

## **Module 2: Important Laws and Regulations for Inspectors**

### **Module 2 Objectives**

After completing this module, you should understand:

- Relevance of the Law and the Regulations to the inspector's role, and
- The enforcement process to be followed in case of ESC violations

### **Module 2 Content**

2a. Introduction

2b. The Virginia Erosion and Sediment Control Law and Regulations

## 2a. Introduction

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The Virginia Erosion and Sediment Control Law and Regulations (VESCLR) are the legal basis for all local erosion and sediment control programs. It establishes the rights and responsibilities of units of local government that administer the Law and of the public and private land users in the Commonwealth who must comply. Therefore, it is important that an inspector is familiar with the sections of the VESCLR that deal with the inspection aspects. These sections will be discussed below.

**The objective of the Virginia Erosion and Sediment Control Law and Regulations:**

*“for the effective control of soil erosion, sediment deposition, and nonagricultural runoff to prevent the unreasonable degradation of properties, stream channels, waters and other natural resources”*

An inspector should be well versed in the VESCLR, as you will often come upon situations that require attention. It is important that you react timely and appropriately and apply the correct section(s) of the law and regulations when enforcing the VESCLR. While everyone involved with an inspection program should have a copy of the VESCLR in their field bag (see the discussion of an inspectors tool box in Unit IV), it is important that you know the VESCLR and are able to react to an issue with authority. In addition, the inspector should also be familiar with the local program requirements (i.e. locality specific changes to the VESCLR in the ordinance).

It is also advantageous for land developers and their contractors or consultants to become familiar with the provisions of the VESCLR, as well as the requirements of local programs in which they operate. Through these proactive efforts, developers may avoid undue delays, minimize construction costs, better comprehend the origin of specific requirements, and improve cooperation and flexibility in communications between the regulated community and local officials.

The complete text of the current version of the Virginia Erosion and Sediment Control Law (Title 62.1, Chapter 51, of the Code of Virginia) may be accessed on the Virginia Legislative Information Services (LIS) webpage at <http://lis.virginia.gov/cgi-bin/legp604.exe?000+cod+62.1-44.15C52> . Copies of the VESCLR are also available on DEQ's website <http://www.deq.virginia.gov/ConnectWithDEQ/TrainingCertification/ESCandSWMLawsandRegulations.aspx> The VESCLR are frequently updated and we recommend that you download the latest version.

## 2b. The Virginia Erosion and Sediment Control Law and Regulations

In this section, we will discuss parts of the VESCLR important to the job as inspector. The basic class should have provided you with a comprehensive look at these documents; however, here we will examine important passages related to your job as an inspector. Unlike the basic class, this section is not separated in a law and a regulations section and the discussion may deal with both documents at the same time.

### Definitions:

- VESCLR =Virginia Erosion and Sediment Control Law and Regulations
- VESCL =Virginia Erosion and Sediment Control Law
- VESCR =Virginia Erosion and Sediment Control Regulations
- VESCH =Virginia Erosion and Sediment Control Handbook
- § = section and the numbers behind it refer to a specific section in the law
- VAC =Virginia Administrative Code and the numbers behind it refer to a section in the regulation

### The Inspection Program

The VESCL establishes the need for districts or localities to have a local erosion and sediment control program (VESCL § 62.1-44.15:54). While these programs may differ among localities, all local programs must have four basic program components:

- Administration,
- Plan Review,
- Inspection, and
- Enforcement.

### Inspection Requirements

The VESCL requires that the plan-approving authority or permit-issuing authority provide regular inspections of every land-disturbing activity within its jurisdiction (see side box). Furthermore, the Law requires that inspections are conducted by a certified inspector or someone who has a certificate of competence to carry out these inspections (VESCL § 62.1-44.15:58).

