potential issues before the proposed project is too far into the review and/or approval process. However, the process is also quite time consuming, and for controversial

projects or very large and complex projects, DEQ has utilized resources outside of the agency to assist – pro bono or not. The process has historically been conducted for even minor modifications of VWP individual permits, where minimal changes to a project have been subject to the process. Also, the provisions do not specify that only parts of a proposed project should be subject to the notification requirements. Therefore, any permittee-responsible compensatory mitigation (PRM) site that is part of the proposed project presumably also qualifies for riparian landowner notification, and this has been inconsistently applied over the years as the use of PRM as a mitigation option has fluctuated.

VWP Permit Program regulations do not stipulate further the requirements for VWP staff or DEQ to conduct notifications. There was internal discussion in 2017 on whether the landowner notification requirements in the Code of Virginia apply to the VWP Permit Program; if all VWP actions are subject to the requirement; and if all parts of project are subject to the requirement. No final determination has been made to date, and thus the VWP Permit Program continues to notify riparian landowners per the most recent VWP Permit & Compliance Manual procedures. The VWP Permit Program previously followed DEQ Guidance Memorandum GM11-2005, which was rescinded for the VWP Permit Program in 2017 upon incorporating practices into the program's manual.

VII. EVALUATING PROJECTS

A. Section 404(b)(1) Guidelines

The Virginia Water Protection (VWP) Permit Program follows federal Section 404(b)(1) guidelines (in accordance with state regulations. In practice, application of the Section 404(b)(1) Guidelines is proportional to the significance of the environmental impact proposed by a permit application.

1. Purpose and Need; Avoidance and minimization

Water dependency and project purpose are entwined, as the project's purpose is the foundation for evaluating water dependency and, subsequently, avoidance and minimization. Water dependent projects are defined by the Section 404(b)(1) guidelines as those activities that require "access or proximity to or siting within the wetland to fulfill [the project's] basic purpose." As part of the permit evaluation process used to authorize a particular project proposing to impact surface waters, the VWPP regulations incorporate the concept of avoidance and minimization from the *Guidelines for Specification of Disposal Sites for Dredged or Fill Material*, 40 CFR Part 230, also known as the Section 404(b)(1) guidelines (See 9VAC25-210-80.B.1.g).

Note that while the VWPP regulations require the applicant to provide the purpose and need for the project as part of the complete application, "judging" the practicality of an applicant's demonstration of need for a project is not required - for instance, multiple shopping centers in close proximity to each other. However, it is critical that the purpose and need provided by the applicant is sufficiently specific to enable review a project for no net loss of wetlands and functions of streams and for avoidance and

minimization in making both state permit decisions and in evaluating applications for SPGP verifications.

The Section 404(b)(1) guidelines allow the agency to require "minor project modifications" to minimize wetland impacts. "Minor project modifications" are defined as those that are feasible (cost, constructability) to the applicant and that will generally meet the applicant's purpose. This includes reduction in scope and size, changes in construction methods or timing, operation and maintenance practices, and other changes reflecting sensitivity to environmental impacts.

Agency policy regarding avoidance and minimization, and compensatory mitigation in general, is subject to change with scientific and engineering advances, changes in laws and regulations, and changes to society's view of the environment over time. Therefore, the basis for permitting decisions may reflect such changes and how DEQ considers avoidance and minimization practices and compensatory mitigation.

2. Alternatives

Section 404(b)(1) guidelines state that a practicable alternative may include "an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity" (40 CFR 230.10(a)(2)). In *Bersani v. EPA*, the United States Second Circuit Court of Appeals held that the practicable alternatives test relative to the availability of sites should be conducted at the time an applicant enters the market for a site, instead of at the time it applies for a permit. Courts often, but not always, support the position that if a property with less environmental impact was available at the time of purchase of the subject property, then a less environmentally damaging alternative did exist. Note that this is often difficult to prove, especially for properties that have been owned for a long period of time but are just now being developed.

Based upon federal case law on this point (specifically, *Bersani v. EPA* and *National Wildlife Federation v. Whistler*, a United States Eighth Circuit Court of Appeals case), a project's overall purpose should be established first, and then a list of alternative sites meeting the project's purpose would be evaluated. Ideally, the preferred alternative should be selected that meets both the project purpose and has the least environmental impact. However, usually this sequential evaluation occurs in reverse, as the applicant may own a property for a period of time prior to establishing the purpose for a project on that property.

Many times, an entity already owns, leases, contracts to purchase, or otherwise has control over a particular parcel of land. To maximize an investment-backed expectation, the entity identifies a project that serves a community need (i.e., housing, retail, institutional, or other socioeconomic factor), then seeks to fulfill this need by proposing to develop the parcel. At this point, an alternatives analysis is conducted to determine that the preferred alternative (i.e., using this site for that particular community need) will meet the project purpose at the exclusion of other alternatives.

Often, the argument for pre-selecting the preferred alternative is that the entity is already in possession of or controls the land, the land may already have the required land use zoning, or the entity is attempting to realize an investment-backed expectation. This situation is precisely what the U.S. Second Circuit Court of Appeals addressed in *Bersani*: that the practical alternatives test should be conducted at the time the applicant entered the market for a site. However, the courts have also addressed the need to consider investment-backed expectations. In *Penn Central v. New York City*, the United Stats Supreme Court established a multi-factor balancing test, where the economic impact and character of the government action is balanced against the extent to which the government action interferes with reasonable investment-backed expectations of the regulant. In *Claridge v. New Hampshire Wetlands Board*, the New Hampshire Supreme Court held that "[a] person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights...." *Claridge* is further supported by *City of Virginia Beach v. Bell*, where the Virginia Supreme Court denied a takings claim by the plaintiff who acquired a parcel two years after a municipal sand dune protection ordinance had been adopted. In this case, the Virginia Supreme Court held that "[plaintiffs] cannot suffer a taking of rights never possessed."

Focusing on an investor's actual expectations makes good sense. If an investor knows about restrictions already in place when he purchases a property, he cannot reasonably assert that the restrictions result in an unfair taking or that he is being asked to avoid impacts to an unreasonable extent. In essence, a property owner cannot complain of regulatory limits on the use of the property that the owner knew about at the time of purchase, or that the owner should have known about. Conversely, if regulations have changed in the time since the owner purchased the property, then he cannot have known at the time of purchase of the difficulties in developing the parcel due to new laws and regulations currently in place. Therefore, the applicant's investment-backed expectations get more consideration than another applicant, who purchased property with knowledge of regulatory constraints.

Given state regulatory requirements and the outcome of these various court cases, staff should ask the applicant to evaluate, and staff should consider, all practicable alternatives for a project that achieves the applicant's stated purpose. Moving the proposed project to another parcel that would result in less environmental impact while achieving the overall project purpose is an alternative that should be considered, if practicable. However, using another parcel of land for a particular project is not practicable in every instance. The Section 404(b)(1) guidelines also allow the agency to require "minor project modifications" to minimize wetland impacts. "Minor project modifications" are defined as those that are feasible (cost, constructability) to the applicant and that will generally meet the applicant's purpose. This includes reduction in scope and size, changes in construction methods or timing, operation and maintenance practices, and other changes reflecting sensitivity to environmental impacts. The VWP Permit Program regulations and incorporated federal guidelines

also require DEQ to take into account the applicant's investment backed expectations at the time of the purchase.

