



Department of Conservation & Recreation

CONSERVING VIRGINIA'S NATURAL & RECREATIONAL RESOURCES

# **Stormwater Management Enforcement Manual**

**Virginia Soil and Water Conservation Board  
and  
Virginia Department of Conservation and Recreation**

# **STORMWATER MANAGEMENT ENFORCEMENT MANUAL**

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# **STORMWATER MANAGEMENT ENFORCEMENT MANUAL**

## **INTRODUCTION**

The purpose of the Stormwater Management Enforcement Manual is to provide the Department of Conservation and Recreation (DCR) staff with guidance for enforcing the Virginia Stormwater Management Act and Regulations. The guidance in the Manual does not carry the force of law; it is intended to provide a framework for ensuring fair and consistent enforcement of the Virginia Stormwater Management Program throughout the Commonwealth.

This Manual is not intended and cannot be relied on to create any rights, substantive or procedural, on the part of any person or entity. DCR reserves the right to modify this guidance at any time without public notice. In addition, DCR may deviate from this guidance as it deems necessary to carry out the intent of the Virginia Stormwater Management Act and Regulations.

The Manual comprises five parts. Part I is an overview of the enforcement process. Part II generally describes how the process works and refers the reader to the appropriate attached guidelines for implementing each part of the enforcement process. Part III explains the roles of the DCR Central Office of Soil and Water Conservation and the DCR Regional Watershed Offices in the enforcement process. Part IV is a flow chart illustrating the stages in the enforcement process. Part V includes attachments.

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## PART I. OVERVIEW OF ENFORCEMENT PROGRAM

### I.1. Enforcement Mission and Goal

DCR's enforcement mission is to ensure compliance with the Virginia Stormwater Management Act and Regulations in order to conserve and protect the environment and the health and well-being of the Commonwealth's citizens. In furtherance of its mission, DCR's primary goal is to take enforcement actions that require violators to comply with the law and also to remedy any harmful environmental impact caused by the noncompliance.

### I.2. Scope of Enforcement Actions

The Virginia General Assembly has enacted the Virginia Stormwater Management Act (Act) which confers upon the Soil and Water Conservation Board (Board) the duty to enforce the Act and Regulations<sup>1</sup> and the power to take administrative enforcement actions and to seek judicial sanctions against violators.<sup>2</sup>

### I.3. Nature of Enforcement Actions

DCR enforcement actions will be timely, predictable, and include sanctions when appropriate. DCR recognizes that its goal of effective enforcement may be accomplished in most cases through informal means by offering compliance assistance to the regulated community and ensuring that any noncompliance is corrected quickly. Nonetheless, DCR will use the full range of its enforcement authority as needed to deter violations and ensure that its mission to conserve and protect the environment and the health and well-being of the Commonwealth's citizens is fulfilled.

## PART II. THE ENFORCEMENT PROCESS

### II.1. Role of the Virginia Soil and Water Conservation Board

The Virginia Stormwater Management Act confers upon the Board the power to take administrative and legal actions to enforce the Act's provisions and to ensure compliance.<sup>3</sup> At its December 8, 2004 meeting, the Board delegated to DCR by unanimous motion all administrative, programmatic, and legal authorities

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<sup>1</sup> Virginia Code § 10.1-603.2:1. The Virginia Stormwater Management Program Permit Regulations are codified at 4 VAC 50-60-10 *et seq.*

<sup>2</sup> Virginia Code §§ 10.1-603.2:1.3 and -1.7 and – 603.14.

<sup>3</sup> Va. Code §§ 10.1-603.2:1 and – 603.2:1.3.

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prescribed under Chapter 372 of the 2004 Acts of the Assembly to implement the Virginia Stormwater Management Program.<sup>4</sup> The delegation does not remove the Board's authority to enforce the Act.

As a practical matter, the delegation means that DCR assumes primary responsibility for implementing the enforcement process described in Part II of this Manual with respect to the Stormwater Management Program. At the same time, the Board retains authority to enforce the Program, should it choose to do so. In addition, at the discretion of the Director, DCR may request that the Board approve specific enforcement actions, issue Orders, or conduct hearings.

## **II.2. Administrative Enforcement**

DCR is responsible for ensuring that the regulated community complies with the Virginia Stormwater Management Program requirements. To accomplish this responsibility, DCR monitors compliance by conducting inspections and offering compliance assistance when needed.

The goal of compliance assistance is to help the regulated community to comply voluntarily. Toward that end, DCR provides education, training, and technical guidance. When compliance assistance is unsuccessful, DCR initiates the enforcement process.

The majority of DCR enforcement actions are resolved by DCR through the administrative enforcement process and do not require judicial action. Administrative enforcement actions may be resolved by using either an informal or a formal process depending on the facts and circumstances of the particular case.

The administrative enforcement process outlined below is streamlined in order to achieve the greatest level of compliance possible within the regulatory community in the shortest time while making the best use of DCR's limited resources. A flow chart illustrating the stages in the enforcement process may be found in Part IV of this Manual. Specific guidelines for implementing each part of the process are included in Part V of this Manual as attachments.

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<sup>4</sup> A copy of the delegation motion is Attachment 1 to this Manual. Pursuant to Va. Code § 10.1-603.2:1.2, the Board may delegate any of the powers and duties vested by the Virginia Stormwater Management Act except for the adoption and promulgation of regulations. Delegation shall not remove from the Board authority to enforce the provisions of the Act.

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## II.2.1. Informal Administrative Enforcement

In an effort to leverage limited resources, DCR staff may exercise professional judgment regarding the circumstances surrounding an enforcement action and choose to resolve routine noncompliance quickly and efficiently through informal means that are not accompanied by sanctions (*e.g.*, civil charges or penalties).<sup>5</sup> When deemed appropriate, DCR staff may employ the procedures described below to correct noncompliance informally.

- **Verbal Warning/Inspection Report** – Under circumstances where an inspection reveals routine noncompliance that can be corrected within a reasonably short time, DCR staff may choose to issue a verbal warning accompanied by an inspection report that describes the specific problems and includes a schedule for correcting the noncompliance.

The purpose of the verbal warning is to give the regulated party responsible for the alleged noncompliance an opportunity to comply voluntarily and thus avoid sanctions that might be imposed by an escalated enforcement response. Guidelines for issuing a verbal warning and example VSMP Construction Permit Inspection Reports are provided as Attachments 2, 2A, and 2B.

- **Notice of Corrective Action** - Under circumstances where the noncompliance is significant, DCR may choose to issue a notice of corrective action (NOCA). The purpose of a NOCA is to inform the regulated party responsible for the alleged noncompliance of the facts surrounding the allegations, the applicable law, and the potential consequences for failing to address the situation, should the allegations prove true. The NOCA also gives the regulated party an opportunity to refute the allegations or to address the discrepancies described in the NOCA within a specified time.

Under circumstances where the regulated party responsible for the alleged noncompliance fails to adequately respond to the NOCA by either successfully refuting the allegations in the NOCA or correcting the cause of the allegations, the severity of the enforcement response

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<sup>5</sup> If an initial informal response is ignored and noncompliance continues, DCR staff will escalate the severity of the response as needed to achieve compliance and deter future violations. For purposes of administrative enforcement, *all* references to noncompliance are intended as only allegations of noncompliance, whether the word alleged is stated or not.



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will escalate as described below in Part II.2.2. [Formal Administrative Enforcement].

Guidelines for issuing a NOCA and an example of a NOCA are provided in Attachments 3, 3A, and 3B.

### II.2.2. Formal Administrative Enforcement

When, in DCR staff's professional judgment, circumstances surrounding an enforcement action warrant an escalated response, staff may seek to resolve the noncompliance through a formal process that may include sanctions provided for under the Virginia Stormwater Management Act.<sup>6</sup> The formal administrative enforcement process is intended to result in a legally binding obligation on the part of the regulated party to comply with the law or submit to a sanction, or both.

Any enforcement action sought to be resolved through the formal administrative process must first be incorporated into an Enforcement Action Recommendation and Plan (EARP). DCR staff will prepare the EARP for review and approval by the Soil and Water Conservation Division Director and Assistant Division Director for Stormwater prior to initiating any formal enforcement response. Guidelines for completing an EARP are included in Attachment 4 and a generic example is included in 4A. When deemed appropriate through an approved EARP, DCR staff may employ the formal procedures listed below to correct the noncompliance.

- **Consent Special Orders** - The Virginia Stormwater Management Act authorizes the Board to *settle* alleged violations of the law through a formal administrative enforcement process. Specifically, the Act provides that, *with the consent* of any person who has violated any law or regulation of the Board, the Board may issue an order (Consent Special Order) to such person requiring payment of civil charges for settlement of any alleged violation.<sup>7</sup> The maximum civil charge allowed is \$25,000 a day for each violation.<sup>8</sup>

In addition to negotiated civil charges, Consent Special Orders may also include an account of the facts of the case, citations to

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<sup>6</sup> Virginia Code § 10.1-603.2:1.7.

<sup>7</sup> Virginia Code § 10.1-603.14.D.2.

<sup>8</sup> Virginia Code § 10.1-603.14.A.

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applicable law, and an appended schedule of compliance for performing corrective actions. Under appropriate circumstances, an administrative Consent Special Order may be issued with a schedule of compliance requiring that the party or parties subject to the Order take specific actions to correct alleged violations but without paying a civil charge.<sup>9</sup>

The Consent Special Order is issued without a formal hearing, by written consent of the regulated party, and serves as the official resolution to the enforcement action.<sup>10</sup> The enforcement process is designed so that the majority of formal enforcement actions may be resolved by Consent Special Order.

As explained above in section II.1, the Board has delegated authority to issue Consent Special Orders to DCR to settle violations of the Virginia Stormwater Management Act and Regulations. Guidelines for resolving a case by means of a Consent Special Order and an example of a generic Consent Special Order are provided in Attachments 5 and 5A.

Guidelines outlining how civil charges are to be assessed at the outset of the settlement process, including Civil Charge Worksheets for calculating dollar amounts, are found in Attachment 6 of this Manual.