*The plan-approving authority or, if a permit is issued in connection with land-disturbing activities that involve the issuance of a grading, building, or other permit, the permit-issuing authority (i) shall provide for periodic inspections of the land-disturbing activity... (VESCL § 62.1-44.15:58)*

The VESCP is required to notify the owner, permittee or person responsible for plan for implementation of the ESC inspection, prior to, during, and/or following the inspection: *“The owner, permittee, or person responsible for carrying out the plan shall be given notice of the inspection.”* [VESCL § 62.1-44.15:58]. This notification can take many forms; but, in general, the inspector will first go to the construction trailer to announce he/she is on site to conduct the inspection. The inspector may then invite the responsible individual on-site to accompany the inspector during the site inspection. Alternatively, the notice can take the form of a written **Inspection Report** that is sent to the developer. If necessary, the VESCL does also grant the inspector authority to enter a site with or without approval of the owner [VESCL § 62.1-44.15:60].

*The Department, the VESCP authority, where authorized to enforce this article, or any duly authorized agent of the Department or such VESCP authority may, at reasonable times and under reasonable circumstances, enter any establishment or upon any property, public or private, for the purpose of obtaining information or conducting surveys or investigations necessary in the enforcement of the provisions of this article. [VESCL § 62.1-44.15:60]*

The timing of inspecting is discussed in the regulations. The Virginia Erosion and Sediment Control Regulations (VESCR) require that inspections are conducted “... *during or immediately following initial installation of erosion and sediment controls, at least once in every two-week period, within 48 hours following any runoff producing storm event, and at the completion of the project prior to the release of any performance bond; ...*” (9VAC25-840-60.B1).

**Alternative Inspection Program:** The same section in the regulations allows for the development of an alternative inspection program (AIP) with the approval of the Board (9VAC25-840-60 B2). An alternative program would allow local programs to prioritize projects based on site-specific criteria and enables localities to focus limited resources on high priority projects.

For information concerning the development of an AIP, including examples, see the AIP Guidelines, which can be found in Appendix B and at

The regulations establish the following requirements for an alternative inspection program:

*...Establish an alternative inspection program which ensures compliance with the approved erosion and sediment control plan. Any alternative inspection program shall be:*

- *Approved by the Board prior to implementation;*
- *Established in writing;*
- *Based upon a system of priorities that, at a minimum, address the amount of disturbed project area, site conditions and stage of construction; and*
- *Documented by inspection records.*

<http://www.deq.virginia.gov/Portals/0/DEQ/Water/Publications/AltInspGuidance.pdf>. However, the AIP must address the following items at a minimum:

- Amount of disturbed acreage,
- Proximity to adjacent properties and/or waters of the Commonwealth,
- Existing and/or altered topography,
- Existing and/or altered soil characteristics,
- Stage of construction, and
- Need for site-specific controls.

As part of their AIP, some localities in Virginia have adopted a weekly inspection program.

### Summary

Absent a Board approved AIP, erosion and sediment control inspections need to be: a) conducted by a certified erosion and sediment control inspector and b) done as per this schedules:

- Immediately following initial installation of erosion and sediment controls;
- At least once in every two weeks;
- Within 48 hours after a runoff-producing storm event;
- At the completion of the project, prior to the release of any performance bonds.

### Violations

Inspectors will encounter violations of the VESCLR. The Law and Regulations provide a distinct set of steps that an inspector or the plan-approving authority has to take to deal with the various types of violations.