One aspect to consider is that the least environmentally damaging practicable alternative (LEDPA) is defined differently in federal regulations than in state regulations, where the focus is narrowed to state waters and wildlife resources, versus a larger set of criteria to consider in federal regulations.

3. Cost

When taking cost into consideration for the alternatives analysis, the preamble of the Section 404(b)(1) guidelines states that "[t]he determination of what constitutes an unreasonable expense should generally consider whether the project cost is substantially greater than the costs normally associated with the particular type of project under consideration." The preamble further states that "if an alleged alternative is unreasonably expensive to the applicant, the alternative is not practicable." The most important point regarding cost considerations is that the Section 404(b)(1) guidelines are not meant to consider financial standing of an individual applicant, but rather the characteristics of the project and what constitutes a reasonable expense for these projects that are most relevant to practicability determinations.

B. State and federal permitting decisions

There have been several changes in recent years to how the provisions of the Clean Water Act (CWA) have been interpreted by the federal government and the courts. As a result, states and tribes have had to make adjustments to their respective, related programs on a continual basis. While not much in the way of law changes have occurred that affect the VWP Permit Program, but there have been changes to interpretations of relevant regulations, and subsequently, process adjustments have also been made.

One process-related change was how the VWP Permit Program provides both state permitting decisions and water quality certification (WQC) decisions under Section 401 of the CWA. The need to consider state water quality requirements in decision-making means application and permit processing has fluctuated to meet the current trend in the federal interpretation of what is included in waters of the United States and how Section 401 should be implemented.

DEQ may make a VWP permit decision independently of making a Section 401 WQC decision. However, whenever possible, the agency and VWP Permit Program strive to keep the decisions together, when both decisions are applicable. At times, this cannot occur due to the particular circumstances of a proposed project, a required timeline, or inconsistencies in the rules governing the decision-making process. The VWP Permit Program updates the VWP Permit & Compliance Manual to the extent possible to capture the processes of application review and permit need determinations where these decisions are similar and where they differ. One specific example of this is development of the DEQ Action Tables

in Chapter 3 detailing the various possible pathways when applicants pursue authorization from the USACE under a Nationwide Permit.

As the certifying authority under Section 401, DEQ may make four types of water quality certification (WQC) decisions: grant, grant with conditions, waive, or deny. DEQ's VWP individual permits, general permits, and general permit coverages are all mechanisms to also provide the 'grant with conditions' WQC decision when applicable. If a VWP individual permit is required, a public notice of the tentative decision to issue the permit occurs at the draft permit stage. The VWP general permits are public noticed through the state's separate regulatory process; issuance of VWP general permit coverage is not public noticed. DEQ's decision to not require or to waive a VWP individual permit or general permit coverage for a certain activity is commonly referred to as a "No Permit Required" or "NPR" decision. This can also serve as a decision to 'waive' WQC. DEQ does not public notice tentative or final, no permit required or waiver decisions for the purposes of VWP permits or Section 401 WQC. Lastly, DEQ's decision to deny a permit application, or request for permit variance, may also serve as a decision to deny WQC. Tentative decisions to deny are public noticed by DEQ.

C. Exclusions from VWP permit issuance

Activities excluded from VWP permitting requirements are listed in 9VAC25-210-60 and subsection 40 of each general permit regulation. The exclusions were first applied in the early years of the non-tidal wetlands program and have not changed substantially since. The VWP Permit and Compliance Manual attempts to add information and hopefully clarify one or more of these regulatory provisions. *In accordance with 9VAC25-210-60* and upon request by the department, any person claiming one of these exclusions shall demonstrate to the satisfaction of the department that he qualifies for the exclusion. Even if demonstration is not an automatic requirement for an exclusion, additional information from an applicant may be necessary to determine if an activity qualifies for an exclusion.

Should a project application be submitted and DEQ-VWP Permit Program determine that an exclusion applies, the general practice is to acknowledge this by notifying the applicant of this determination, and often staff copy other relevant agencies such as USACE and VMRC. While DEQ is not required by law or regulation to provide this acknowledgement in writing or verbally, the VWP Permit Program staff often do so upon request of the applicant, and at times, upon request of another agency.

1. Projects Permitted By Other DEQ Discharge Permits (9VAC25-210-60.2 and .7)

   These exclusions clarify that discharge of *effluent or stormwater* into state waters permitted by a Virginia Pollutant Discharge Elimination System (VPDES) permit does not require a VWP permit. These exclusions do not apply to other discharges beyond the VPDES-permitted discharge that also require a VWP permit or coverage in accordance with § 62.1-44.15:20. For example, these exclusions do not apply to:

a. Discharges of sediment into surface waters that result in filling of a wetland or stream channel.
b. Discharges of stormwater from land disturbance that would cause a flooding or loss of acreage or function of wetlands or stream channels.
c. The excavation in a wetland or stream channel or placement of fill material in all waters associated with installing a structure for a discharge permitted under a VPDES permit.

2. Certain Virginia Marine Resources (9VAC25-210-60.3 and VA Code § 62.1-44.15:21.G)

   DEQ's VWP Permit Program may exclude several activities that are regulated by the Virgnia Marine Resources Commission (VMRC) and traditionally receive authorization from that agency. Most commonly, these include certain activities in tidal waters or structures crossing over or under a stream bed.

   The VWP Permit Program has developed application review and processing procedures that follow the *Memorandum of Agreement for Implementation of 2023 Virginia Acts Chapters 258 and 259 Regarding Permitting in Non-tidal Waters of the Commonwealth* (Amended August 2023) when proposed activities *may* require authorization from DEQ and/or VMRC.

3. Normal Residential Gardening and Landscaping (9VAC25-210-60.4)

   To qualify, the activity is incidental to the ongoing occupation of a residential dwelling. By incidental, DEQ means minor, secondary or accidental impacts that are related to living in the residence. For example, in many areas of Virginia, rising sea levels or changes in stormwater management can result in an existing residential lawn to begin to support wetland vegetation through no efforts of the existing property owner. The ongoing mowing or landscaping of this yard would not require a permit.

   The activity should not result in a conversion of a wetland to an upland or to another wetland type, irrespective of any other criteria.

   In support of agency emergency response measures managed in other DEQ programs, as well as external emergency response organizations, internal and external coordination among multiple government agencies may be necessary when tree clearing for safety reasons needs to occur.

4. Maintenance of Currently Serviceable Structures (9VAC25-210-60.5)

   Maintenance, including maintenance dredging, should align with the existing or damaged structure's original purpose, service, and/or function(s). Applicants may be asked to provide documentation that the net impacts from the maintenance activities will not be detrimental to the environment.

Increasing the replacement pipe diameter may be considered excluded as long as the original purpose, service, and/or function of the structure is not changed, or in the case of a ditch pipe, as long as the original approximate capacity of the irrigation ditch or related structures is not increased. Replacement of an existing culvert may include using a culvert constructed from a different material (e.g., concrete replacing metal) or using a differently shaped culvert (e.g., bottomless replacing round). These allowances under the exclusion account for human-induced changes in the watershed over time and design requirement changes over time.