- **Special Orders** – The Virginia Stormwater Management Act authorizes the Board to issue Special Orders to a permittee to require compliance, but only after the permittee has been given notice and the opportunity to be heard.<sup>11</sup> In certain narrowly proscribed emergency circumstances, the Board may issue an **Emergency Special Order** before conducting a hearing.<sup>12</sup>

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<sup>9</sup> A Consent Special Order has the same statutory basis as the Special Order issued after a notice and hearing pursuant to Virginia Code § 10.1-603.2:1.7.

<sup>10</sup> Prior to execution by the Director, the Consent Order and its terms are subject to a thirty-day public notice and comment period. (See 4 VAC 40-60-660.)

<sup>11</sup> Virginia Code § 10.1- 603.2:1.7.

<sup>12</sup> Virginia Code § 10.1-603.2:1.7.

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The Board has delegated DCR authority to issue Special Orders and Emergency Special Orders. Circumstances that may require DCR or the Board to issue a Special Order or an Emergency Special Order are exceptional. As noted above, most formal enforcement actions are resolved by Consent Special Order. Guidelines applicable to Special Orders and Emergency Special Orders, as well as generic examples of each, are provided in Attachments 7, 7A, and 7B.

## **II.3. Judicial Enforcement**

The Virginia Stormwater Management Act provides for civil and criminal sanctions against violators. The Board may choose to pursue violators of the Act and Regulations and any Board-issued Permit or Order through the courts.

At the request of the Board or the Director, or both, the Office of the Attorney General of Virginia represents the Board, the Director, and DCR in any civil action to impose civil judicial sanctions. It is the responsibility of the Office of the Commonwealth's Attorney to represent program authorities other than DCR, including the localities and the Soil and Water Conservation Districts.<sup>13</sup> In addition, the Commonwealth's Attorney may seek criminal judicial sanctions against violators.

### **II.3.1. Civil Judicial Enforcement**

Under the Virginia Stormwater Management Act, the Board, DCR, or the permit-issuing authority may seek civil penalties not to exceed \$25,000 per violation<sup>14</sup> or injunctive relief,<sup>15</sup> or both. The local circuit court hears actions for civil penalties and injunctive relief.

Guidelines for referring a case for civil judicial action to the Office of the Attorney and an example memorandum in support of litigation are provided in Attachments 8 and 8A of this Manual.

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<sup>13</sup> Va. Code § 2.2-507.A provides that "Upon the request of the local attorney for the Commonwealth, the Attorney General may provide legal service in civil matters for the soil and water conservation district directors or districts."

<sup>14</sup> Pursuant to Virginia Code § 10.1-603.14.A, the Board shall adopt a schedule of penalties for use by the permit-issuing authority for enforcing the Act. At present, DCR is the permit-issuing authority.

<sup>15</sup> Virginia Code § 10.1-603.14.D.1. An injunction is a judicial remedy requiring the person to whom it is directed to do or refrain from doing a particular thing.

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## II.3.2. Criminal Judicial Enforcement

Under the Virginia Stormwater Management Act violators with the requisite criminal intent (*i.e.*, the violation is intentional, willful, or knowing) may be subject to serious criminal sanctions. Alleged violations may be prosecuted by the Commonwealth's Attorney in the locality where the alleged criminal act occurred. EPA may also pursue criminal prosecution of violators through the Justice Department.

## II.4. Virginia Administrative Process Act

The Virginia Administrative Process Act<sup>16</sup> supplements the Virginia Stormwater Management Act with procedures for adopting regulations, adjudicating or deciding cases (*e.g.*, making a decision on a permit application or an enforcement matter) and for judicial review of Agency action.<sup>17</sup>

When acting in an adjudicative or decision-making role with respect to enforcement matters, the Board or DCR may need to make a determination as to whether a regulated party is in violation of any law, regulation, or permit.<sup>18</sup> The Administrative Process Act defines this kind of determination as a case decision.<sup>19</sup> Case decisions are a necessary component of the enforcement process. Special Orders, Emergency Special Orders, and Consent Special Orders, discussed in Section II.1.2 above, are examples of case decisions.

The procedures applicable to making case decisions are intended to ensure that fair treatment is afforded to the regulatory community as guaranteed by the Constitution of Virginia.<sup>20</sup> To that end, the Administrative Process Act requires, among other things,

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<sup>16</sup> Virginia Code § 2.2-4000, *et seq.*

<sup>17</sup> The Administrative Process Act is, in turn, supplemented by the Virginia Supreme Court's procedural rules for judicial review of Agency action.

Pursuant to Va. Code § 10.1.603.2:1.6, the Board may adopt rules governing procedures respecting hearings; filing reports; issuing permits or orders; and all other procedural matters.

<sup>18</sup> Virginia's courts interpret this definition broadly to include any specific application by the government of facts to law.

<sup>19</sup> Virginia Code § 2.2 – 4001 defines “case or “case decision” to mean “any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.”

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that the decision-maker (*e.g.*, the Board or DCR) conduct either an informal fact-finding proceeding or a formal hearing, depending on the circumstances, prior to issuing any case decision.<sup>21</sup> These proceedings allow the regulated party an opportunity to be heard before any decision is made affecting his or her interests.<sup>22</sup>

Typically, routine case decisions are made pursuant to an informal fact-finding proceeding. For example, the party responsible for carrying out land-disturbing activities at a construction site may request an informal fact-finding hearing to resolve a dispute with DCR as to whether coverage under the General Permit<sup>23</sup> is required at that site. The regulated party and the agency may agree to waive the informal fact-finding proceeding and go directly to a formal hearing. In either case, the proceeding is designed to enable the decision-maker to reach a fully-informed decision based on the facts and the law.

Unilateral enforcement actions such as Special Orders and Emergency Special Orders require formal hearings.<sup>24</sup> Consent Special Orders, the terms of which are negotiated with the regulated party as opposed to being issued unilaterally by the Board, allow the regulated party to waive the hearing requirement altogether.

Guidelines applicable to informal fact-finding proceedings are included in Attachment 9 and an outline of the process for conducting an informal fact-finding proceeding is provided in Attachment 9A. Guidelines for conducting a formal hearing are included in Attachment 10 and an outline of the process for conducting a formal hearing is provided in Attachment 10A.

### **PART III. COORDINATION BETWEEN THE DCR CENTRAL OFFICE AND THE REGIONAL WATERSHED OFFICES**

An effective enforcement program is essential to ensuring that the regulated community complies with the law. The DCR Central Office staff and the Regional Watershed staff each play critical roles in the enforcement process.

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<sup>20</sup> Constitution of Virginia, Article I, Section 11, stating that “no person shall be deprived of his life, liberty, or property without due process of law.”

<sup>21</sup> Virginia Code §§ 2.2 -4019 and -4020.

<sup>22</sup> As noted above, the enforcement process is designed so that the majority of enforcement actions are resolved by consent and thus do not require an informal fact-finding proceeding or a formal hearing.

<sup>23</sup> General Permit for the Discharges of Stormwater from Construction Activities, 4 VAC 50-60-10.

<sup>24</sup> The Board or DCR may issue a case decision. The Board issues Special Orders and Emergency Special Orders.

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## **III.1. Regional Watershed Offices**

The Regional Watershed field staff is responsible for helping to ensure compliance with the Virginia Stormwater Management Program. The field staff monitors compliance and offers compliance assistance when needed with the goal of helping the regulated community comply voluntarily. In furtherance of that goal, field staff provides education, training, and technical assistance.

Field staff plays an equally important role in the enforcement process by detecting violations, gathering evidence for pursuing violators, and initiating the informal enforcement process by issuing Verbal Warnings and Notices of Corrective Action. With respect to the formal enforcement process, field staff may pursue settlement of alleged violations of the Virginia Stormwater Management Program, in cases where the civil charges are less than \$15,000 through issuance of Consent Special Orders.

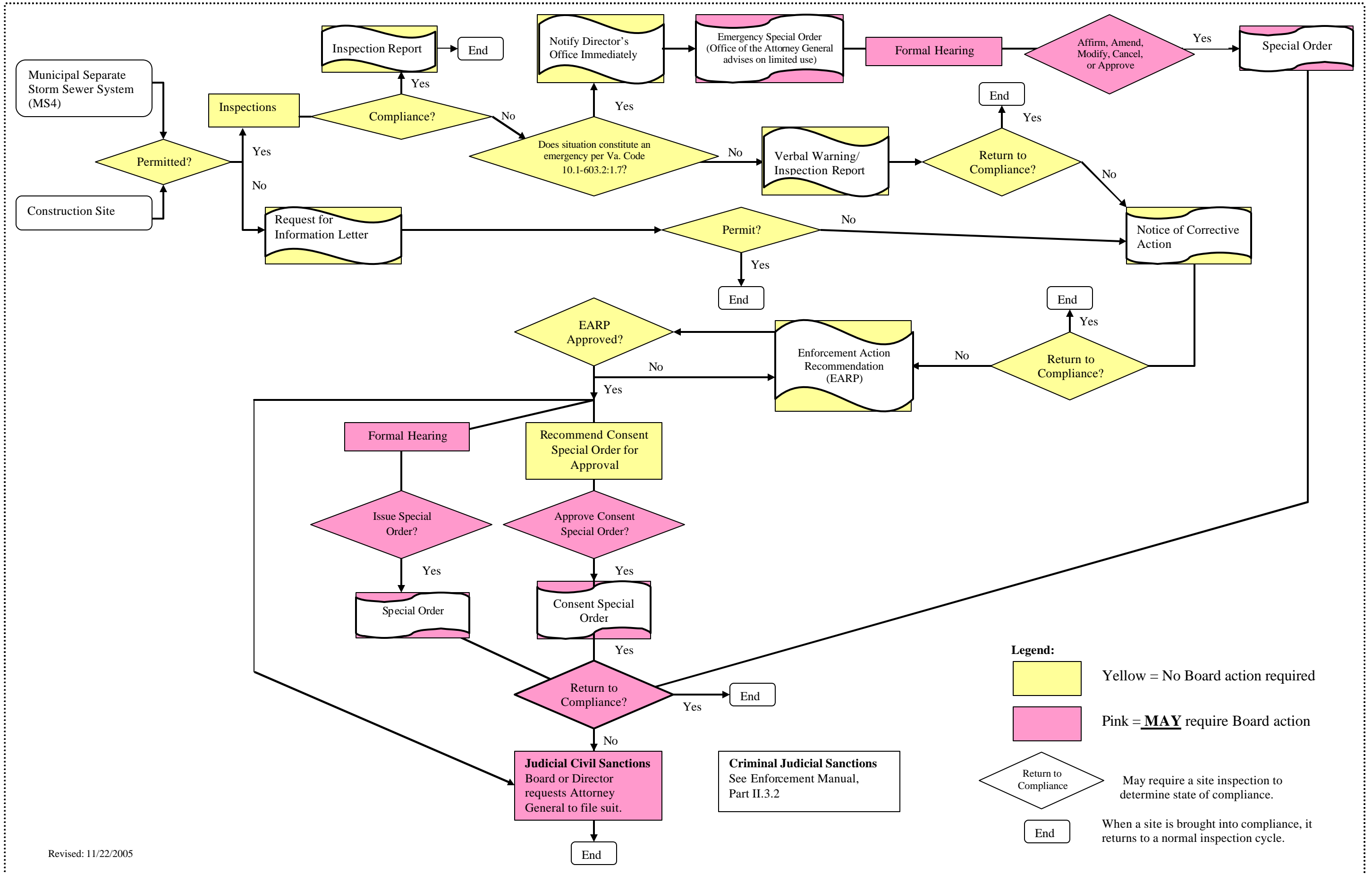
## **III.2. Central Office Enforcement**