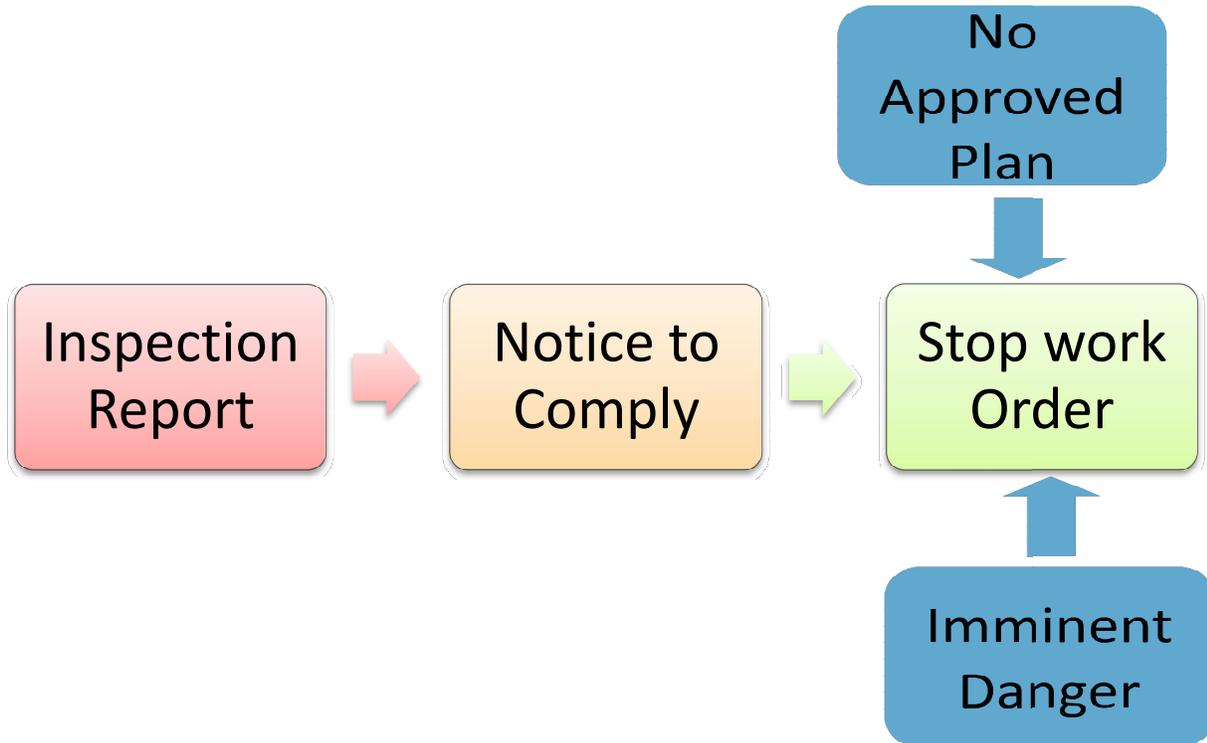
The enforcement process most commonly has three (3) levels, including (1) an **Inspection Report**, (2) a **Notice to Comply** and (3) a **Stop Work Order**. The VESCLR are very straightforward in laying out which violations require a **Stop Work Order** (see the next section). The decision of what actions to take when encountering other types of violations is more complicated, as the distinction between a serious violation, minor violation, and regular maintenance issues may be less obvious. Actions may be done on a case by case basis. However, (as a general rule of thumb) more serious violations or re-occurring minor violations require a **Notice to Comply**; while an **Inspection Report** is often used for minor or first time violations.