Activities such as clearing an existing easement that has been previously disturbed to lay utility lines, and recorded for such utilities use, would be maintenance. A utility easement that is recorded but never utilized, and later cleared, would not be maintenance. Clearing outside of the original recorded easement would not be maintenance, such as when a new line is laid parallel to an existing line which causes an extension of the easement corridor. Removal of existing utility lines as an excluded activity is typically limited in scope to single-family homes, docks, boat ramps, and other associated attendant infrastructure rather than lengthy utility corridors. Removal of structures without replacing them with another structure may not be consistent with the original purpose, service, or function of the utility project or corridor.

The VWP Permit Program regulation does not require a permit for maintenance of dikes or dams (9VAC25-210-60.5) but is silent regarding vegetation maintenance near dams or other impounding structures - although exclusion 9VAC25-210-60.12 may be applicable to vegetation maintenance. To maintain consistency between the VWP Permit Program regulation and the Virginia Soil and Water Conservation Board (SW Board) Impounding Structure Regulations (4VAC50-20 *et seq*.), the manual discusses the serviceable structure of a dam or impounding structure, as well as the compensatory mitigation requirements for unavoidable surface water impacts. In the interest of public safety and to encourage protection of communities downstream, VWP staff will not require a permit for permanent wetland conversion within the specified areas referenced above for vegetative maintenance of dams or emergency spillways. Prior DEQ approval is required for wetland impacts, including permanent wetland conversion beyond these specifically identified areas. Permanent removal of vegetation beyond these specified areas may be subject to VWP permitting and compensatory mitigation when required.

The manual provides clarification regarding maintenance of stormwater management (SWM) facilities originally built in surface waters, as the Code of Virginia was amended in 2018 regarding the need for VWP permits. The program recognizes that VPDES Municipal Separate Storm Sewer System (MS4) and construction stormwater general permits require regular SWM facility maintenance. In addition, most other SWM facilities will eventually require maintenance as well, independent of any regulatory maintenance mandate.

Converting an existing open water feature into a stormwater management facility, or filling the feature, may qualify for this exclusion on a case-by-case basis, provided that:

a. the open water features are entirely owned by the property owner requesting to complete the work;

b. the conversion will not reduce downstream flow;

c. the open water feature is not in-line on a perennial stream channel; and

d. there will be no wetland impacts associated with the work that are not otherwise excluded from permitting.

Also, a surface water withdrawal may not be excluded from VWP permitting even if the maintenance activities are found to be excluded.

Generally speaking, the VWP Permit Program follows federal regulatory provisions for maintenance activities related to agriculture, silviculture, and aquaculture, with exceptions in certain cases, particularly where surface water withdrawals occur. There are other state agencies such as the Virginia Department of Conservation and Recreation (DCR) Division of Dam Safety that also have regulatory oversight on related maintenance activities. Should the purpose of the work in surface waters change, or if the activities constitute a change in use, the previously excluded normal agricultural or silvicultural activities, farm or forest roads, farm ponds, or surface water withdrawal activities may be subject to VWP Permit Program regulations. Also, when the Natural Resources Conservation Service (NRCS) provides a label of "manipulated wetland" and there are impacts to surface waters, DEQ and USACE attempt to make unified permit need determinations whenever differing regulatory authorities do not preclude it.

Maintenance of farm irrigation or drainage ditches is excluded from regulation when conducted in ditches containing surface waters (9VAC25-210-60.10.d) – if not containing surface waters, these are presumed to be upland ditches. The maintenance dredging of existing agricultural ditches is included in this exclusion provided that the final dimensions of the maintained ditch do not exceed the designed cross-sectional dimensions of the original ditch. The construction of new agricultural drainage ditches is not excluded, nor is the filling of existing agricultural ditches in accordance with this section. Channelization of streams is expressly not included in this exclusion. If the applicant cannot provide demonstration that a ditch meets the exclusion criteria, a VWP permit may be required to establish the ditch as a drainage or irrigation ditch, and once established as a drainage or irrigation ditch, future considerations will be based on this status.

Fill or dredge activities associated with installation of piers, piles, pylons, and/or bridge abutments have historically not required a VWP individual permit or general permit coverage when meeting specific criteria that would qualify the activities for federal or other state permits. The list of criteria outlined in the manual was derived from the USACE-Norfolk District's Regional Permit No. 17 (YY-RP-17) that, along with several other regional permits, was recently replaced by the 23-SPGP-PASDO

(September 2023). DEQ adopted many of the protocols developed by the USACE for reviewing project proposals, as detailed in the VWP Permit and Compliance Manual. Other protocols, such as what qualifies as dredged volume or how shading impacts may be considered, were modified for DEQ's own review and permitting use.

5. Activities regulated by VMRC and USACE (9VAC25-210-220.B)

   The provision only applies to potential VWP individual permit decisions. VWP individual permits are the only available VWP permit option for authorizing impacts to tidal waters.

   In order for this waiver to be available an applicant should obtain a permit from the Virginia Marine Resources Commission (VMRC), and the proposed activities should qualify for a permit from the USACE. The general perspective is that two agencies are providing review and decisions considering impacts to state resources, and while DEQ also may regulate the proposed activities in tidal waters, the VWP permit would not provide significant benefits over what are already provided via these other authorizations.

   Recent DEQ-VMRC agreements[2] provide for a more streamlined evaluation approach where both agencies have authority to regulate activities in either tidal or non-tidal waters. If the VMRC determines there is no need to issue a permit because DEQ is already providing a permit, then this waiver provision cannot be met, regardless of what the USACE may decide.

6. Other provisions

   A VWP permit is not required for the open water features such as a borrow pit where a permit for the mine construction or excavation was issued. However, once the permit expires and the site is abandoned, then any areas that meet the definitions of surface waters regulated by the VWPP program would be subject to the provisions of the VWP regulations. Water-filled depressions are not typically considered to be waters of the United States (WOTUS)[3] and would not be considered jurisdictional under the VWP Permit Program, provided that the permit for the construction or excavation is active (consistent with the federal implementation of delineation practices).

D. Waiver of VWP permitting decisions

   Several provisions in the Code of Virginia and Virginia Administrative Code allow for a VWP permit to be waived or mandate that a VWP permit be waived.

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[2] DEQ-VMRC Memorandum of Agreement (Amended August 16, 2023).

[3] Based on WOTUS information available from the USACE in 2019. Current interpretation by the USACE may vary.

Should a project application be submitted and DEQ-VWP Permit Program determine that a waiver applies, the general practice is to acknowledge this by notifying the applicant of this determination, and often staff copy other relevant agencies such as USACE and VMRC. While DEQ is not required by law or regulation to provide this acknowledgement in writing or verbally, the VWP Permit Program staff often do so upon request of the applicant, and at times, upon request of another agency.