The Central Office Enforcement staff supports the Regional Watershed field staff in all compliance and enforcement activities. As part of that support, Central Office Enforcement staff develops enforcement guidance and trains Regional Watershed field staff to apply the guidance to specific situations and advises field staff on enforcement strategy and any legal issues that may arise.

In addition, Central Office Enforcement staff reviews, comments, and approves field staff's proposed enforcement recommendations and accompanying materials to ensure that recommended actions are fair and consistent with past enforcement actions across the State, as well as sufficient to resolve the noncompliance and remedy any harmful impact. The review process is also intended to ensure that the written materials supporting enforcement actions are factually accurate and technically correct and of high quality in form and content.

The Stormwater Compliance & Enforcement Manager takes primary responsibility for pursuing specific categories of formal enforcement actions including negotiating Consent Special Orders with civil charges over \$15,000, preparing for formal and informal hearings, and providing litigation assistance to the Office of the Attorney General.

# DCR STORMWATER MANAGEMENT ENFORCEMENT FLOWCHART



**Legend:**

- Yellow = No Board action required
- Pink = **MAY** require Board action
- Return to Compliance May require a site inspection to determine state of compliance.
- End When a site is brought into compliance, it returns to a normal inspection cycle.

Revised: 11/22/2005

REPLY TO:  
DCR/Watershed Office Contact information:



Department of Conservation & Recreation  
CONSERVING VIRGINIA'S NATURAL AND RECREATIONAL RESOURCES

**VSMP CONSTRUCTION PERMIT INSPECTION REPORT ATTACHMENT 2A**

Project Name: \_\_\_\_\_ Permit Number: \_\_\_\_\_  
 Project Address: \_\_\_\_\_ County/City: \_\_\_\_\_  
 Project Operator: \_\_\_\_\_ Operator Telephone: \_\_\_\_\_  
 Operator Address: \_\_\_\_\_ County/City: \_\_\_\_\_ ZIP: \_\_\_\_\_  
 Inspector Name: \_\_\_\_\_ Inspection Date: \_\_\_\_\_ Time: \_\_\_\_\_

TYPE OF INSPECTION: Routine  Re-inspection  Complaint  Termination

Item#		Yes	No	Comments/Notes
1	Has a complete registration statement been submitted? 4VAC50-60-1150			
2	Is a coverage letter and permit on-site? § II B.2.			
3	Is SWPPP signed and available on-site? § II			
4	Is an approved Erosion and Sediment Control Plan been incorporated and is available on-site? § II			
5	Are contractors identified in SWPPP? § II C.4			
6	Has detailed site map? § II D.1.g. (1) – (9)			
7	Does the SWPPP contain all required items? § II			
8	Are stabilization practices implemented and effective? § II D.2.a.(1)			
9	Are dates of major grading activities recorded? § II D.2.a.(1) (a)			
10	Are structural practices in place and effective? § II D.2.a.(2)			
11	Have sediment escapes been removed at a frequency sufficient to minimize off-site impacts? § II D.2.b.(2)			
12	Have litter, debris, and chemicals been controlled from becoming a pollutant source? § II D.2.b.(3)			
13	Have post-construction stormwater management practices been installed and effective? § II D.2.c.(1 & 2)			
14	Is discharge from stormwater facilities or conveyance systems to an adequate channel? § II D.2.c.(3)			
15	Are there significant impacts to receiving waters? § II D.2.c.(3)			
16	Are public roads cleaned as required? § II D.2.d.(2)			
17	Are controls being maintained? § II D.3.a.			
18	Are inspections conducted by “Qualified Personnel”? § II D.4.			
19	Are inspections conducted at required frequency? § II D.4.a.			
20	Do inspection reports summarize the scope of the inspections including corrective actions? § II D.4.e. (1-5)			

**RECOMMENDED CORRECTIVE ACTION**



REPLY TO:  
DCR/Watershed Office Contact information:



Department of Conservation & Recreation  
CONSERVING VIRGINIA'S NATURAL AND RECREATIONAL RESOURCES

**STORMWATER PROGRAMS SITE INSPECTION REPORT**

Project Name: \_\_\_\_\_ Permit Number: \_\_\_\_\_  
Project Address: \_\_\_\_\_ County/City: \_\_\_\_\_  
Inspector Name: \_\_\_\_\_ Inspection Date: \_\_\_\_\_ Time: \_\_\_\_\_

**STAGE OF CONSTRUCTION**

- |   |   |  |
|---|---|--|
| <i>Pre-Construction Conference</i> <input type="checkbox"/> | <i>Building Construction</i> <input type="checkbox"/> | <i>Construction of SWM Facilities</i> <input type="checkbox"/> |
| <i>Clearing &amp; Grubbing</i> <input type="checkbox"/>     | <i>Finish Grading</i> <input type="checkbox"/>        | <i>Maintenance of SWM Facilities</i> <input type="checkbox"/>  |
| <i>Rough Grading</i> <input type="checkbox"/>               | <i>Final Stabilization</i> <input type="checkbox"/>   | <i>Other</i> _____ <input type="checkbox"/>                    |

Item#	State Regulation <sup>(1)</sup>			Description and Location of condition observed <sup>(2)</sup> , Recommended Corrective Actions, and Other Comments/Notes
		Initial	Repeat	

(1) Refers to applicable regulation found in the most recent publication of the *Virginia Erosion and Sediment Control Regulations* (4VAC50-30) or the *Virginia Stormwater Management Program Permit Regulations* (4VAC50-60).  
(2) Note whether or not off-site damage resulting from the condition observed was evident during the inspection.

**RECOMMENDED CORRECTIVE ACTION DEADLINE DATE:** \_\_\_\_\_ **Re-inspection Date:** \_\_\_\_\_

The recommended corrective action deadline date applies to all conditions noted on this report unless otherwise noted. If listed condition(s) currently constitute non-compliance and/or corrective actions are not completed by the deadline, a **NOTICE OF CORRECTIVE ACTION** and/or other enforcement actions may be issued to the entity responsible for ensuring compliance on the above project.

Inspector: \_\_\_\_\_  
Signature Date

Acknowledgement of on-site receipt: \_\_\_\_\_  
Print Name Signature Date



# VSMP CONSTRUCTION PERMIT INSPECTION REPORT Attachment 2B

Project Name: \_\_\_\_\_ Permit Number: \_\_\_\_\_  
 Project Address: \_\_\_\_\_ County/City: \_\_\_\_\_  
 Project Operator: \_\_\_\_\_ Operator Telephone: \_\_\_\_\_  
 Operator Address: \_\_\_\_\_ County/City: \_\_\_\_\_ ZIP: \_\_\_\_\_  
 Inspector Name: \_\_\_\_\_ Inspection Date: \_\_\_\_\_ Time: \_\_\_\_\_

**Legal Status** (Check one only)

Federal  State  Public  Private

**Nature of Project** (Check all that apply)

Commercial  Industrial  Residential  Road  Utility  Agriculture  Other: \_\_\_\_\_

**General Stormwater Pollution Prevention Plan Information**

	Yes	No		Yes	No
Copy of permit			SWPPP prepared and available on site		
Copy of permit coverage letter			SWPPP signed/certified by operator		
Approved ESC plan or agreement in lieu of a plan			Approved stormwater management plan (if applicable)		

**Specific SWPPP Information**

(If information is not applicable indicate so in comments/notes)

SWPPP CONTENT		Yes	No	Comments/Notes
§ II D.1.a	Description & function of project			
§ II D.1.b	Sequence & timing of land-disturbance activities			
§ II D.1.c	Estimate of total land-disturbance area including off-site areas			
§ II D.1.d	Description of potential pollution sources (fuel, chemical storage, sanitary waste, etc.)			
§ II D.1.e	Identification of nearest receiving waters			
§ II D.1.f	Location & description of industrial activity discharges covered by this permit (dedicated asphalt & concrete plants)			
§ II D.1.g	Site map indicating:			
	1. Direction of final storm flows & slopes			
	2. Areas of disturbed & undisturbed sites			
	3. Location of controls			
	4. Location of stabilization practices			
	5. Surface body water including wetlands			
	6. Location of stormwater discharges			
	7. Location of off-site areas			
	8. Location of potential pollution sources			
	9. Areas of final stabilization			

