

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

Subject: Guidance Memo No. 15-2004
Point Assessment for Alleged Violations of the Construction Stormwater Permit Criteria and Enforcement Referral Guidance

To: Regional Directors

From: Melanie D. Davenport, Director 

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Copies: Deputy Regional Directors, Regional VWPP Program Managers, Regional Stormwater Compliance Managers, James Golden, Jeff Steers, Jefferson Reynolds, Fred Cunningham, Jerome Brooks

Summary:

This guidance document provides direction for evaluating noncompliance with the General VPDES Permit for Discharges of Stormwater from Construction Activities Regulations ([9 VAC 25-880](#)), the Virginia Stormwater Management Program Regulations ([9 VAC 25-870](#)) and the State Water Control Law ([Va. Code § 62.1-44.2 et seq.](#)) and provides a point system for determining the appropriate compliance response, including when to refer cases to the Division of Enforcement. The point system allows Stormwater Compliance staff to consistently assess and respond to alleged noncompliance.

Electronic Copy:

An electronic copy of this guidance document in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at:
<http://www.deq.virginia.gov/Programs/Water/Laws,Regulations,Guidance/Guidance/WaterPermitGuidance.aspx>.

Contact Information:

Please contact Matthew Stafford, Office of Water Compliance, at (804) 698-4097 or Matthew.Stafford@deq.virginia.gov with any questions regarding the application of this guidance.

Disclaimer:

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

I. PURPOSE

This guidance establishes procedures for addressing alleged noncompliance with the General Permit for Discharges of Stormwater from Construction Activities and unpermitted discharges of stormwater from construction activities. It establishes methods and tools for quantifying noncompliance and unpermitted activities in order to determine the appropriate compliance response and for referring cases to the Division of Enforcement. This guidance provides the Point Assessment Criteria for assessing noncompliance in the Virginia Stormwater Construction General Permit (CGP) Program.

II. AUTHORITY

The DEQ's authority to conduct compliance investigations and inspections is provided for in the State Water Control Law ([Va. Code §§ 62.1-44.2 thru 62.1-44.34:28](#)), the VSMP Regulations and the CGP conditions.

- Code of Virginia ([§ 62.1-44.15\(6\)](#)) authorizes the State Water Control Board: “To make investigations and inspections, to ensure compliance with any certificates, standards, policies, rules, regulations, rulings and special orders which it may adopt, issue or establish and to furnish advice, recommendations, or instructions for the purpose of obtaining such compliance.”
- Code of Virginia ([§ 62.1-44.20](#)) states: “Any duly authorized agent of the Board may, at reasonable times and under reasonable circumstances, enter any establishment or upon any property, public or private, for the purpose of obtaining information or conducting surveys or investigations necessary in the enforcement of the provisions of this chapter.”
- Code of Virginia ([§ 62.1-44.15:25\(4\)](#)) authorizes the State Water Control Board to: “Cause investigations and inspections to ensure compliance with any state or VSMP authority permits, conditions, policies, rules, regulations, rulings, and orders which it may adopt, issue, or establish and to furnish advice, recommendations, or instructions for the purpose of obtaining such compliance.”
- Code of Virginia ([§ 62.1-44.15:39](#)) states: “The Department, the VSMP authority, where authorized to enforce this article, any duly authorized agent of the Department or VSMP authority, or any locality that is the operator of a regulated municipal separate storm sewer system 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.”
- [9 VAC 25-870-114.A](#) Inspections of the VSMP Regulations states: “The VSMP authority shall inspect the land-disturbing activity during construction for:
 1. Compliance with the approved erosion and sediment control plan;
 2. Compliance with the approved stormwater management plan;
 3. Development, updating, and implementation of a pollution prevention plan; and
 4. Development and implementation of any additional control measures necessary to address a TMDL.”
- [9 VAC 25-880-70 Part III.W](#) Inspection and Entry of the General Permit for Discharges of Stormwater from Construction Activities states: “ The operator shall allow the department as the board's designee, the VSMP authority, EPA, or an authorized representative of either entity (including an authorized contractor), upon presentation of credentials and other documents as may be required by law to:

1. Enter upon the operator's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this general permit;
2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this general permit;
3. Inspect and photograph at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this general permit; and
4. Sample or monitor at reasonable times, for the purposes of ensuring state permit compliance or as otherwise authorized by the Clean Water Act or the Virginia Stormwater Management Act, any substances or parameters at any location.

For purposes of this section, the time for inspection shall be deemed reasonable during regular business hours, and whenever the facility is discharging. Nothing contained herein shall make an inspection unreasonable during an emergency.”