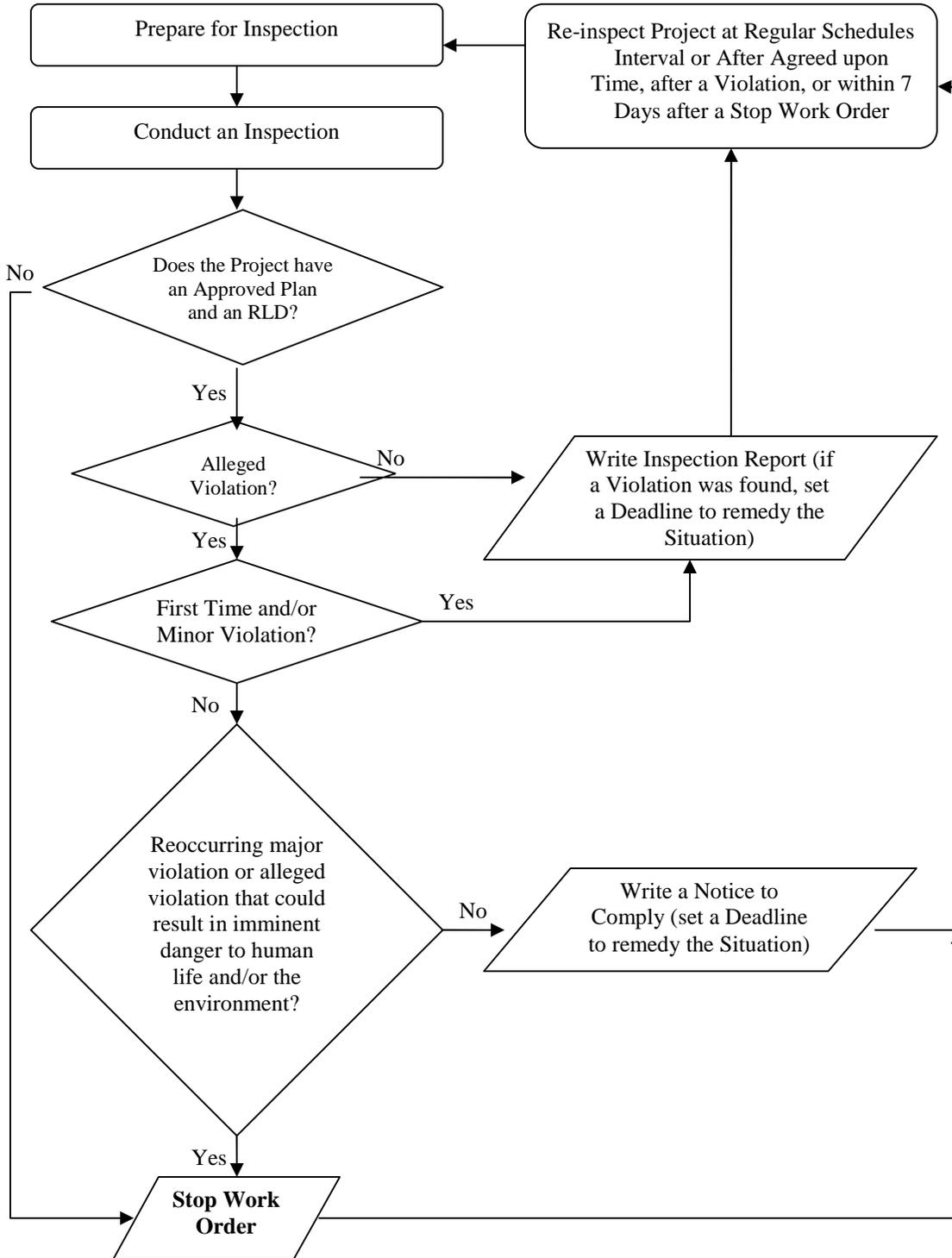
§ 62.1-44.15:58.A. details the requirement that the owner and person responsible for carrying out the plan, i.e. the Responsible Land Disturber (RLD) comply with the approved plan. We can therefore assume that during the plan approval process the approved plan was evaluated for compliance with the **Minimum Standards** as published in the VESCR (9VAC25-840-40), and the standards and specifications set forth by ESCH. Any violation encountered in the field would therefore automatically be a failure to comply with an approved plan. This would be a violation under § 62.1-44.15:58.A and of the **Minimum Standards** (VESCR 9VAC25-840-40).