VIII. SPECIAL CIRCUMSTANCES

A. Impacts on PRM sites

Under the Virginia Water Protection Permit Program regulations, impacts to state surface waters are regulated, regardless on which part of the project they occur. The use of permittee-responsible mitigation (PRM) as a means of providing compensatory mitigation is often part of a project's scope. The use of PRM has fluctuated in recent decades, typically when other means of providing compensatory mitigation have been challenging, such as when bank credits are not available. If the impacts incurred on a mitigation site have been avoided and minimized to the extent possible, but there are still impacts that are unavoidable, these are counted toward impact totals, and those permanent impacts may require compensatory mitigation as well.

B. Shading impacts

If the activity, such as a boardwalk installation, avoids tree removal within a forested or scrub-shrub wetland, impacts may still occur due to shading. When assessing a project, permit writers will require specific information regarding the dimensions of any structures that may cause shading. The equation below, developed in consultation with the United States Army Corps of Engineers and Virginia Department of Transportation (VDOT), has been in use since at least 2015. It was derived from regulatory agency evaluation of piers constructed over vegetated wetlands, where such piers did not exceed five feet wide by four feet high, or a width-to-height ratio equal to or less than 1.25.

The quantity of impact from shading is determined utilizing the following equation:

$I = L_b(W_b\text{-}1.25H_b)$

If $I < 0$, then assume $I = 0$.
Also, where:
I = wetland impact (sq. ft)
L_b = bridge length over wetlands (ft)
W_b = bridge width (ft)
H_b = average bridge height over wetlands (ft)

Boardwalk example: In instances where the boardwalk has a height to width ratio less than 0.8, the boardwalk will be considered to have a permanent impact on the wetland's functionality, and thus require compensatory mitigation at a 0.5:1 ratio. The reduced

compensatory mitigation ratio is to account for the loss of vegetative functionality but recognize the maintenance of wetland hydrology and relatively undisturbed hydric soils. (§ 62.1-44.15:21; 33 CFR 323.3(c))

C. Fencing in surface waters

In instances where fence infrastructure is within stream channels, this would constitute an impact to the stream channel, and thus require compensatory mitigation utilizing the USM, with the length of impact derived from the affected bank width. Should assessment of the cross-sections demonstrate the potential for a fence to serve as an impediment to stream flow, permit writers are to work with applicants to modify fence designs, re-orientate crossings, or develop alternatives that still achieve the applicant's desired outcome. For complicated proposals, staff are encouraged to review the details with program management.

D. Change in Use – Manipulated Wetlands

Determining what type and quantity of compensatory mitigation may be needed for timbered wetlands will likely have to be determined on a case-by-case basis. One key aspect of this determination is whether or not the timbered wetland area is changing from a silviculture use to a new use.

Researching the historical use of the site's previous condition, going back five years on sites with manipulated or disturbed wetlands.

Historically, both DEQ and the USACE applied a five-year 'rule' to address previous site conditions in manipulated or disturbed wetlands. The agencies considered a palustrine forested (PFO) wetland site that was timbered within five years to still be PFO wetlands, regardless of conditions on the ground. DEQ-VWPPP maintains the view that if a PFO wetland was timbered within the last five years, stumps remaining, that this area is still considered to be PFO wetland regardless of current state, such as a dominance of scrub-shrub growth rather than tree canopy.

IX. COMPENSATORY MITIGATION

A. Changes to compensation plans

If additional information is required to complete the application or for VWP permit staff to evaluate the appropriateness of the proposed compensation, this information should be requested within the 15-day review period. Once the application is considered complete, VWP permit staff should process the application following typical protocols, with two possible exceptions:

1. In the event that mitigation bank credits become available prior to issuance, but after the application is complete, VWP permit staff should not *require* a change

from permittee-responsible compensation to bank credits – the applicant may make this change voluntarily.

2. In the event that mitigation bank credits are not available – but become available after permit issuance – there is no requirement for the applicant to retrace bank credit availability efforts, and/or request a Modification or Notice of Planned Change to switch from in-lieu fee program credits back to bank credits. Again, the applicant may voluntarily choose to change the proposed compensation from permittee-responsible to in-lieu fee program credits, should bank credits not be available.

B. Permittee-responsible compensation sites

A proposed, permittee-responsible compensatory mitigation site (PRM) is part of a proposed project. Any impacts associated with developing a PRM site are counted toward the project impacts, and those that are permanent may require compensatory mitigation in addition to the project's permanent impacts in order to achieve success and meet no net loss of wetland acreage and functions and stream functions.

DEQ-VWP Permit Program supports a watershed approach to providing PRM as along as such an approach is applicable and documented as meeting the approach goals. Such an evaluation may include these considerations: Is there adequate information currently available on watershed conditions and needs? Do in-house resources (e.g., mapping, threatened or endangered species databases, aerial photographs) provide additional watershed or site-specific data? Is the scope of analysis adequate?

Use of invasive plant species and/or seeds is prohibited when constructing a mitigation site for compensatory mitigation credit, whether the surface disturbance is permanent or temporary. Applicants and staff should consult the most recent Department of Conservation and Recreation Virginia Invasive Plant Species List if uncertain about a plant or seed status. As a result of the 2024 Virginia General Assembly, a work study group requested state agencies to assist with getting the message out regarding avoidance and minimization in using any invasive plant or seed species for activities authorized under its respective programs, including updating program materials such as the VWP Permit and Compliance Manual.

C. In-lieu Fee Program credits in the mitigation hierarchy

DEQ may consider in-lieu fee program *released* credits to be more practicable and ecologically and environmentally preferable than in-lieu fee program *advance* credits. This is because in-lieu fee program released credits are those credits that have been constructed, are meeting performance standards, and are in excess of the in-lieu fee program's existing liability for impacts in the watershed. In-lieu fee program released credits are the most equivalent mitigation option to released credits from a mitigation bank, for ecological and environmental preferability.

This approach is consistent with "Compensatory Mitigation for Losses of Aquatic Resources", 73 Fed. Reg. 19594 (April 10, 2008) (codified at 33 CFR Parts 325 and 332 and 40 CFR Part 230 (http://www.epa.gov/wetlandsmitigation/#plan).

D. Preservation

Although allowed, caution should be taken in considering use of preservation in conjunction with use of mitigation bank credits, because bank credits often already incorporate a preservation component. It is critical to ensure that, when preservation is combined with bank credits made up in part by additional preservation, the project will still achieve no net loss of wetland acreage and function and no net loss of stream functions. As permittee responsible mitigation, preservation should meet the same criteria as a mitigation bank in order to ensure success. Neither the statute nor the regulation lists economic practicability as a factor the agency should consider when evaluating compensatory mitigation proposals; therefore, choosing preservation due to anticipated savings to the applicant is not acceptable.

Appropriate preservation sites and proposals must meet all of the following criteria:

1. The system to be preserved is of exceptional quality, and demonstrate all of the following characteristics:

   a. documented presence of Threatened or Endangered species, Species of Greatest Conservation Need (classified as Tier 1 or 2, or assemblages of Tier 3 and/or 4 species (See http://bewildvirginia.org/species/)) or areas listed as a Natural Heritage Resource;

   b. invasive species absent (see the most recent Department of Conservation and Recreation (VDCR) Virginia Invasive Plant Species List);

   c. system at or near maturity; and

   d. favorable water quality within the system.