<b>POLLUTANT REDUCTION CONTROLS</b>		<b>Yes</b>	<b>No</b>	<b>Comments/Notes</b>
<b>§ II D.2.</b>	<i>Description of pollution controls to be implemented &amp; operator responsible for implementation of the control measures</i>			
<b>§ II</b>	<i>For ESC plans incorporated by reference: plan is approved by the locality or by appropriate plan-approving authority</i>			
<b>EROSION AND SEDIMENT CONTROLS</b>		<b>Yes</b>	<b>No</b>	<b>Comments/Notes</b>
<b>§ II D.2.a. (1)</b>	<i>Stabilization practices</i>			
	(a) Dates of major grading activities			
	Dates when grading temporarily or permanently cease			
	Dates when stabilization measures are initiated			
	(b) Stabilization measures initiated within 7 days after construction has temporarily or permanently ceased {except as provided in §II D.2.a (1) (c), (d), & (e)}			
<b>§ II D.2.a. (2)</b>	<i>Structural practices</i>			
	(a) Sediment basin for disturbed areas of 3 acres or greater or equivalent control measures provided until final stabilization			
	(b) Where basins are not attainable, smaller sediment traps or at a minimum silt fence, vegetative buffer strips or equivalent sediment controls are installed for all down and side slope boundaries as appropriate			
	(c) Sediment traps are used for areas < 3 acres or at a minimum silt fence, vegetative buffer strips or equivalent sediment controls are required for all down and side slope boundaries as appropriate			
<b>§ II D.2.b.</b>	<i>Management practices</i>			
	(1) Control measures properly selected, installed and maintained			
	(2) Off-site sediment accumulation removed to minimize off-site impacts			
	(3) Litter, construction debris, and chemicals prevented from becoming a pollutant source			
<b>§ II D.2.c.</b>	<i>Stormwater management</i>			
	(1) Calculations supporting all post-construction stormwater management measures to be installed and measures designed and installed in accordance with applicable local and state requirements			

	(2) Technical explanation for practices selected to control pollutants and flows that exceed predevelopment levels			
	(3) Outflows from stormwater facility or conveyance system discharge to an adequate channel (no significant changes in the hydrologic regime of receiving water)			
<b>§ II D.2.d.</b>	<i>Other controls</i>			
	(1) Measures to prevent discharge of solid materials to surface waters			
	(2) Construction entrance (MS-17)			
	(3) Compliance with state or local waste disposal, sanitary sewer or septic system regulations			
	(4) Description of construction and waste materials, updates, controls to reduce storage, and storage practices			
	(5) Description of pollutant sources from areas other than construction (dedicated asphalt or concrete plants) and control measures to be used at those sites			
<b>§ II D.2.e.</b>	<i>SWPPP consistent with applicable requirements for ESC &amp; SW management</i>			
<b>MAINTENANCE OF CONTROLS</b>		<b>Yes</b>	<b>No</b>	<i>Comments/Notes</i>
<b>§ II D.3.a</b>	<i>Description and schedule of procedures to maintain all controls in effective operational condition</i>			
<b>§ II D.4.b.</b>	<i>Existing BMPs modified or additional BMPs installed prior to next storm event. (If impractical to implement prior to storm event, documented in SWPPP)</i>			

<b>INSPECTIONS</b>		<b>Yes</b>	<b>No</b>	<i>Comments/Notes</i>
<b>§ II D.4.</b>	<i>Conducted by "Qualified Personnel"</i>			
<b>§ II D.4.a.</b>	<i>Once every 14 days and within 48 hours after any runoff producing storm event</i>			
<b>§ II D.4.b.</b>	<i>Inspection of discharge locations to ascertain whether ESC measures are effective in preventing significant impact to receiving waters</i>			
<b>§ II D.4.c.</b>	<i>Linear projects inspected 0.25 miles above and below each access point</i>			
<b>§ II D.4.d.</b>	<i>Based on results of inspections, the site, activity description, and pollution prevention measures are modified as appropriate within 7 calendar days following the inspection</i>			

<b>§ II D.4.e</b>	<i>Report summarizing scope of inspection</i>			
	1. Locations of pollutant discharges			
	2. Locations of BMPs needing maintenance			
	3. Locations of inadequate or failed BMPs			
	4. Locations where BMPs are needed			
	5. Corrective action required			

<b>NONSTORMWATER DISCHARGE MANAGEMENT</b>		<b>Yes</b>	<b>No</b>	<i>Comments/Notes</i>
<b>§ II D.5</b>	<i>SWPPP identifies all allowable discharges</i>			
	a. Fire fighting controls			
	b. Fire hydrant flushing			
	c. Vehicle washing (no detergent)			
	d. Water used for dust control			
	e. Potable water source			
	f. Water for hydrostatic testing of pipelines			
	g. Building washing (no detergent)			
	h. Pavement washwaters (no hazardous materials or detergent used on pavement)			
	i. Air conditioner or compressor condensation is uncontaminated			
	j. Uncontaminated ground water or springs			
	k. Foundation or footing drains			
	l. Uncontaminated excavation dewatering			
	m. Landscape irrigation			

## STORMWATER PROGRAMS SITE INSPECTION REPORT

Project Name: \_\_\_\_\_ Permit Number: \_\_\_\_\_  
 Project Address: \_\_\_\_\_ County/City: \_\_\_\_\_  
 Inspector Name: \_\_\_\_\_ Inspection Date: \_\_\_\_\_ Time: \_\_\_\_\_

### STAGE OF CONSTRUCTION

- |  |  |   |
|--|--|---|
| Pre-Construction Conference <input type="checkbox"/> | Building Construction <input type="checkbox"/> | Construction of SWM Facilities <input type="checkbox"/> |
| Clearing & Grubbing <input type="checkbox"/>         | Finish Grading <input type="checkbox"/>        | Maintenance of SWM Facilities <input type="checkbox"/>  |
| Rough Grading <input type="checkbox"/>               | Final Stabilization <input type="checkbox"/>   | Other _____ <input type="checkbox"/>                    |

Item#	State Regulation <sup>(1)</sup>			Description and Location of condition observed <sup>(2)</sup> , Recommended Corrective Actions, and Other Comments/Notes
		Initial	Repeat	

(1) Refers to applicable regulation found in the most recent publication of the *Virginia Erosion and Sediment Control Regulations* (4VAC50-30) or the *Virginia Stormwater Management Program Permit Regulations* (4VAC50-60).  
 (2) Note whether or not off-site damage resulting from the condition observed was evident during the inspection.

**RECOMMENDED CORRECTIVE ACTION DEADLINE DATE:** \_\_\_\_\_ **Re-inspection Date:** \_\_\_\_\_

The recommended corrective action deadline date applies to all conditions noted on this report unless otherwise noted. If listed condition(s) currently constitute non-compliance and/or corrective actions are not completed by the deadline, a **NOTICE OF CORRECTIVE ACTION** and/or other enforcement actions may be issued to the entity responsible for ensuring compliance on the above project.

Inspector: \_\_\_\_\_  

Signature
Date

Acknowledgement of on-site receipt: \_\_\_\_\_  

Print Name
Signature
Date

*[PRINT ON DCR LETTERHEAD]*

**REQUEST FOR INFORMATION**

*[Date]*

**Certified Mail  
Return Receipt Requested  
*[OR BY HAND]***

*[Fill in Contact's name and address.]*

RE: *[Fill in the Site Name and location.]*  
**VSMP Permit Registration Statement and Fee**

Dear *[Fill in contact's name.]*:

On *[Fill in date of inspection.]* Department of Conservation and Recreation (DCR) staff inspected the *[Fill in the name of construction site.]* for compliance with the Virginia Stormwater Management Program (VSMP). During the inspection, staff noted that *[Fill in the name of the person responsible for the land-disturbing activities (i.e., either the owner or developer of the project or the general contractor.)]* had not registered the site for coverage under the VSMP General Permit for Discharges of Stormwater for Construction Activities.

Also at the time of the inspection, DCR staff provided *[Fill in the name and title of the person with whom the inspector left the registration material.]* with a copy of the registration statement and instructions, as well as a permit application fee form and other pertinent information. Please read the information and determine whether the site should be registered for coverage under the VSMP General Permit. For your convenience, outlined below are the applicability requirements for the VSMP General Permit as set forth in the Virginia Stormwater Management Act and Regulations.

The Virginia Stormwater Management Act, Virginia Code § 10.1-603.2:2, prohibits stormwater discharges from a land-disturbing activity without a permit. The VSMP Permit Regulations, 4 VAC 50-60-310.A, state that, except in compliance with a VSMP permit issued by the Board, it shall be unlawful for any person to discharge stormwater into state waters from land-disturbing activities. **Pursuant to 4 VAC 50-60-380.B.1, land-disturbing activities that are either greater than one acre or exceed an area of 2,500 square feet in jurisdictions subject to the Chesapeake Bay Preservation Act and Regulations must be registered for coverage under the VSMP General Permit.**

*[Fill in site name.]*

Request for Information

Page 2

Please contact *[Fill in Inspector's name.]* within 3 days of the date of this letter to explain why the site is not required to obtain coverage under the General Permit. Otherwise, please submit a completed Registration Statement and fee to the Department of Conservation and Recreation by *[Fill in date; date should be 7 business days of the date of this letter].*

Please submit the Registration Statement to the following address:

Department of Conservation and Recreation  
Soil and Water Conservation Division  
Stormwater Permitting  
203 Governor Street, Suite 206  
Richmond VA 23219

The Application Fee Form and check or money order payable to the "Treasurer of Virginia" should be submitted to the following address:

Department of Conservation and Recreation  
Division of Finance, Accounts Payable  
203 Governor Street  
Richmond VA 23219

If you submit a Registration Statement and fee, please notify *[Fill in the Inspector's name.]* by faxing a copy of the cover letter accompanying the registration Statement to DCR at *[Fill in Inspector's fax number.]*

The purpose of this letter is to provide you with information DCR has gathered regarding the *[Fill in name of site.]* and to solicit additional information from you regarding conditions observed at the site. This letter is not a case decision as defined in the Virginia Administrative Process Act, Virginia Code § 2.2 - 4001.