The VESCLR are very specific on how to serve an **Inspection Report** and a **Notice to Comply**: Section 62.1-44.15:58 (A) of the VESCL states: “... If the VESCP authority, where authorized to enforce this article, or the Department determines that there is a failure to comply with the plan following an inspection, notice shall be served upon the permittee or person responsible for carrying out the plan by mailing with confirmation of delivery to the address specified in the permit application or in the plan certification, or by delivery at the site of the land-disturbing activities to the agent or employee supervising such activities. The notice shall specify the measures needed to comply with the plan and shall specify the time within which such measures shall be completed. ...” and “... Upon failure to comply

*within the time specified, the permit may be revoked and the VESCP authority, where authorized to enforce this article, the Department, or the Board may pursue enforcement as provided by § 62.1-44.15:63. ”*

Once a minor violation has been observed, the inspector can discuss the issue and its remedy with the site superintendent/RLD. Subsequently, she/he needs to document this discussion and the proposed remedy to the violation in an **Inspection Report**. Inspection reports are then shared with the land disturber. In cases where the violation is more severe or when the Inspection Report seems to have been ignored, an accompanying **Notice to Comply** may be appropriate. Under more severe circumstances (such as repeated major violations, non compliance, when there appears to be imminent danger to the environment or population, or in cases of land disturbance without a plan or RLD), the inspector can issue a **Stop Work Order**. These choices and applicable Laws and Regulations will be discussed in more detail below. The figure below and the flow chart on the following page provide a graphical overview of the sequential process when you find a potential violation and have to react to it.





**Figure II-1.** Flowchart for Alleged Violation .

Erosion and Sediment control practices and structures have been designed to function in an optimal way, and any change from their original design will alter their function and make them less efficient in capturing sediment. The VESCR 9VAC25-840-60 (A) requires that all erosion and sediment control plans have a maintenance section in the plan, and structures and practices must be inspected as part of that maintenance: “... *All erosion and sediment control structures and systems shall be maintained, inspected and repaired as needed to insure continued performance of their intended function. A statement describing the maintenance responsibilities of the permittee shall be included in the approved erosion and sediment control plan.*” Maintenance measures are detailed in the Erosion and Sediment Control Handbook. Poor maintenance must therefore be treated as a violation and listed on an **Inspection Report**. Further enforcement may be appropriate when there appears to be gross negligence or when the violation appears to be of imminent danger of causing erosion and sedimentation issues down gradient of the site.

### Inspection Reports

All inspections must be documented by a written report or log. It can be in digital or hard copy format. We recommend that inspectors maintain a note book in which all his or her inspections are documented in chronological order. Pages from the log can then be copied to individual project files. General observations may also be recorded in an **Inspection Report**. If no problems are found during the inspection, the log or an inspection report should be used to document that the inspection occurred on that date and that no problems were found. Inspections and the writing of inspection reports are discussed in more detail in Module 4 and the Appendix. When alleged violations are found, the inspector is required to write an **Inspection Report**. **Inspection Reports** must contain, at a minimum:

Documentation is important: **If there is no inspection report, the inspection never took place!** No matter what the inspector may claim.

- Project name,
- Date of inspection,
- Information on items observed during the inspection,
- Any changes or maintenance required,
- Any problems or potential violations encountered during the inspection,
- Details on these violations, and
- Deadlines for correcting the violations.

This is detailed in the VESCR: “*The local program authority shall maintain, either on-site or in local program files,.... a record of inspections for each active land-disturbing activity* [9VAC25-840-90 (A.3)].

It is also advisable to include notes on any verbal communication concerning the project in the inspection report.

The inspection report and supporting documents can then be used to support enforcement action if warranted. DEQ suggests that photographs accompany inspection reports. Photographs are especially useful when documenting violations prior to taking enforcement action. Photographs with date stamps are particularly valuable. A copy of a generic Inspection Report developed by DEQ can be obtained from DEQ’s

website and in Appendix C. Example and a discussion on how to fill out the form are included in Module 4 of this course material.