III. PROTOCOL FOR CENTRAL OFFICE REVIEW

In order to promote Regional Office consistency with statewide compliance and enforcement cases and actions there will be Central Office review of any Notice of Alleged Violation (NOAV) prior to its issuance and the following protocol will be observed:

Regional Offices (RO) submit a draft NOAV, either Warning Letter (WL) or Notice of Violation (NOV), to Central Office (CO) for review prior to its issuance. CO review is completed by the Office of Water Compliance (OWC), the Office of Stormwater Management (OSM) and the Division of Enforcement (DE). A written response will be provided to the Regional Office via email as soon as possible but no later than 7 days based on the following protocol.

1. The regional office submits the draft NOAV (WL or NOV) to the OWC (Construction Stormwater Compliance Coordinator), who will ensure that it is distributed to the appropriate CO staff.
2. After distribution, the OWC will coordinate the review and responses for WLs. The DE will coordinate the review and responses for NOVs.
3. If additional information is needed or there are questions, the RO will be contacted by phone for clarification prior to response.
4. Responses will be in writing and provided to the RO via email. The response will either indicate that there is no comment and the NOAV is ready for issuance or provide comments. If the response includes comments for revision, the regional office should revise the document and issue the NOAV unless a request to return the document for further review is included.

IV. POINT ASSESSMENT FOR ALLEGED VIOLATIONS OF THE CONSTRUCTION STORMWATER PERMIT

Alleged permit noncompliance or unpermitted activities are evaluated using the Point Assessment for Alleged Violations of the Construction Stormwater Permit (Attachment A) and associated criteria and guidance.

Point Assessment for Alleged Violations of the Construction Stormwater Permit

Notes:

- Points will be assessed initially with first inspection/observation of violation(s). There is no grace period for correction without an assessment of points.
- Points should be assessed cumulatively for a responsible party that has violations at multiple sites.
- Reassessment of points will occur if responsible party has not corrected violations or provided an adequate response (i.e., appropriate schedule of corrective action) within the timeframes given by the written notice. Generally, noncompliance that poses a serious threat to the environment should be reassessed approximately 7 days from the date of the written notice. Routine/maintenance/minor issues should be reassessed approximately 14 days from the date of the written notice. These timeframes are flexible, and should reflect the specific circumstances surrounding each case.
- In no case should points be reassessed sooner than 7 days from the original written notice.
- A total point value greater than or equal to 4 points warrants an NOV; a total point value greater than or equal to 2 and less than 4 points warrants a WL; and a total point value less than 2 points warrants written notice in the inspection report or informal letter accompanying the report.
- “Written notice” means the written document that is the outcome of the point assessment. If points do not warrant a WL or NOV, the written notice is the inspection report or informal letter accompanying the report (if applicable). If points warrant a WL or NOV, the written notice means the WL or NOV. Note: In the latter case, the written notice would not mean an inspection report provided to the responsible party prior to the issuance of a WL or NOV.
- For repeat occurrences of the same violation(s) within 12 months, points shown in this table should be doubled and evaluated cumulatively over the 12 month period to determine the appropriate action.

The aggravating factors listed at the end of this document should be added if there is an actual or potential adverse impact to state waters with concurrence of the Office of Water Compliance and the Division of Enforcement.

ATTACHMENT A

Table 1. Point Assessment Criteria

	Type of Violation	Points (first occurrence)	Notes
1	Failure to obtain permit coverage when required prior to commencing land disturbing activities.	2	As applicable (not for detached single family dwellings (SFDs)) Use for sites without required construction stormwater permit coverage. Assess the site for unpermitted discharge or unauthorized impacts.
2	Unpermitted discharge to state waters or discharge to state waters not in compliance with permit	2	Use where there is a discharge of stormwater from land disturbing activities, which reaches state waters, either (1) from a site without required permit coverage, or (2) from a site with permit coverage where required treatment controls, and pollution prevention measures are wholly or almost entirely lacking or deficient, such that stormwater discharged from the site has essentially bypassed treatment or control, or (3) from a site with permit coverage where discharge due to a violation of permit conditions results in a significant demonstrated environmental impact (e.g. a fish kill). Do not use this category (Item #2) for points assessment when stormwater discharge results in a measurable volume of sediment accumulation on the bed of the receiving water. Use Item #3, "Unauthorized impacts to wetlands and/or streams."
3	Unauthorized impacts to wetlands and/or streams -Serious -Moderate -Minor	4 4 2	Use when the unauthorized discharge of stormwater from land-disturbing activities results in a measurable volume of sediment accumulation on the bed of the receiving wetlands, streams or other surface waters. -Impacts of more than 2 acres of wetlands or open water or more than 1500 linear feet of stream -Impacts from 0.1 to 2 acres of wetlands or open water or from 301 to 1500 linear feet of stream -Impacts to less than 0.10 acres of wetland or open water, or up to 300 linear feet of streambed Do not use this category (Item #3) for points assessment when an unauthorized stormwater discharge results in turbidity in the receiving water without a measurable volume of sediment accumulation on the bed of the receiving water.