Sincerely,

(DCR staff name  
and title)

cc: [File; appropriate DCR staff]



**GUIDELINES APPLICABLE TO NOTICES OF CORRECTIVE ACTION**

When DCR field staff's initial attempts to secure a voluntary return to compliance are unsuccessful, staff may escalate the enforcement response by issuing a Notice of Corrective Action (NOCA). Examples of situations where issuance of a NOCA is appropriate include the following:

- (i) When the regulated party has failed to correct the noncompliance at the site pursuant to a prior Verbal Warning;
- (ii) Where inspections of a construction site indicate a continuing pattern of various routine noncompliance after DCR has issued one or more Verbal Warnings for specific noncompliance; or
- (iii) Noncompliance at a construction site is causing an adverse impact to human health or the environment such as a discharge of sediment to a stream or wetland. This situation does not necessarily require prior issuance of a Verbal Warning.

The NOCA is not a *case decision* as defined by the Virginia Administrative Process Act and, as such, is not subject to appeal in the courts and does not entitle the recipient to any additional due process prior to issuance.<sup>1</sup> The purpose of a NOCA is to inform the regulated party responsible for the alleged noncompliance of the facts surrounding the allegations, the applicable law, and the potential consequences for failing to address the situation, should the allegations prove true. The NOCA also gives the regulated party an opportunity to refute the allegations or to address the discrepancies described in the NOCA within a specified time.

It is important that field staff gathers sufficient evidence throughout the informal enforcement process to support escalating the enforcement response, should the need arise. For this reason, field staff should carefully document all of the steps of the informal process in inspection reports, photographs, telephones logs, and field notes.

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<sup>1</sup> Virginia Code § 2.2 – 4001 defines “case” or “case decision” to mean “any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.”

Whether a NOCA is warranted in a particular situation is a matter of professional judgment on the part of DCR field staff. These guidelines are intended to help DCR field staff exercise sound professional judgment throughout the informal enforcement process. They are not intended to substitute for professional judgment; but rather are intended to allow DCR field staff sufficient latitude to make informed, responsible choices based on the facts of each case.

Outlined below are the steps in the process for issuing a NOCA.

### **The NOCA Process**

- Except for special circumstances (*e.g.*, ongoing adverse impacts to human health or the environment), past noncompliance should be documented in one or more Verbal Warning/VSMP Construction Permit Inspection Report issued pursuant to the guidelines in this Manual. (Please see Attachments 2, 2A, and 2B of this Manual.
- Explain to the responsible party in easily understood terms (i) any noncompliance identified during the site inspection or investigation and (ii) describe specific measures needed to achieve compliance. Also explain any (i) documented history of noncompliance at the site, (ii) your decision to issue NOCA, (iii) the reasons for that decision, and (iv) the potential consequences, should the responsible party fail to complete the measures specified in the Notice within the allotted time (*i.e.*, may result in escalation to formal enforcement, such as an Order with a civil charge).
- Complete the VSMP Construction Permit Inspection Report. It may be appropriate to use the longer version (Attachment 1B) at this juncture.
- Draft the NOCA following the directions in Attachment 3A.
- Either deliver the approved NOCA by hand or send it by certified mail.
- Conduct a follow-up inspection to ensure compliance. Under circumstances where the responsible party has not corrected the problem or where significant new noncompliance is identified, escalate the enforcement response.
- Issue a second NOCA as an escalated response, if the responsible party has good reason for needing a short extension to complete the agreed upon measures or if the new noncompliance is minor and can be corrected immediately.
- Always use professional judgment to make the best use of limited resources and remember that the primary goal of enforcement is to ensure that the responsible party complies with the law and remedies any harmful environmental impact caused by the noncompliance.
- If professional judgment dictates that issuing a second NOCA is not appropriate, initiate the formal enforcement process by discussing the facts of case with Regional Manager.
- If the Regional Watershed Manager agrees that formal enforcement action is appropriate, complete the EARP according to the guidelines in Attachment 4 of this Manual.

**[PRINT ON DCR LETTER HEAD]**

**NOTICE OF CORRECTIVE ACTION**

[Date]

**Certified Mail  
Return Receipt Requested  
[OR BY HAND]**

[Fill in Contact's name and address.]

RE: [Fill in the Site Name and location.]

Dear [Fill in contact's name.]:

On [Fill in date of inspection.] Department of Conservation and Recreation (DCR) staff inspected the [Fill in the name of construction site and Permit number.] for compliance with the Virginia Stormwater Management Program (VSMP). During the inspection, staff observed the following conditions:

[Describe the offending conditions. Use bullets. For example:

- A significant amount of sediment had left the site and accumulated in an adjacent wetlands area.
- At the time of inspection, a review of facility records revealed that inspections had not been performed at the required frequency.
- The Stormwater Pollution Prevention Plan (SWPPP) was not available onsite at the time of inspection.]

An inspection report documenting these observations is attached.

[Include any relevant facts that may help explain the situation (e.g., the person with whom you spoke, what was said, etc.) [Include if relevant and helpful--During prior inspections conducted on {Give dates of any previous inspections}], staff observed similar conditions. Please see the attached inspection reports.]

[Include relevant citations.]

The VSMP Regulations at [Fill in citation.] require that [State requirement]. [For example:

- The VSMP Regulations at 4 VAC 50 -60 -1170 at Section II(Stormwater Pollution Prevention Plan)D.2.b.(2) requires that escaped sediments be removed to minimize off site impacts;

*[Fill in site name.]*

Notice of Corrective Action

Page 2

- *The VSMP Regulations at 4 VAC 50 -60 -1170 at Section II (Stormwater Pollution Prevention Plan) D.4.a requires that the construction site be inspected every 14 days at a minimum, and within 48 hours of any runoff producing rain event; and*
- *The VSMP Regulations at 4 VAC 50-60-1170 Section II (Stormwater Pollution Prevention Plan) B.2 requires that the SWPPP be retained on-site during the construction process.]*

While DCR makes no determination at this time regarding the observations documented by the staff, there appear to be discrepancies between the conditions observed at the *[Fill in name of site.]* and the requirements of the VSMP governing those conditions. Please contact *[Fill in Inspector's name.]* within five days of the date of this letter *[Fill in date.]* either to explain the apparent discrepancies or to describe any relevant changes in the conditions at the site. *[Allow five days if you deliver the NOCA by hand and 10 days for certified mail].*

The purpose of this letter is to provide you with information DCR has gathered regarding the *[Fill in name of site.]* and to solicit additional information from you regarding conditions observed at the site. This letter is not a case decision as defined in the Virginia Administrative Process Act, Virginia Code § 2.2 - 4001.

If the alleged discrepancies described above cannot be resolved to the satisfaction of DCR within the time allotted, DCR will pursue formal enforcement action regarding the allegations in this NOCA. The Virginia Stormwater Management Act provides for civil penalties of up to \$25,000 per day for any violation of the Act, the VSMP Regulations, or any condition of a permit issued pursuant to the Act.

Sincerely,

*[Regional Watershed Manager]*

cc: *[File; appropriate DCR staff]*

*[PRINT ON DCR LETTERHEAD]*

**FINAL REQUEST FOR INFORMATION**

*[Date]*

**Certified Mail  
Return Receipt Requested  
*[OR BY HAND]***

*[Fill in Contact's name and address.]*

RE: *[Fill in the Site Name and location.]*  
**VSMP Permit Registration and Fee**

Dear *[Fill in contact's name.]*:

On *[Fill in date of inspection.]* Department of Conservation and Recreation (DCR) staff inspected the *[Fill in the name of construction site.]* for compliance with the Virginia Stormwater Management Program (VSMP). During the inspection, staff noted that *[Fill in the name of the person responsible for the land-disturbing activities (i.e, either the owner or developer of the project or the general contractor.)]* had not registered the site for coverage under the VSMP General Permit for Discharges of Stormwater for Construction Activities.

Also at the time of the inspection, DCR staff provided *[Fill in the name and title of the person with whom the inspector left the registration material]* with a copy of the registration statement and instructions, as well as a permit application fee form and other pertinent information. On *[Fill in the date of the Request for Information letter.]*, DCR sent you a **Request for Information letter asking that you determine whether the site should be registered for coverage under the General permit and that you respond the DCR by *[Fill in the date that you should have received the response.]* To date, DCR has received no response from you.**

As noted in DCR's Request for Information letter, the Virginia Stormwater Management Act, Virginia Code § 10.1-603.2:2, prohibits stormwater discharges from a land-disturbing activity without a permit. The VSMP Permit Regulations, 4 VAC 50-60-310.A, state that, except in compliance with a VSMP permit issued by the Board, it shall be unlawful for any person to discharge stormwater into state waters from land-disturbing activities. **Pursuant to 4 VAC 50-60-380.B.1, land-disturbing activities that are either greater than one acre or exceed an area of 2,500 square feet in jurisdictions subject to the Chesapeake Bay Preservation Act and Regulations must be registered for coverage under the VSMP General Permit.**

*[Fill in site name.]*

Final Request for Information

Page 2

Please contact *[Fill in Inspector's name.]* within five days of the date of this letter *[Fill in date.]* to explain why the site is not required to obtain coverage under the General Permit. Otherwise, please submit a completed Registration Statement and fee to the Department of Conservation and Recreation.

Please submit the Registration Statement to the following address:

Department of Conservation and Recreation  
Soil and Water Conservation Division  
Stormwater Permitting  
203 Governor Street, Suite 206  
Richmond VA 23219

The Application Fee Form and check or money order payable to the "Treasurer of Virginia" should be submitted to the following address:

Department of Conservation and Recreation  
Division of Finance, Accounts Payable  
203 Governor Street  
Richmond VA 23219

If you submit a Registration Statement and fee, please notify *[Fill in the Inspector's name.]* by faxing a copy of the cover letter for the submission to DCR at *[Fill in Inspector's fax number.]*

The purpose of this letter is to provide you with information DCR has gathered regarding the *[Fill in name of site.]* and to solicit additional information from you regarding conditions observed at the site. This letter is not a case decision as defined in the Virginia Administrative Process Act, Virginia Code § 2.2 - 4001.