### Notices to Comply

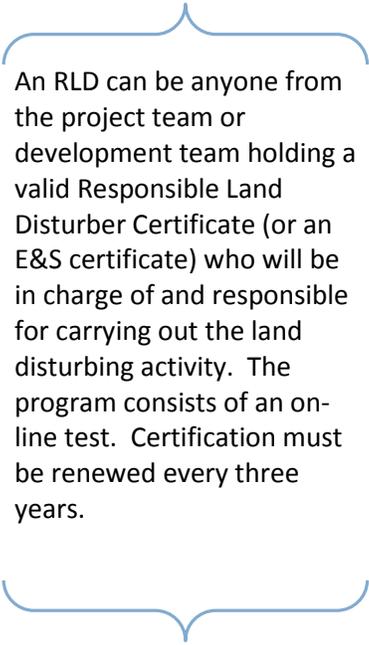
As mentioned above, the decision to issue a **Notice to Comply** is often based on a distinction between alleged violations which are more serious versus minor violations as observed by the inspector. What may be considered a serious violation in one case might be a minor violation in another case; however, as a general rule, more serious violations or re-occurring minor violations require a **Notice to Comply**; while an **Inspection Report** is often used for minor or first time violations.

The “case by case” decision to issue a Notice to Comply or an Inspection Report becomes apparent when working with an RLD/site superintendent who is willing to work with the inspector to solve issues. Such a person may be shown more lenience compared to the site contractor who repeatedly violates the VESCLR and is always antagonistic or hostile. In those cases an **Inspection Report** might get faster and better action than a **Notice to Comply**. However, a **Notice to Comply** is more appropriate for alleged violations of a major nature and when a minor violation is not fixed or reoccurs.

### The Stop Work Order

The VERCL §62.1-44.15:55(A) stipulates that “no person may engage in any land-disturbing activity until he has submitted to the district or locality an erosion and sediment control plan for the land-disturbing activity and the plan has been reviewed and approved by the plan-approving authority.” In other words land-disturbing activities of an area larger than 10,000 square feet can only be done with an approved plan, and any disturbance without a plan must be considered a violation. The proper response to this violation is the issuance of a **Stop Work Order**. In the case of a single family residence an Agreement in Lieu of a Plan may serve as an approved plan.

The VERCL §62.1-44.15:55 (B) also requires that “... In addition, as a prerequisite to engaging in the land-disturbing activities shown on the approved plan, the person responsible for carrying out the plan shall provide the name of an individual holding a certificate of competence to the program authority, as provided by §62.1-44.15:52, who will be in charge of and responsible for carrying out the land-disturbing activity.” In other words, before starting a land-disturbing activity, the owner needs to provide to the program-authority the name of a person holding a certificate of competence. Such a person is either a RLD, or a person who successfully obtained certification by DCR as an Inspector, a Combined Administrator or who is a Professional Engineer. This does not mean that a name of a RLD needs to be provided during the permit application process; although some localities require this. Other localities often require that the owner provide a name of a RLD when picking up their land-disturbance permit. In all cases, a RLD needs to be known to the program-authority before the first shovel of dirt is moved at the site. When an inspector comes upon a project that does not have a RLD, the proper action would be the issuance of a **Stop Work Order**.



An RLD can be anyone from the project team or development team holding a valid Responsible Land Disturber Certificate (or an E&S certificate) who will be in charge of and responsible for carrying out the land disturbing activity. The program consists of an on-line test. Certification must be renewed every three years.

In summary, when an inspector happens on a situation that allegedly violates the requirement to have an approved plan and/or a RLD, a **Stop Work Order** must be issued as per VESCLR §62.1-44.15:58 (C).