ATTACHMENT A

	Type of Violation	Points (first occurrence)	Notes
4	<p>Failure to develop a stormwater pollution prevention plan.</p> <p>Failure to have an approved Erosion and Sediment Control (E&S) Plan or agreement in lieu of a plan.</p> <p>Incomplete SWPPP other than E&S plan requirements:</p> <ul style="list-style-type: none"> a) Pollution prevention components b) Approved or incorporated SWM plan/annual standards and specifications 	<p align="center">3</p> <p align="center">1</p> <p align="center">1</p> <p align="center">1</p>	<p>The lack of all the documents noted under this section is a failure to develop a SWPPP.</p> <p>When an approved ESC plan is available onsite assess the SWPPP for the other components.</p> <p>In no situation should the assessment under this section (Item #4) and Item #10 exceed 3 points total.</p>
5	Failure to maintain SWPPP on site.	0.5	This assumes that a SWPPP was developed; but neither the SWPPP nor the location where it can be found is onsite.
6	Failure to install or to properly install or maintain E&S controls or other pollution prevention measures prior to commencing construction activity.	0.5 - 1	<p>Points are assessed for the overall site.</p> <p>The upper end of the range may be used when many controls, or one or more critical controls, have not been installed.</p> <p>Points should be reassessed after schedule of corrective action has elapsed without correction.</p>
7	Failure to install or properly install post-construction stormwater management BMPs.	0.5 - 1	<p>Points are assessed for the overall site.</p> <p>The upper end of the range may be used when many controls, or one or more critical controls, have not been installed or maintained correctly. Points should be reassessed after schedule of corrective action has elapsed without correction.</p> <p>When assessing BMPs during a Notice of Termination inspection use the point values in Item #11.</p>

ATTACHMENT A

	Type of Violation	Points (first occurrence)	Notes
8	Failure to have approved annual standards and specifications when required or comply with approved annual standards and specifications.	0.5	Points should be reassessed after schedule of corrective action has elapsed without correction.
9	Failure to conduct or record inspections, or incomplete inspections.	0.5-1	<p>For the initial Points assessment, 1 Point will be assigned regardless of how many inspections have been missed. If inspections have not commenced after the initial written notification from DEQ, then each month inspections are not completed, the violation would be assessed additional Points using the Point level for the next occurrence.</p> <p>This repeats until the case is referred to the Division of Enforcement.</p> <p>If recorded inspections are incomplete, utilize the low end of the range. Points should be reassessed after schedule of corrective action has elapsed without correction.</p>
10	Failure to Implement Permit and/or SWPPP Requirements or comply with SWM Plan or E&S Plan, not otherwise specifically listed.	0.25	<p>Should be used for violations that are not specifically listed. Points are assessed per requirement.</p> <p>Examples of components considered may include: a copy of the coverage letter, a copy of the CGP, identification of qualified personnel, identification of contractors, dates of major grading or stabilization measures initiated, posting of coverage, criteria for TMDL WLA addressed (other than inspections).</p>
11	<p>Failure to implement or install permanent control measures necessary to terminate permit coverage:</p> <p>a) Final stabilization on all portions of the site</p> <p>b) Post-construction SWM BMPs</p>	<p>1-2</p> <p>1-2</p>	Points are assessed for the entire site. Points assigned to final stabilization should assess an established ground cover that is “uniform, mature enough to survive, and will inhibit erosion.” Evaluation of post-construction SWM BMPs may consider the SWM plan and the design specifications for correct implementation or the site’s history of proper sequencing of post-construction SWM BMPs. If final stabilization has not been applied to the site or the post-construction SWM BMPs have not been installed the highest values should be used.
12	Failure to Submit Notice of Termination	2	

ATTACHMENT A

Table 2. Aggravating Factors

Notwithstanding the above, any violation 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 Office of Water Compliance and the Division of Enforcement.

Factor	Points	Notes
Adverse environmental impact, loss of beneficial use, or presenting an imminent and substantial danger	4	“Adverse Environmental Impact” includes, but is not limited to, fish kills, loss of drinking water supply, or loss of other beneficial uses. Any allegation of adverse environmental impact due to spills, bypasses, unpermitted discharges, and other violations of state law and regulations shall be reported to the enforcement staff with documentation that shall conclude that either there was or was not an adverse impact.
Potential for adverse impact or potential loss of beneficial use When a BMP, control or measure treats an area: ≥3 acres ≥1 acre and <3 acres <1 acre	1-3 3 2 1	Use when there is an imminent storm event for a site without functioning BMP(s) necessary and identified in the Assessment Criteria (Item #6 and 7) to prevent the release of sediment or other pollutants to state waters.
Violations resulting in exceedances of water quality standards	2	
Suspected falsification	4	When falsification is considered an aggravating factor, follow up discussions with Central Office will be necessary.
Suspected willful violation	4	
Violation due to clear indifference	4	
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 Other site access violations	4 1 (first occurrence) 3 (second occurrence)	