If the issue regarding the registration statement described above cannot be resolved to the satisfaction of DCR within the time allotted, DCR will pursue formal enforcement action regarding the allegations in this Notice of Corrective Action. The Virginia Stormwater Management Act provides for civil penalties of up to \$25,000 per day for any violation of the Act, the VSMP Regulations, or any condition of a permit issued pursuant to the Act.

Sincerely,

*[Regional Watershed Manager name  
and title]*

cc: *[File; appropriate DCR staff]*

**GUIDELINES FOR COMPLETING THE ENFORCEMENT ACTION  
RECOMMENDATION AND PLAN**

The enforcement action recommendation and plan (EARP) is an internal planning tool that provides DCR management the means to review and approve any formal enforcement action prior its initiation. In the EARP, staff briefly summarizes the facts of the case and recommends a strategy for resolving the noncompliance, including any monetary sanctions that may be appropriate. DCR management may either accept the recommendation, amend it, or propose an alternative resolution.

**An approved EARP signed by DCR management must be in place before staff pursues a formal enforcement action.** The EARP and any supporting materials are exempt from the Virginia Freedom of Information Act <sup>1</sup> pursuant to Virginia Code § 10.1-603.12:2 until a sanction is determined (*e.g.*, the regulated party has signed the Consent Order or a unilateral sanction is imposed.)<sup>2</sup>

With respect to formal enforcement actions, Regional Watershed field staff pursues resolution of routine enforcement cases with civil charges of \$15,000 or less. The Central Office Enforcement staff supports the Regional Watershed field staff in all compliance and enforcement activities. Part of that support includes advising field staff on enforcement strategies, negotiations tactics, and any legal issues that may arise.

**The EARP Process for Regional Watershed Field Staff**

- Past noncompliance should be documented in one or more Verbal Warning/VSMP Construction Permit Inspection Reports and at least one Notice of Corrective Action issued pursuant to the guidelines in this Manual before escalating the enforcement response.

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<sup>1</sup> Virginia Code § 2.2-3700 *et seq.*

<sup>2</sup> Virginia Code § 10.1-603.12:2 provides that disclosure of records of DCR, the Board, or the permit-issuing authority relating to (i) active federal enforcement actions that are considered confidential under federal law; (ii) enforcement strategies, including proposed sanctions for enforcement actions, and (iii) any secret formulae...is prohibited.

- Also before escalating the enforcement response, discuss the situation with the Regional Watershed Manager.<sup>3</sup> If the Regional Watershed Manager agrees that escalating the enforcement response is appropriate, begin drafting an EARP and a draft enforcement response (*e.g.*, a draft Stop Work Order or a draft Consent Special Order) according to the guidelines in this Manual.<sup>4</sup>
- Submit an electronic copy of the draft EARP, draft enforcement response (*e.g.*, Consent Special Order), and any supporting materials to the Stormwater Compliance and Enforcement Manager for review and approval. Upon the draft EARP's approval, submit it to the Regional Watershed Manager for signature.
- Assemble the enforcement package including: (i) the EARP, *signed by the Regional Watershed Manager*; (ii) a draft of the recommended enforcement response (*e.g.*, a draft Consent Special Order); and (iii) any other materials necessary to support the EARP.
- Submit the package to the Stormwater Compliance and Enforcement Manager, who will sign the EARP and submit the package for approval and signature to the Division Director and Assistant Division Director for Stormwater.
- Once the proposed EARP is signed, begin negotiations with the responsible party to resolve the case as recommended in the signed EARP and the guidelines in this Manual.<sup>5</sup>

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<sup>3</sup> If circumstances indicate that the case should be referred to Central Office (*i.e.*, the civil charge may exceed \$15,000, the case is controversial, or the schedule of compliance is longer than 18 months) confer with the Stormwater Compliance and Enforcement Manager.

<sup>4</sup> See Attachments 4A, 5, 5A, 7, and 7A.

<sup>5</sup> Guidelines for Consent Special Orders are found at Attachment 7 and 7A. Guidelines for assessing civil charges are found at Attachment 8.



**[PRINT ON LETTERHEAD]**

{CONFIDENTIAL PURSUANT TO VA. CODE § 10.1-603.12:2}

**ENFORCEMENT ACTION RECOMMENDATION & PLAN (EARP)**

**WATERSHED OFFICE:**

**DATE:**

**PERMITTEE/OWNER:** *[Use the owner's name if the site is unpermitted.]*

**SITE/LOCATION:** *[Give the street address and the county.]*

**GENERAL PERMIT REGISTRATION NO. :** VPDES Permit No. VAR*[Fill in Number.]*

**STATE WATERS AFFECTED:** *[Give the name of any water body affected by the alleged violations. (E.g., Unnamed tributary of the Rappahannock River in the Albemarle Sound Coastal Rappahannock River Drainage Basin.<sup>1</sup>)]*

**VIOLATIONS:**

<b>Citation(s)</b>	<b>Description</b>
<i>[Cite to the section of the statute or regulation or both, allegedly]</i>	<i>[E.g., Failure to have an <u>approved</u> Erosion and Sediment Control Plan incorporated by reference into the Stormwater Pollution Prevention Plan.]</i>

<sup>1</sup> *[State whether the affected waters are being considered for designation as an exceptional. (e.g., The unnamed tributary is not being considered for designation as a TIER III water.) State whether the water body is listed as impaired on the Department of Environmental Quality's Report on Impaired Water and, if so, why (e.g., The water body is listed on the 2002 303(d) Report on Impaired Waters for total suspended solids and, as such, is not supportive of the Clean Water Act's aquatic life use goal.) Include any additional pertinent information (e.g., DEQ is scheduled to develop a total maximum daily load ("TMDL") for total suspended solids by 2010 in order to address the aquatic life impairment.) ]*

<p><i>violated (e.g., Virginia Code § 10.1-603.8 and 4 VAC – (con't) 50-60-1170 at Section II (Stormwater Pollution Prevention Plan)</i></p>	
--	--

**CASE SUMMARY:**

*[A summary should be limited to a brief explanation of the facts that are relevant to the enforcement action. It is not intended to be a chronology of every event that occurred over the course of the case. That information, if needed, is in the DCR files. A good summary is a narrative that tells the story of the case in sufficient detail to allow the reader to understand the purpose of the enforcement action. In order to do this, the case summary should answer four questions: (1) who is responsible for having caused the noncompliance; (2) what the noncompliance was or is, (3) when, where, and why the noncompliance occurred; and (4) how DCR, through this enforcement action, plans to resolve the problem so that, at a minimum, the noncompliance is corrected and any harmful environmental impact is remedied. While it is important to include sufficient detail in the summary, it is equally important be concise so that every word adds something necessary to the story. Whenever possible, omit needless words. Use active voice, avoid jargon, and define acronyms.]*

**ENVIRONMENTAL IMPACT (ACTUAL OR POTENTIAL):** *[Describe any environmental impacts (e.g., No impact is documented but the permittee’s failure to have an approved erosion and sediment plan in place while conducting land-disturbing activities created a potential for adversely impacting the unnamed tributary adjacent to the western boundary of the site.)]*

**PREFERRED ACTION:** *[Identify the preferred course of action and explain how it resolves the problem (e.g., Issue a Consent Order with a schedule of compliance requiring that the permittee take the following actions: (1) submit a revised erosion and sediment control plan to the local program authority for review and approval; and (2) cease all land-disturbing activity at the site until an approved plan is in place.)]*

**RECOMMENDED CIVIL CHARGE:** *[The recommendation should come from the Civil Charge Worksheet included in Attachment 8 of this Manual. Explain how you determined the*

*degree of harmfulness (i.e., serious, moderate, or marginal). For example, the degree of harmfulness in this case was moderate for the following reasons: (1) the potential for causing an adverse impact to the environment due to the lack of an approved erosion and sediment control plan was increased because some of the required erosion and sediment controls were not in place; (2) the lack of proper control measures could have easily resulted in an adverse impact to the unnamed tributary adjacent to the western boundary of the site because of its proximity to the land-disturbing activities; and (3) Although the permittee conducted land-disturbing activities for two weeks with no approved plan some controls were in place and no actual harm occurred.]*

The civil charge may be reduced, if such a reduction is warranted during negotiations based on adjustment factors such as the regulated party's cooperativeness and good faith effort to reach a timely settlement agreement with an expedited compliance schedule. *[Attach the worksheet you used to calculate your recommended civil charge to the EARP.]* (Please see the attached Civil Charge Worksheet.)

**RECOMMENDED BY:**     *[Initial.]*

**CONCURRENCE** (sign and date):

\_\_\_\_\_  
Regional Watershed Manager

\_\_\_\_\_  
Stormwater Compliance and Enforcement Manager

\_\_\_\_\_  
Assistant Division Director Stormwater Management

\_\_\_\_\_  
Soil and Water Conservation Division Director

**GUIDELINES APPLICABLE TO CONSENT SPECIAL ORDERS**

A Consent Special Order is a means of settling alleged violations of the Virginia Stormwater Management Act and Regulations through an expedited formal administrative enforcement process. As part of the process, DCR and the regulated party negotiate the terms of settlement and memorialize those terms in a written agreement called a Consent Special Order. The regulated party signs the Order, after which its terms are subject to a thirty-day public notice and comment period. All comments are considered before the Director of DCR executes the Order.<sup>1</sup> The Consent Special Order is issued with the written consent of the regulated party, without a formal hearing, and serves as the official resolution to the enforcement action.

The Consent Special Order is the most commonly used formal enforcement response because of the practical benefits it affords. The terms of the Consent Special Order are legally binding and may be enforced by a court. Moreover, a negotiated settlement expedites the enforcement process by eliminating the need for an administrative hearing or litigation. Thus, DCR may leverage limited resources to pursue more enforcement actions than would otherwise be possible. More enforcement results in greater compliance with the Stormwater Management Program and, as a consequence, improved water quality throughout Virginia.

Watershed field staff pursues resolution of routine enforcement cases through Consent Special Orders with civil charges of \$15,000 or less. In addition, the Central Office Enforcement staff supports the Regional Watershed field staff throughout the enforcement process by advising field staff on enforcement strategies, negotiation tactics, and any legal issues that may arise. It is the responsibility of Central Office Enforcement staff to pursue resolution of enforcement cases under circumstances where the civil charge may exceed \$15,000, the case is controversial or involves complicated issues of fact or law, or the schedule of compliance is longer than 18 months.