There are two additional cases when we may issue a **Stop Work Order**. First, the VESCL §62.1-44.15:58 (C) also allows for the issuance of a *Stop Work Order* in cases “... *Where the alleged noncompliance is causing or is in imminent danger of causing harmful erosion of lands or sediment deposition in waters within the watersheds of the Commonwealth, ...*” Imminent danger includes a threat to human life, property, or the environment including wetlands and streams. Secondly, a stop work order is appropriate when you repeatedly find the same violation at a site and the superintendent or RLD have failed to comply with previous **Notices to Comply**. Concerning this case the VESCLR §62.1-44.15:58 (C) states: “*Otherwise, such an order may be issued only after the alleged violator has failed to comply with a notice to comply.*” In these cases, a stop work order is in effect for 7 days, after which the stop work order will expire, or can be renewed for an additional 7 days. In cases where work was started without a permit, the program administrator may stop all construction at a site if permits have not been obtained within the first 7 day window: “... *If the alleged violator has not obtained an approved plan or any required permits within seven days from the date of service of the order, the chief administrative officer or his designee may issue an order to the owner requiring that all construction and other work on the site, other than corrective measures, be stopped until an approved plan and any required permits have been obtained...*” [VESCLR §62.1-44.15:58 (C)].

**Summary**

A **Stop Work Order** is issued where any of the following exist:

1. LDA without an approved ESC plan/permit,
2. No designated RLD on the project,
3. Imminent danger to the environment and human population, or
4. Failure to comply with previous **Notice(s) to Comply**

*Variations during Construction*

As the land-disturbing activity progresses, the inspector may find that ESC measures required by the approved ESC plan are not adequate for the site conditions. Subsequently, the person responsible for implementing the plan is encouraged to request a change to the approved plan from the plan-approving authority. The request must explain the reasons for the request and must be in writing. The “change” procedure is documented in VESCL §62.1-44.15:55 (C): “*An approved plan may be changed by the authority that approved the plan in the following cases: Where inspection has revealed that the plan is inadequate to satisfy applicable regulations; or Where the person responsible for carrying out the approved plan finds that because of changed circumstances or for other reasons the approved plan cannot be effectively carried out, and proposed amendments to the plan, consistent with the requirements of this article, are agreed to by the plan-approving authority and the person responsible for carrying out the plan.*”

Sometimes the change in plan will require a variance – a departure from the Minimum Standards explained below. The plan-approving authority must review the request for a variance and respond in writing. *If no response is provided within **10 days**, the variance is automatically disapproved.*

If the variance is disapproved, the applicant may resubmit the request with additional information: *“During construction, the person responsible for implementing the approved plan may request a variance in writing from the plan-approving authority. The plan-approving authority shall respond in writing either approving or disapproving such a request. If the plan-approving authority does not approve a variance within 10 days of receipt of the request, the request shall be considered to be disapproved. Following disapproval, the applicant may resubmit a variance request with additional documentation.”* (VESCR 9VAC25-840-50)

### State Agency Projects

Section 62.1-44.15:56 requires that state agency projects also comply with the VESCL, by requiring them to submit annual specifications or preparing a conservation plan for each project and submitting these to the DEQ. Subsequently, the VESCL requires that the state agency is responsible for ESC inspections and enforcement of the agency’s projects: *“The state agency responsible for the land-disturbing activity shall ensure compliance with the approved plan or specifications.* (VESCL §62.1-44.15:56 F)

DEQ staff oversees the implementation of the ESC program on state agency projects by monitoring the construction sites.

### Local ESC Program Review

The VESCL requires that local ESC programs and State Agency Projects undergo a periodic review. This review of local program effectiveness is a responsibility of the State Water Control Board as defined in the Virginia Erosion and Sediment Control Law (VESCL), §62.1-44.15:56 D, which states that the *“Board shall periodically conduct a comprehensive review and evaluation to ensure that all erosion and sediment control programs operating under the jurisdiction of this article meet minimum standards of effectiveness in controlling soil erosion, sediment deposition and nonagricultural runoff.”*

The criteria used to determine whether a local program satisfies the minimum standards of effectiveness are contained in the Virginia Erosion and Sediment Control Regulations (VESCR), 9VAC25-840-90A and B. DEQ has developed program review documents which are used during reviews of local programs. These documents address the criteria for each of the four program areas: administration, plan review, inspection and enforcement.

#### State Agencies Submitting Annual Specifications

- Virginia Department of transportation (VDOT)
- State Colleges and Universities
- State Community Colleges