2. The system has an important, positive effect on downstream water quality.

3. Documented threat of loss or degradation, such as from development, agriculture, or silviculture.

4. Preservation requirements are not already in place (such as Resource Protection Areas (RPAs) or other local ordinances).

5. The preservation plan protects the aquatic system, to the extent possible, against present and potential future adverse effects, such as fill, fragmentation, erosion or sedimentation, litter, stormwater inputs, hydrologic changes, and lack of buffer.

6. Resources to be preserved are geographically connected to each other, are physically buffered from project development, and are not within subdivided lots or other areas that make them susceptible to human or other anthropological impacts.

7. The preserved site must be legally protected in perpetuity through a protective mechanism such as, but not limited to, a conservation easement held by a third party in accordance with the Virginia Conservation Easement Act (§ 10.1-1009 *et seq*. of the Code of Virginia) or Virginia Open-Space Land Act (§ 10.1-1700 *et seq*. of the Code of Virginia), a duly recorded declaration of restrictive covenants, or another protective instrument. Declarations of restrictive covenants must follow the most recently approved template. Any changes to the template must be approved by Central Office prior to approval. See section 3.9 for additional information on preserved areas and the Declaration of Restrictions.

8. A long-term stewardship plan must be completed and must include a description of long-term management and maintenance needs, the entity responsible for stewardship, annual cost estimates for management and maintenance, and provide funding to be used to meet those needs.

9. All other IRT planning, execution and success criteria are met.

E. Ratios

Generally accepted compensation ratios are as follows:

Resource Type	**Total Compensation Ratio**
Palustrine Forested Wetland (PFO)	2:1
Palustrine Scrub Shrub Wetland (PSS)	1.5:1
Palustrine Emergent Wetland (PEM)	1:1
Conversion impact, PFO to PSS (confirm the area is being maintained as PSS)	0.5:1
Conversion impact, PSS to PEM	0.5:1
Conversion impact, PFO to PEM	1:1
Shading	0.5:1
Stream bed	Apply Unified Stream Methodology

Resource Type	Total Compensation Ratio
Open Water	Case-by-case, if required

These ratios are not firm for every situation. Ratios may vary in individual permits depending on specific site characteristics; however, any proposed variation should be discussed between regional and central office management and would require a functional analysis per 9VAC25-210 80.C if the proposal includes bank/in-lieu fee program credit purchase at less than the listed ratios.

Compensation ratios for wetlands should be applied to the acreage of permanent wetland impacts *that has been rounded to the second decimal place*, and ratios for streams should be applied to the linear footage of stream channel impacts that has been rounded to the nearest whole number. Ratios should not be applied to square footage of wetland impacts. *These rounded values are to be used for the purposes of determining applicable permit application fees and any required compensatory mitigation.* The program recognizes that such math, for example, may result in impacts that technically exceed 0.10 acre (4,356 square feet) but still round down to 0.10 acre.

Compensation for stream channel impacts requires analysis of each impacted stream reach according to the Unified Stream Methodology (USM) to determine compensatory requirements (9VAC25-210-80.B.1.h(2)).

Certain open water impacts may require compensation if necessary to protect state waters and fish and wildlife resources from significant impairment if they do not otherwise qualify for the open water impacts exclusion (9VAC25-210-60.6). The regulation prohibits DEQ from requiring compensation for permanent or temporary palustrine open water impacts unless they are within karst topography and were formed by the natural dissolution of limestone (9VAC25-210-116.C.4).

Impacts within jurisdictional ditches containing open water or vegetated wetlands are calculated in acres. Compensation is determined using standard ratios for the applicable Cowardin class (open water ditches are subject to guidelines on open water impact compensation). Impacts within channelized streams or ditches containing streams are calculated in linear feet, assessed using the USM, and compensated as streams.

F. Phasing compensation

The phasing of compensatory mitigation within a permit is only applicable to individual permits. Coordinate compensatory mitigation phasing with the regional VWP program manager. The following guidelines apply:

1. Compensatory mitigation is to be provided prior to initiating any authorized impact of a particular phase.

2. Phase boundaries should be logical and contiguous.

3. As part of the application, the applicant must submit an impact map depicting the phase boundaries and a table containing a list of each impact within each phase, with applicable compensation for each impact as well as total impacts and compensation for each phase. (9VAC25-210-80 and -90)

4. The Construction Status Update form (CSU) should clearly differentiate impact numbers across the phases.

5. The Special Conditions of the VWP individual permit should incorporate a requirement to provide an accounting of the compensatory mitigation completed to date. For each phase, applicants should submit that accounting as an attachment to the biannual CSU.

Permit conditions supporting these guidelines enable the VWP permit staff to enter specific mitigation due dates into CEDS as Compliance Events, in order to better track the project. Changes to the hard dates can be authorized as a minor modification under 9VAC25-210-180.E.2.

G. Vacatur of protective instruments

In some instances, part or all of a previously protected area may need to be vacated by DEQ or USACE to allow for the same or another project to proceed. This often occurs when there is a conflict with a roadway or utility and maintenance easements.

If the proposed impacts to the protected area are permanent, resulting in the permanent vacatur of a preserved area, then a VWP individual permit modification or general permit notice of planned change may be necessary. Approval of such vacaturs is accomplished on a case-by-case basis via either the formal or informal template revision and approval process, typically involving revision of existing Covenant and Restrictions language. Whether or not the vacatur of an existing Declaration of Restrictions (DOR) is necessary is a determination that should be made in consult with regional managers. Revisions should be reflective of the proposed scope and any implications to the compensatory mitigation provided for existing permits and permit coverages.

X. VWP GENERAL PERMITS / COVERAGE

A. Coverage after 45 days

Various chapters of Title 62.1 of the Code of Virginia and associated regulations provide authority for requiring the avoidance and minimization of impacts to state waters; for protecting state waters and wildlife from significant impairment; and for protecting water quality and beneficial uses. DEQ's Virginia Water Protection (VWP) Permit Program strives to apply consistent requirements to proposed activity(ies) in surface waters across the entire geographic project footprint, regardless of whether a federal agency intends to

claim jurisdiction or not, and regardless of what federal requirements may be applied to all or a portion of the proposed project, all surface waters are state waters in Virginia. This is not a new or modified application of state authority and has been consistent in State Law since 2001.

The process for providing a streamlined issuance approach became necessary when recent federal rulemakings regarding activities in surface waters began affecting the VWP Permit Program and permitting workloads. The federal rulemakings changed the extent of federal jurisdiction in surface waters (Final Navigable Waters Protection Rule, eff. June 22, 2020; Waters of the United States Rule, eff. September 8, 2023) and changed the scope for state certification under Section 401 of the Clean Water Act (Final CWA Section 401 Certification, eff. September 11, 2020; Final CWA Section 401 Certification, eff. November 27, 2023). Since the USACE took early action on reissuing its Nationwide Permits (NWPs), eff. in 2021and 2022, DEQ has implemented a workload management tool using existing provisions in the Code of Virginia.

DEQ implements an expedited issuance of VWP General Permit Coverage when an applicant certifies by signed application and checklist that the project will or may have minimal environmental impacts[4].

