COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER PERMITTING DIVISION

Subject: Guidance Memo No. 18-2012
Point Assessment for Alleged Violations of the Construction Stormwater Permit Criteria and Enforcement Referral Guidance

To: Regional Directors

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Date: December 19, 2018

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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. This guidance replaces DEQ Guidance Memo No. 15-2004.

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. 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. The Point Assessment Criteria provides a mechanism for determining the level of response to noncompliance: informal corrective action, WL, or a referral to the Division of Enforcement using a NOV.

Point Assessment for Alleged Violations of the Construction Stormwater Permit

Notes:

- Points will be assessed and documented for all inspections starting with the first inspection and observation of alleged violation(s). There is no grace period for correction without an assessment of points. At a minimum, documentation of alleged noncompliance found during a site inspection must include an inspection report summarizing observations, photographs with supporting descriptive information, point assessment calculation, and any required Comprehensive Environmental Data System (CEDS) entry in accordance with the following procedures:
    1. Identify alleged permit noncompliance or unpermitted activity through site inspections, file review, and/or other appropriate means. Staff must document alleged permit noncompliance or unpermitted activity using field notes, photographs, inspection forms, file review notes, inspection reports, and/or other methods to provide supporting information for future compliance or enforcement actions.
    2. Utilize the Point Assessment Criteria to characterize all noncompliance identified during an inspection and group violations into standardized categories.
    3. Staff compiles a comprehensive list of all noncompliance and resulting points in order to provide a useful reference for future enforcement cases. Points are tracked over the entire permit term. When available, Staff uses the CEDS to track alleged noncompliance and points.
    4. Staff uses the sum of all points calculated to determine the appropriate compliance response. 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.

- After utilizing Steps 1 through 4 above to calculate the total points and to determine the appropriate compliance response, Staff review the result of the Point Assessment Criteria with their managers. Situations may arise when a case exceeds the 4.0 point threshold, but the facts of the case do not merit immediate referral to the Division of Enforcement. However, Staff should always refer unpermitted activities that exceed the 4.0 point threshold to the Division of Enforcement. With CO consultation and concurrence, points should be assessed cumulatively for a responsible party that has violations at multiple sites.

- Reassessment of points will occur if responsible party (ie. owner, operator) has not corrected violations or provided an adequate response (i.e., appropriate schedule of corrective action) within the timeframes given by the written notice[1].

- Point totals for a site should be evaluated cumulatively over the rolling 12 month period, beginning with the date of first inspection. However, noncompliance corrected more than 6 months ago may be excluded from the cumulative total unless there is an established pattern of noncompliance.

- Points should be doubled as follows for repeat occurrences of Stormwater Pollution Prevention Plan (SWPPP) documentation items and failure to install or to properly install and maintain stormwater management, pollution prevention, or erosion and sediment control measures, including stabilization. For

[1] 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. 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

repeat occurrences at a site of the same violation(s) (i.e. in the same location, under the same operating circumstances and no intermediate corrective action taken) within 12 months, points shown in this table should be doubled after the 1st occurrence (e.g., first occurrence = 1, 2nd occurrence = 2, 3rd occurrence = 2, Total = 5 points) and evaluated cumulatively.

- Points should not be doubled for repeat occurrences of maintenance issues related to erosion and sediment control or pollution prevention control measures when all previously noted maintenance issues were corrected and new maintenance issues developed since the previous inspection.

- Staff should only issue additional NOVs for specific violations if the responsible party has failed to respond adequately to earlier NOVs. Staff should only send multiple NOVs after consulting with the Division of Enforcement.

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.

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.	**3**	Use for sites without required construction stormwater permit coverage. Evaluate 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 the point 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." May be used in conjunction with Items #1 and #7 with evidence of discharge to state waters.
3	Unauthorized impacts to wetlands and/or streams -Major -Minor	 **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 0.10 or greater of wetlands or open water or 301 linear feet or greater 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 the point 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.

	Type of Violation	Points (first occurrence)	Notes
4	Failure to develop a stormwater pollution prevention plan. **OR** Failure to have an 1. Approved Erosion and Sediment Control (ESC) Plan, agreement in lieu of a plan, or ESC plan prepared in accordance with annual standards and specifications. 2. Pollution prevention components 3. Approved or incorporated Stormwater Management (SWM) Plan or SWM plan prepared in accordance with annual standards and specifications.	**3** **1** **1** **1**	The lack of all the documents noted under this section is a failure to develop a SWPPP. Failure to develop a SWPPP may be established by lack of SWPPP at the site along with verbal or written confirmation from the operator that a SWPPP has not been developed or failure to provide the SWPPP in response to a Request for Information (RFI). When a SWPPP is available onsite, assess the document for required components based on a Focused or Comprehensive inspection report. In no situation should the assessment under this section (Item #4) and Item #5 exceed 3 points total.
5	Failure to Implement Permit and/or SWPPP Requirements or comply with SWM Plan or E&S Plan, not otherwise specifically listed.	**0.25**	Should be used for violations that are not specifically listed. Points are assessed per requirement. Examples of components considered may include: a copy of the coverage letter, a copy of the CGP, delegation of authority, 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). In no situation should the assessment under this section (Item #5) and Item #4 exceed 3 points total.
6	Failure to maintain SWPPP on site or make available when dormant.	**0.5**	This assumes that a SWPPP was developed; but neither the SWPPP nor the location where it can be found is onsite.
7	Failure to install or to properly install or maintain ESC or other pollution prevention measures.	**0.25 - 2**	Points are assessed for the overall site. The upper end of the range may be used when many control measures or one or more critical control measures, have not been installed or not properly installed. The lower end of the range may be used for routine maintenance issues.

	Type of Violation	Points (first occurrence)	Notes
8	Failure to install or properly install post-construction stormwater management BMPs or to complete final stabilization.	**0.5 - 2**	Points are assessed for the overall site. The upper end of the range may be used when many controls, or one or more critical controls, have not been installed correctly. Points assigned to final stabilization should be assessed when the site lacks 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.
9	Failure to conduct or record inspections, or incomplete inspections.	**0.5-1 (as noted below)** **1** **0.75** **0.5**	 No inspections Inspections do not meet required frequency. Inspection meet the required frequency, but are incomplete

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)**	