The Division Director and Assistant Division Director review and approve the terms of all Consent Special Orders. The Director of DCR approves and executes all Consent Special Orders.<sup>2</sup>

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<sup>1</sup> If the Order is revised after the comment period, it may be readvertised for public notice and comment.

<sup>2</sup> At its December 8, 2004, Virginia Soil and Water Conservation Board Meeting, the Board delegated to DCR by unanimous motion all administrative, programmatic, and legal authorities prescribed under the Chapter 372 of the 2004 Acts of the Assembly to implement the Virginia Stormwater Management Act. Pursuant to that delegation, the Director signs and executes Consent Special Orders.

Outlined below are the steps necessary to complete the Consent Special Order process.

### **The Consent Special Order Process**

- Past noncompliance should be documented in one or more Verbal Warning/Inspection Reports and at least one Notice of Violation issued pursuant to the guidelines in this Manual before escalating the enforcement response.
- Also before escalating the enforcement response, discuss the situation with the Regional Watershed Manager.<sup>3</sup> If the Regional Watershed Manager agrees that escalating the enforcement response is appropriate, begin drafting an EARP and Consent Special Order according to the guidelines in this Manual.<sup>4</sup>
- Submit an electronic copy of the draft EARP, Consent Special Order, and any supporting materials to the Stormwater Compliance and Enforcement Manager for review and approval. Upon the draft EARP's approval, submit it to the Regional Watershed Manager for signature.
- Assemble the enforcement package including: (i) the EARP, *signed by the Regional Watershed Manager*; (ii) a draft of the Consent Special Order; and (iii) any other materials necessary to support the EARP.
- Submit the package to the Stormwater Compliance and Enforcement Manager, who will sign the EARP and submit the package to the Division Director and Assistant Division Director for signature.
- Once the proposed EARP is signed, begin negotiating the terms of the Consent Special Order with the responsible party. Discuss any changes with Regional Watershed Manager.<sup>5</sup>
- Present the regulated party with a proposed Consent Special Order for signature. Once the signature is secured, advertise the Consent Special Order for public notice and comment.
- After the public comment period has passed and all comments have been received and considered and any revisions made, submit the signed Order to the Stormwater Compliance and Enforcement Manager who, in turn, will send it forward to be executed by the Director of DCR.

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<sup>3</sup> If circumstances indicate that the case should be referred to Central Office (*i.e.*, the civil charge may exceed \$15,000, the case is controversial, or the schedule of compliance is longer than 18 months) confer with the Stormwater Compliance and Enforcement Manager.

<sup>4</sup> See Attachments 4, 4A, and 7A.

<sup>5</sup> If the final negotiation results in an agreement with significantly different terms than those approved in the EARP, submit a revised EARP signed by the Regional Watershed Manager to the Stormwater Compliance and Enforcement Manager for signature by Division Director and Assistant Division Director.

# EXAMPLE CONSENT SPECIAL ORDER

## SOIL AND WATER CONSERVATION BOARD ENFORCEMENT ACTION

### SPECIAL ORDER BY CONSENT

#### ISSUED TO

*[REGULATED PARTY]*

#### FOR

*[CONSTRUCTION SITE]*  
*(VPDES PERMIT NO. VAR-----)*

#### **SECTION A: Purpose**

This is a Consent Special Order issued under the authority of Va. Code § 10.1-603.2:1.1, -603.2:1.7.3, and -603.2:1.7 by the Soil and Water Conservation Board to *[Regulated Party]* regarding the *[Name of Construction Site]* for the purpose of resolving certain alleged violations of the Virginia Stormwater Management Act and Regulations.

#### **SECTION B: Definitions:**

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. “Va. Code” means the Code of Virginia (1950), as amended.
2. “Board” means the Soil and Water Conservation Board, a permanent citizens’ board of the Commonwealth of Virginia as described in Va. Code §§ 10.1-104.1, -503, and –603.2:1.
3. “Department” or “DCR” means the Department of Conservation and Recreation, an agency of the Commonwealth of Virginia as described in Va. Code §§ 10.1-101 and –104.1.

4. “Director” means the Director of the Department of Conservation and Recreation.
5. “Order” means this document, also known as a Consent Order.

*[This section includes other definitions as appropriate.]*

### **SECTION C: Findings of Fact and Conclusions of Law**

1. *[This section includes an account of the facts and citations to applicable law.]*

### **SECTION D: Agreement and Order**

Accordingly the Board, by virtue of the authority granted in Va. Code §10.1-603.2:1.7 orders ***[Regulated Party]***, and ***[Regulated Party]*** agrees, to perform the actions described in Appendix A of this Order. The ***[Regulated Party]*** also agrees to pay a civil charge in the amount of ***[\$amount]*** within 30 days of the effective date of the Order. Payment shall be made by check, money order, or cashier’s check payable to “Treasurer of Virginia” and sent to:

Department of Conservation and Recreation  
Division of Finance, Accounts Payable  
203 Governor Street  
Richmond, Virginia 23219

Either on a transmittal letter or as a notation on the check or money order, the ***[Regulated Party]*** shall indicate that this payment is submitted pursuant to this Order and shall include the ***[Regulated Party’s]*** Federal Identification Number.

### **SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend the Order with the consent of ***[Regulated Party]*** for good cause shown by ***[Regulated Party]*** or on its own motion after notice and opportunity to be heard.
2. This Order addresses and resolves those violations specifically alleged herein. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility as may be authorized by law; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.

3. **[Regulated Party]** declares it has received fair and due process under the Administrative Process Act, Va. Code § 2.2 - 4000 *et seq.*, and the Virginia Stormwater Management Act, and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.
4. Failure by **[Regulated Party]** to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
5. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
6. **[Regulated Party]** shall be responsible for its failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. **[Regulated Party]** shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. **[Regulated Party]** shall notify the Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order.

Such notice shall set forth:

- a. the reasons for the delay or noncompliance;
- b. the projected duration of any such delay or noncompliance;
- c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
- d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Director within 48 hours of learning of any condition above, which **[Regulated Party]** intends to assert will result in the impossibility of compliance, shall



constitute a waiver of any claim to inability to comply with a requirement of this Order.

7. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.
8. This Order shall become effective upon execution by both the Director or his designee and **[Regulated Party]**. Notwithstanding the foregoing, the **[Regulated Party]** agrees to be bound by any compliance date, which precedes the effective date of this Order.
9. This Order shall continue in effect until the Director or the Board terminates the Order in his or its sole discretion upon 30 days written notice to **[Regulated Party]**. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve **[Regulated Party]** from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.
10. By its signature below, **[Regulated Party]** voluntarily agrees to the issuance of this Order.

And it is so ORDERED this day of \_\_\_\_\_, 2005.

\_\_\_\_\_  
Joseph H. Maroon,  
Director, Department of  
Conservation and Recreation

**[Regulated Party]** voluntarily agrees to the issuance of this Order.

By: \_\_\_\_\_

Date: \_\_\_\_\_

Commonwealth of Virginia  
City/County of \_\_\_\_\_

The foregoing document was signed and acknowledged before me this \_\_\_\_ day of

\_\_\_\_\_, 2005 by \_\_\_\_\_, who is  
(name)

\_\_\_\_\_ on behalf of **[Regulated Party]**.  
(title)

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_.

***[The Order should be signed for the Regulated Party by one of the following:***

- If the regulated party is a corporation; the president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy-making or decision-making functions for the corporation;***
- If the regulated party is a partnership, by a general partner; and***
- If the regulated party is a sole proprietor, by the proprietor or owner.]***

**APPENDIX A  
SCHEDULE OF COMPLIANCE**

**[Regulated Party]** shall:

1. **[Includes corrective measures, as well as deadlines for completing the measures.]**
- 2.
- 3.

**APPENDIX B**

**INTERIM EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS**

**ALEXANDRIA SANITATION AUTHORITY**

**ASA ADVANCED WASTEWATER TREATMENT PLANT**

During the period beginning with the effective date of this Order and lasting until the Permit compliance deadline in the schedule provided under item two in Appendix A of this Order, Alexandria Sanitation Authority shall limit the discharge from outfall 001 at the Facility in accordance with the VPDES Permit No. VA0025160, except as specified below. These interim limits shall retroactively apply, if applicable, as of the first day of the month in which this Order becomes effective. These requirements shall be construed in light of the Board’s Permit Regulation.

PARAMETER	DISCHARGE LIMITATIONS					MONITORING REQUIREMENTS		
	<u>Monthly Average</u>		<u>Weekly Average</u>		<u>Minimum</u>	<u>Maximum</u>	<u>Frequency</u>	<u>Sample Type</u>
TSS	12 mg/l	2450 kg/d	18 mg/l	3674 kg/d	N/A	N/A	1/D	24HC
CBOD <sub>5</sub>	10 mg/l	2041 kg/d	15 mg/l	3062 kg/d	NA	NA	1/D	24HC
Phosphorus	0.4 mg/l	81 kg/d	0.6 mg/l	122 kg/d	N/A	N/A	1/D	24HC

N/A = Not Applicable

N/L = No Limit

1/D = Once per day

24HC = A flow proportional composite sample collected manually or automatically, and discretely or continuously, for the entire discharge of the monitored 24-hour period.

## GUIDELINES FOR ASSESSING CIVIL CHARGES

Whether a civil charge is warranted in a particular case will depend upon the facts and should be determined at the outset of the settlement process. The purpose of including a civil charge in an administrative Consent Special Order is twofold:

- A civil charge acts as a deterrent to future noncompliance in the regulated community; and
- A civil charge may be used to ensure a level playing field throughout the regulated community by recovering any economic advantage that may have been gained from noncompliance.

In order to be effective, the method employed to assess a civil charge should be fair, reasonable, and easily understood. Moreover, the method used should be applied consistently across the State to ensure that the regulated community is treated equitably throughout the Commonwealth.