A checklist was developed based on existing impact thresholds and types that dictate whether compensatory mitigation will be necessary and whether an application fee will be required. Also considered are existing conditions in the VWP General Permit Program regulations, past practices related to the issuance of federal general permits, and overall staff experience in permitting low-impact projects.

Under this process, staff records receipt of the application and sends an email to the applicant (copy to Virginia Marine Resources Commission) stating that if DEQ does not respond within 15 days (10 days for VDOT projects) the application is considered complete; and, if DEQ does not respond within 45 days (35 days for VDOT projects), coverage is authorized under the VWP general permit so indicated. The notification will include a link to the general permit in regulation, including the general permit terms and conditions. The process has the dual benefit of the project receiving general permit coverage, and DEQ having an enforcement mechanism should it be needed. Prior to the Federal regulatory changes, DEQ would not have received these applications and these projects would not have been issued a VWP permit of any kind. The most important advantage is to allow staff to focus on projects with larger surface water impacts and significant environmental considerations and public involvement.

B. Agency coordination

While the Code of Virginia allows a total of 45 days for a response from resource agencies before staff can assume the agencies have no comment (§ 62.1-44.15:20.C), the Code also

[4] DEQ Processing Virginia Water Protection (VWP) Permits in Conjunction with 2021 USACE Nationwide Permits, and Associated Staffing Needs – Amendment No. 1, October 31, 2023.

provides that, within 45 days of receipt of a complete application, DEQ must deny, approve, or approve with conditions any application for coverage under a general permit, or the application shall be deemed approved (§ 62.1-44.15:21.F, referred to as 45-day coverage). This contradiction means that DEQ cannot wait the full 45 days from a complete general permit coverage application for resource agency comments.

The general basis for coordination on the shorter coordination timeframe is provided in the 2007 Memorandum of Understanding between DEQ, DWR, and DCR. Some parts of the memo processes have been routinely updated over time. While the MOU allots 14 days for agency comment, the Permitting Enhancement and Evaluation Platform (PEEP) provides DWR and DCR with 15 calendar days to review and respond to the coordination information provided by VWP staff. Agency comments will be accepted through 11:59 p.m. on the 15th day. The 15-day period is counted from application complete (APCP), or from the day on which DEQ requested comments, whichever occurs first.

Several provisions in the Code of Virginia and VWP Permit Program regulations require consideration of potential impacts to threatened or endangered species, while others prohibit DEQ from issuing permits that would constitute a take of these species. Therefore, the VWP Permit Program will often apply agency-recommended conditions when issuing VWP General Permit coverage. Comments or recommendations made that do not pertain to the protection of a T-E species are not included in the permit coverage but are provided to the applicant for their information.

C. Notice of Planned Change

Notices of Planned Change (NOPCs) do not have regulatory deadlines to review and complete the action, nor do these actions require application fees at this time. However, staff is encouraged to process NOPCs using the general permit timeframes. Therefore, reviews of NOPC requests and initial requests for additional information should be conducted within 15 days (10 days for VDOT projects) of receipt as time allows. Approval or denial of the NOPC should be completed within 45 days (30 days for VDOT projects) of receiving all necessary information associated with the request.

D. Stacking VWP general permit coverage and/or individual permits

Use of more than one VWP general permit coverage on one single and complete project is not permissible by regulation. In addition, when some impact areas qualify for VWP general permit coverage, but other areas do not, the VWP Permit Program considers the entire project as qualifying for a VWP individual permit and would not issue a VWP general permit coverage for part of the project and an individual permit for the other part of a project – assuming that an individual permit is necessary. Stacking coverages with an individual permit would be administratively challenging for tracking of the issuance process and documentation, for determining any required compensatory mitigation, determining any applicable permit application fees. Additionally, this would negate the need for applicants to demonstrate avoidance and minimization of impacts.

XI. VWP INDIVIDUAL PERMITS

A. Agency coordination

The general basis for coordination timeframes is provided in the 2007 Memorandum of Understanding between DEQ, DWR, and DCR. Some parts of the memo processes have been routinely updated over time. The MOU allots 45 days for agency comments from multiple agencies and other interested and affected agencies. The Permitting Enhancement and Evaluation Platform (PEEP) provides agencies with 45 calendar days to review and respond to the coordination information provided by VWP staff. Agency comments will be accepted through 11:59 p.m. on the 45th day. The 45-day period is counted from application complete (APCP), or from the day on which DEQ requested comments, whichever occurs first.

Several provisions in the Code of Virginia and VWP Permit Program regulations require consideration of potential impacts to threatened or endangered species, while others prohibit DEQ from issuing permits that would constitute a take of these species. Therefore, the VWP Permit Program will often apply agency-recommended conditions when issuing a VWP individual permit. Comments or recommendations made that do not pertain to the protection of a T-E species are not included in the permit conditions but are provided to the applicant for their information.

B. Modifications

Though minor modifications to VWP individual permits do not have regulatory processing deadlines, staff are encouraged to process these with the same priority as any other permit application or modification request. Minor modifications do not require re-coordination with state and federal resource agencies or other affected and interested parties, unless 1) the modification proposes additional impacts that were not included in the original project area or boundary, or the addition of which may change the nature of an agency or party review or conclusions drawn; or 2) the project boundaries change. In such instances, additional coordination may be necessary.

Multiple minor modifications to a VWP individual permit may fluctuate in amounts that meet or do not meet the specific minor modification limits established in regulation. Provided that the net change to total impacts does not exceed the originally noticed and permitted total impacts, multiple changes may proceed under the minor modification process, particularly where a combination of impact reductions and impact increases have occurred over time. When *any* request for a minor modification exceeds the total impacts originally public noticed and permitted for the project, then the major modification process will apply instead.

XII. COMPLIANCE AND ENFORCEMENT

A. Prioritizing inspections

The program worked with DEQ's Enforcement Division to develop risk factors that help agency staff prioritize inspections on most VWP Permit Program projects. These include but are not limited to: project construction status; applicant/permittee/contractor compliance history; permit or coverage expiration date; avoided surface waters; mitigation type and status; pending agency actions; the public interest; condition of nearby waters; and applicability of other state/local programs. These factors may change over time as a result of program priority shifts or changing regulatory requirements.

B. Site or property access for inspections

The VWP permit regulation does not require site ownership (hold title to the property) to obtain a VWP Permit, and the VWP Permit does not convey any real or personal property rights (9VAC25-210-70.B). However, VWP Permit Program or Water Compliance staff need to conduct inspections to ensure compliance with regulations and the permit coverage or permit, if issued.

DEQ uses a property access agreement form for gaining access that is signed by the proper parties. In some cases, access by state-owned rights of way is the only need or option.

Existing DEQ Guidance Memorandum 1-2011, *Access to Private Property for Inspections and Investigations, Denial of Access, and Obtaining Administrative Inspection Warrants* (March 3, 2011), also is used by the VWP Permit Program staff in gaining site/property access.

C. VWP Permit Program points matrix

Each program conducting compliance activities may generate its own points matrix, typically in consultation with DEQ's Enforcement staff, to use when evaluating permitted or non-permitted projects. The VWP Permit Program employs a tiered approach to assessing compliance points for potentially taking compliance actions. The VWP Permit Program points matrix is attached and can also be found in Chapter 11, Appendix 11.B.

VWP Permit Program managers and/or other agency compliance staff may use discretion when assigning points to alleged noncompliance on a project, particularly where the responsible party has a valid and approved corrective action plan or where the responsible party is self-reporting noncompliance and offering corrective actions acceptable to DEQ.

Noncompliance in providing the required compensatory mitigation may result in Enforcement actions that require alternative forms of compensation to be provided, and such compensatory mitigation may be more or less expensive than what was originally approved and permitted.

The VWP Permit Program works in close collaboration with the DEQ Stormwater Management Program. For VWP permit or coverage compliance purposes, the program developed several measurable sedimentation guidelines to assist staff in making compliance decisions and inform any necessary compliance actions. 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. When sediment deposition is temporal or is allowed to be left in place, staff should assess the functional impacts to the resource. Compensation for functional losses may be required. The points guidelines are:

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

2. Non-Compliance, Erosion and Sediment Control: typically less than 2-inches in depth = Major, approximately 2 points or less depending on the scope.

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

D. After the fact

The VWP Permit Program does not authorize impacts after they have been taken on a project because the authorization to conduct the activities in surface waters could not comply with the VWP Permit Program regulations and/or the State Water Control Law. After-the-fact permitting legitimizes unpermitted activities and circumvents the required regulatory review and oversight to avoid and minimize impacts. Therefore, rather than issuing after-the-fact permits for major unpermitted impacts, it is more appropriate and more in-line with the regulatory goals of the VWP Permit Program for DEQ to conduct enforcement actions for unpermitted impacts. Regional VWP Permit Program staff will use standard permitting methodologies to review the avoidance/minimization and compensation in collaboration with enforcement staff during the development of injunctive relief.

Where a permit or coverage exists, changes to a project that accumulate additional, nonpermitted impacts must be approved by DEQ prior to making those project changes and taking the additional impacts, with one exception for certain temporary impacts. (9VAC25-210-180) Then, the existing permit or coverage may be modified to account for the additional impacts and any required compensatory mitigation.

Nonpermitted, unauthorized impacts may be resolved through compliance or enforcement action(s). A compliance or enforcement action is better suited for addressing unpermitted impacts which result in environmental harm, as compared to the permitting process for the following reasons:

1. Certain enforcement actions can provide additional scrutiny by being subject to public comment where a general permit is not.

2. Enforcement staff has more flexibility to apply greater mitigation ratios than do permitting staff potentially serving as deterrence to future noncompliance.

3. Enforcement actions remove the economic incentive for non-compliance by capturing any benefit of noncompliance that may exist.

4. Enforcement actions can require restoration of unpermitted impacts in a legally binding action.

VWP Permit Program staff may need to coordinate noncompliance activities with the USACE for SPGP-verified projects, where resolution may differ from that achieved for an associated VWP permit or coverage, or where no VWP permit or coverage applies (e.g., 23-SPGP-PASDO).

E. Termination

Requesting a termination by consent is optional for VWP individual permit holders. Each VWP general permit, in Section 100 of the applicable general permit regulation, requires that a request for termination by consent be submitted by the permittee within 30 days of project completion or project cancellation. While this is a requirement of the VWP general permit regulations, the lack of submitting such a request is not considered to be an actionable noncompliance item, provided that this is the only outstanding item.

F. Transfer

In certain instances, a new owner or responsible party will request to transfer a VWP individual permit or general permit coverage, even if the current permittee cannot be located or is unwilling to sign the transfer agreement. If the current permittee refuses or is unavailable to complete the transfer agreement, a separate new permit or coverage may be issued to the new owner. If the original permit or coverage is not terminated by the original permittee, the original permittee and the new owner will have joint liability for the actions that occur on the site, including liability for compliance with the requirements of enforcement activities related to the authorized activity. If the original permittee is no longer a legal entity due to death or dissolution, or when a company is no longer authorized to conduct business in the Commonwealth, termination of the original permit is processed in accordance with VWP Permit Program regulations and any applicable Administrative Process Act provisions.

In some instances, a permittee requests to transfer only a portion of a VWP general permit coverage or individual permit. The division of authorized activities across two or more separate general permit coverages or individual permits is processed as a Notice of Planned Change or individual permit minor modification. One part of the project will continue under the existing permit coverage or permit, while the other portion(s) will require new general permit coverage(s) or individual permit(s), and thus, new permit number(s). Typically this is requested when a portion of the permitted project is sold to a new owner, and the new owner and existing permittee do not wish to become co-permittees of the permit (which would cause both to be equally responsible for all activities, even those not on their respective properties).

ATTACHMENT – POINTS MATRIX

Definitions:

Major Exceedance: Permitted project where unauthorized activity typically exceeds the minor modification/notice of planned change thresholds (For specific thresholds, see 9VAC25-210-180, 9VAC25-660-80, 9VAC25-670-80, 9VAC25-680-80, and 9VAC25-690-80). Major exceedance can be more or less than the thresholds, depending on additional factors, such as harm to human health or the environment, the effects on the regulatory program, the size of the exceedance relative to the amount of permitted impacts, or the willingness of the permittee to provide compensation or perform restoration.

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

Minor Exceedance: Permitted project where unauthorized activity is typically less than or equal to minor modification/notice of planned change thresholds (For specific thresholds, see 9VAC25-210-180, 9VAC25-660-80, 9VAC25-670-80, 9VAC25-680-80, 9VAC25-690-80). Minor exceedance can be more or less than the thresholds, depending on additional factors, such as harm to human health or the environment, the effects on the regulatory program, the size of the exceedance relative to the amount of permitted impacts, or the willingness of the permittee to provide compensation or perform restoration.

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

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

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

Table 11.B.1: Non-Administrative (Onsite) Violations				
Infraction	**Points**			**Notes**
	1st Occurrence	**2nd Occurrence**	**Additional Occurrences**	
1. Unpermitted For unpermitted activity, assess Points for this infraction only. Do not use any of the other onsite infractions listed. Impact areas in multiple locations over a given time period are summed to determine if the impact is considered major or minor. Individual impacts are generally not assigned Points separately. Inspection reports should still indicate if more than one State water is impacted and over how many days the discharge has occurred. *Failure to obtain coverage under a VWPP General or Individual Permit prior to commencing activity:*				
Major Unpermitted Impacts	4	4	4	Major Unpermitted Impact: Generally, impacts that exceed 0.10 acre of wetland or open water, or 300 linear feet of stream bed are considered major and should require a NOV. However, these acreage and linear feet impact thresholds serve only as a guide for assessing alleged noncompliance. The facts of the case must be considered carefully regardless of the size of impacts. Smaller impacts to more significant aquatic resource functions may also be considered major.
Minor Unpermitted Impacts	2	2	2	Minor Unpermitted Impacts: Generally, impacts 0.10 acre or less of wetland or open water, or impacts 300 linear feet or less of stream bed can be considered minor based on the particular facts of the case.
2. Exceeding Permitted Impacts Impact areas in multiple locations over a given time period are summed to determine if the impact is considered major or minor; individual impacts are not assigned Points separately. Impact thresholds serve only as a guide for assessing alleged noncompliance; the facts of the case must be considered carefully regardless of the size of impacts; smaller impacts to more significant aquatic resource functions may also be considered major, whereas larger impacts in context with a larger permitted impacts may be considered minor.				
Major Exceedance	1-4	1-4	4	Major Exceedance: above minor modification/notice of planned change thresholds.
Minor Exceedance	1-2	1-2	4	Minor Exceedance: below minor modification/notice of planned change thresholds.
3. Compensatory Mitigation *Failure to conduct compensatory mitigation in accordance with approved mitigation plan as follows:*				

Table 11.B.1: Non-Administrative (Onsite) Violations				
Infraction	**Points**			**Notes**
	1st Occurrence	**2nd Occurrence**	**Additional Occurrences**	
Onsite or off-site creation, restoration, or enhancement not initiated.	4	4	4	If compensation work was not performed in accordance with the approved plan or was not completed, the Points allocated for this infraction should be assigned after considering the degree of variance from the approved compensation plan, extent of fulfillment of "no net loss" requirements, and the level of cooperation demonstrated by the permittee in regards to corrective action; for example, a compensation site at the end of its period is found to be a PEM wetland instead of a PFO wetland, as designed, and the permittee refuses to complete the required corrective action – this infraction should be assigned a higher Point value (4.0 Points) than an infraction in which the required number of groundwater monitoring wells have not been installed at a compensation site (1.0 to 2.0 Points)
Failure to purchase bank or in-lieu fee program credits, record preservation deed restrictions, etc.	4	4	4	
Late purchase of bank or in-lieu fee program credits, recordation of preservation deed restrictions, etc.	2	2	2	
Compensation work not performed in accordance with approved plan or not completed	1-4	1-4	1-4	
4. Construction Special Conditions *Failure to comply with required construction special conditions (such as stormwater management, E&S controls, flagging non-impact areas, restoring temporary impacts, working in the dry, time of year restrictions, minimum stream flow, sidecasting in streams, operating equipment in streams, discharge of concrete to waters, etc.):*				
With Major Impact to Surface Waters	2	4	4	If the activity results in a measurable impact, then the activity should also be accounted for in the first section of this table.
With Minor Impacts	1	1	2	
With No Impact	0.5	0.5	1	
5. Corrective Action				
Failure to undertake required corrective action	2	2	2	Where the permittee has been notified of alleged noncompliance and Staff has requested corrective actions in writing

Table 11.B.1: Non-Administrative (Onsite) Violations				
Infraction	**Points**			**Notes**
	1st Occurrence	**2nd Occurrence**	**Additional Occurrences**	
Failure to undertake required corrective action resulting in failure to meet success criteria	4	4	4	that have not been implemented by the permittee.
Failure to conduct required water quality monitoring	2	4	4	
Any activity resulting in a fish kill; failing to report a fish kill, fuel, or oil spill	4	4	4	

Table 11.B.2: Administrative Violations

Table 11.B.2: Administrative Violations				
Infraction	**Points**			**Notes**
	1st Occurrence	**2nd Occurrence**	**Additional Occurrences**	
1. Construction Monitoring				
Failure to submit construction monitoring report within the required timeframe	0.5	1	1.5	Permittee must be notified of the initial late submittal and Points assessed; if the required submittal is not received within the period

Table 11.B.2: Administrative Violations				
Infraction	**Points**			**Notes**
	1st Occurrence	**2nd Occurrence**	**Additional Occurrences**	
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	requested, then the violation would be assessed additional Points using the Point level for the next occurrence; this repeats until the case is referred to the Division of Enforcement. Each report required is assigned Points and tracked separately; for example, if 3 monthly CMR's were required, failure to submit each would be considered a violation and would receive 0.5 Points for a total of 1.5 Points; however, the Point values are not elevated to the 2nd or additional occurrence unless the permittee has been notified and does not respond.
2. Compensation Monitoring				
Failure to submit compensation monitoring report within the required timeframe	1	2	2	
Report does not include required information and/or contains omissions or errors so great as to prevent a determination of compliance	0.5	0.5	1	
Failure to provide copies of conservation easements or preservation plats within the required timeframe	0.5	1	1	Deed restriction has been recorded, but notice was not provided to DEQ
Failure to provide proof of credit purchase within the required timeframe	0.5	1	1	Credit purchased, but notice was not provided to DEQ

Table 11.B.2: Administrative Violations				
Infraction	**Points**			**Notes**
	1st Occurrence	**2nd Occurrence**	**Additional Occurrences**	
Failure to submit a complete final mitigation plan within the required timeframe	1	2	2	
3. Notification				
Failure to provide required notice prior to commencing or completing construction or compensation	1	1	1	Where several distinct impacts occur at different times, separate notification may be necessary, and each would be assessed additional Points
Failure to submit plans and specifications for permitted areas prior to initiating construction	0.5	0.5	1	
4. Other Violations Not Listed Above				
Failure to record conservation easements not required as compensation, include certification statements, submit as-built surveys, provide permit transfer notification, etc.	1-3	1-3	4	
Failure to submit required information so as to prevent a determination of compliance or violation resulting in Major Harm	1-3	1-3	4	Major Harm: Alleged violation related to a documented substantial adverse environmental impact, or presents substantial risk, or has a substantial adverse effect on the regulatory program.
Information is not required in order to determine compliance or, violation resulting in Minor Harm or no environmental harm	0.5	0.5	1	Minor Harm: Alleged violation presents little or no risk of environmental impact or has little or no adverse effect on the regulatory program.

Table 11.B.3: Aggravating Factors

Table 11.B.3: Aggravating Factors				
Infraction	**Points**			**Notes**
	1st Occurrence	**2nd Occurrence**	**Additional Occurrences**	
Notwithstanding the above, any infraction with the following characteristics may be considered an aggravating factor. This should be determined on a case-by-case basis and in consultation with the Division of Enforcement.				
1. Staff can also assign Points for additional factors associated with unpermitted impacts or permit exceedances. Factors include but are not limited to, adverse environmental impact, loss of beneficial use, or presenting an imminent and substantial danger to human health or the environment.	4	4	4	Adverse environmental impact, loss of beneficial use, or imminent danger must be documented. Typical factors include impacts to threatened, endangered, or rare species and habitats, compliance history, impacting wetlands avoided through permit negotiations, wetland type and/or quality, landscape, or regional considerations (amount of impact in comparison to watershed), landowner notification of permit requirement, substantial economic benefit, and additional impacts required to complete the project; other factors may also be considered (*see* Section VI.A).
2. Potential for adverse impact or loss of beneficial use	2	2	2	Potential for secondary effects to cause adverse impact(s) to beneficial uses; impact is expected but has not occurred yet; for example, presence of or potential impacts to threatened, endangered, or rare species and habitats.

Table 11.B.3: Aggravating Factors				
Infraction	**Points**			**Notes**
	1st Occurrence	**2nd Occurrence**	**Additional Occurrences**	
3. 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.
4. Suspected falsification	4	4	4	
5. Suspected willful violation	4	4	4	
6. Site Access Violations: *Failure to provide reasonable access otherwise required by statute or permit to any facilities where there is adverse environmental impact or an imminent and substantial danger*	4	4	4	