The method of assessing civil charges outlined below is intended to serve the twofold purpose of deterring noncompliance and recovering economic benefit, in addition to ensuring its consistent application by DCR staff across Virginia. The proposed method is fair and reasonable in that it is graduated and assesses the highest dollar amounts in cases that have resulted in the greatest harm either to human health or the environment or to the integrity of the Virginia Stormwater Management Program (VSMP), or both.

The Civil Charge Worksheets included on pages four and five of these Guidelines illustrate in an easily understood manner how the method is applied in each enforcement case in order to derive a civil charge for inclusion in a Consent Special Order. The Worksheets are a means of ensuring that civil charges are assessed consistently across the State.

### Method for Assessing a Civil Charge

Civil charges have two components:

- A **gravity component** designed to measure harm to either human health or the environment or to the integrity of the VSMP; and
- An **economic benefit component** designed to eliminate any financial advantage accrued from breaking the law.

The gravity of the harm caused by an alleged violation to either human health or the environment or to the integrity of the VSMP, is measured by degree of severity as seriously harmful, moderately harmful, or marginally harmful. The degree of harmfulness assigned to a particular violation (*i.e.*, serious, moderate, or marginal) will depend on the consequences of the alleged violation, whether actual or potential; the duration of the violation; and the extent of the deviation from the requirement in the law. Assigning a degree of harmfulness is a qualitative decision that is based on the best professional judgment of DCR staff and approved by DCR management.

The economic benefit derived from an alleged violation is measured in terms of delayed or avoided expenditures that would have prevented the noncompliance from occurring. Removing the economic benefit of noncompliance ensures that the regulated party responsible for the alleged violation does not gain any competitive advantage for failing to comply with the law.

The following hypothetical situation illustrates how the gravity of harm, economic benefit, and resulting civil charge would be determined in a particular case.

Example: A developer failed to install a sediment basin (*i.e.*, BMP) required by the construction site's approved Erosion and Sediment Control Plan for the first four months of the eight-month construction period. Because the sediment basin was not installed during those four months, approximately 50 cubic yards of sediment from the site discharged into a nearby stream.

Under the circumstances of this case, the degree of harm would be "serious" based on the three criteria described above (*i.e.*, the consequences of the violation, the duration, and the extent of deviation from the regulatory requirement). The discharge of sediment resulted in a seriously detrimental impact to the stream because it reduced the stream's benthic population and depleted some of the underwater grasses compromising the water quality. Moreover, the duration of the violation spanned four months or one-half of the entire construction period, as did the deviation from the Permit requirement.

The developer delayed the cost of installing, operating, and maintaining the stormwater BMP that could have prevented the harmful impacts from occurring for four months and in doing so accrued an economic benefit to himself from the money he saved and the competitive advantage he may have gained over other developers.

In computing the dollar amount of a civil charge in this case, the Worksheet indicates that the developer's failure to install the stormwater BMPs for four months equals \$4,000 (1 BMP x \$1,000 x 4 months). With respect to the economic benefit of noncompliance, the estimated delayed cost for installing, operating, and maintaining the BMP is \$600. The \$4,000 gravity-

based component added to the \$600 economic benefit equals \$4,600. Thus, \$4,600 is the recommended civil charge.

In the hypothetical example above, the developer would also be responsible for any corrective actions that may be necessary to remedy the harmful impact caused by the noncompliance, including removing the sediment from the stream. The corrective actions would be incorporated into a schedule of compliance and appended to the Consent Special Order. The costs of the corrective actions are in addition to the civil charge. During the course of negotiating of the terms of the Consent Special Order, new facts may be introduced that result in the amount of the civil charge being adjusted.

Civil charges are paid into the State Treasury and deposited into the Stormwater Management Fund.

These guidelines for assessing civil charges do not carry the force of law but are intended as a framework for ensuring fair and consistent enforcement. Further, these guidelines are not intended and cannot be relied on to create any rights, substantive or procedural, on the part of any person or entity. DCR reserves the right to deviate from these guidelines as it deems necessary to carry out the intent of the Virginia Stormwater Management Act and Regulations.

## STORMWATER CIVIL CHARGE WORKSHEET

1. Gravity-based Component	Serious	Moderate	Marginal	
Violations* and Frequency of Occurrence **	\$\$ x occurrences	\$\$ x occurrences	\$\$ x occurrences	SUBTOTAL
No Permit Registration ( <i>each month w/o coverage = 1 occurrence</i> ) (Maximum charge \$12,000)	2,000 x ____	1,000 x ____	500 x ____	
No SWPPP (No SWPPP components including E&S Plan) ( <i>each month of land-disturbing w/o SWPPP = 1 occurrence</i> ) (Maximum charge \$12,000)	2,000 x ____	1,500 x ____	1,000 x ____	
Incomplete SWPPP	1,000 x ____	500 x ____	300 x ____	
SWPPP not on site	500 x ____	300 x ____	100 x ____	
No approved Erosion and Sediment Control Plan	2,000 x ____	1,000 x ____	500 x ____	
Failure to install stormwater BMPs or erosion and sediment ("E&S") controls	1,000 x ____	500 x ____	300 x ____	
Stormwater BMPs or E&S controls improperly installed or maintained	750 x ____	500 x ____	250 x ____	
Operational deficiencies ( <i>e.g.</i> , failure to initiate stabilization measures as soon as practicable; failure to implement control measures for construction debris)	5,000 x ____	2,000 x ____	1,000 x ____	
Failure to conduct required inspections	3,000 x ____	2,000 x ____	500 x ____	
Incomplete, improper or missed inspections ( <i>e.g.</i> , inspections not conducted by qualified personnel; site inspection reports do not include date, weather information, location of discharge, or are not certified, <i>etc.</i> )	1,000 x ____	500 x ____	300 x ____	
			Subtotal #1	
<b>2. Estimated Economic Benefit of Noncompliance (if applicable)</b>			Subtotal #2	
<b>3. Recommended Civil Charge</b>			Total (#1 and #2)	

\* Each stormwater BMP or E&S control that is either not installed or improperly installed or maintained is a separate violation.

\*\* The frequency of occurrence is per event unless otherwise noted.



## MS4 CIVIL CHARGE WORKSHEET

1. Gravity-based Component	Serious	Moderate	Marginal	
Violations* and Frequency of Occurrence	\$\$ x occurrences	\$\$ x occurrences	\$\$ x occurrences	SUBTOTAL
Failure to apply for and obtain Permit	10,000 x ____	5,000 x ____	1,000 x ____	
Incomplete Permit applications ( <i>e.g.</i> , no map)	1,000 x ____	500 x ____	300 x ____	
Failure to submit Annual Report ( <i>each month late = 1 occurrence</i> )	1,000 x ____	500 x ____	300 x ____	
Failure to comply with Permit reporting requirements* ( <i>e.g.</i> , monitoring)	2,500 x ____	1,500 x ____	750x ____	
Failure to comply with Permit conditions* ( <i>e.g.</i> , failure to develop, implement, or enforce Stormwater Management Plan)	5,000 x ____	3,000 x ____	1,500x ____	
Include multiplier of 0.5 for Phase I facilities			Subtotal #1	
<b>2. Estimated Economic Benefit of Noncompliance (if applicable)</b>			Subtotal #2	
<b>3. Recommended Civil Charge</b>			Total (#1 and #2)	

\* Each reporting requirement or Permit condition not met is a separate violation.

**GUIDELINES APPLICABLE TO SPECIAL ORDERS  
AND EMERGENCY SPECIAL ORDERS**

Special Orders are unilateral, final decisions subject to appeal in the courts. Under usual circumstances, DCR or the Board must conduct a formal hearing prior to issuing a Special Order.

DCR, by delegation of the Board, may issue Special Orders to require compliance with the Virginia Stormwater Management Act, should DCR fail to resolve the noncompliance by consent (*i.e.*, through issuance of a Consent Special Order to the regulated party). Special Orders may be used to direct a party to cease and desist from allowing or causing unreasonable degradation of properties, water quality, stream channels, or other natural resources or to comply with a VSMP Permit or Consent Special Order issued by DCR or the Board.<sup>1</sup>

Under circumstances where there is an imminent and substantial danger to (i) the public health, safety, or welfare, or the health of animals, fish or aquatic life; (ii) a public water supply; or (iii) recreational, commercial, industrial, agricultural or other reasonable uses; DCR may issue an Emergency Special Order pursuant to the Stormwater Management Act directing the regulated party to cease such pollution or discharge immediately. The party subject to an Emergency Special Order is entitled to a hearing within 45 days of its issuance. At the hearing, DCR may affirm, amend, modify, or cancel the Order.

Should the party subject to the Order fail to comply, DCR or the Board may seek injunctive relief from the courts to compel compliance.<sup>2</sup>

Outlined below are the processes applicable to issuing Special Orders and Emergency Special Orders.

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<sup>1</sup> Va. Code § 10.1-603.2:1.7.

<sup>2</sup> If an Emergency Special Order requires cessation of a discharge, DCR shall provide the affected party with a hearing within 48 hours of the issuance of an injunction.

### **The Special Order Process**

- Before initiating the Special Order Process, (i) past noncompliance should be documented in one or more Verbal Warning/Inspection Reports and at least two Notices of Corrective Action issued pursuant to the guidelines in this Manual; and (iii) all good faith attempts to resolve the noncompliance by consent must have failed.
- Also before initiating the Special Order process, the Stormwater Compliance and Enforcement Manager will discuss the situation with Regional Watershed Manager, the Division Director, and Assistant Division Director for Stormwater to decide whether escalating the enforcement response to the level of Special Order the best alternative.
- If all agree that pursuing a Special Order is appropriate, the Stormwater Compliance and Enforcement Manager will assemble the enforcement package including: (i) the EARP; (ii) a draft of a proposed Special Order; and (iii) any other materials necessary to support the EARP.
- The Stormwater Compliance and Enforcement Manager will sign the EARP and submit the package to the Division Director and Assistant Division Director for signature.
- Once the proposed EARP is signed, the Division Director, Assistant Division Director, and Stormwater Compliance Manager will submit the enforcement package to the Director for approval.
- After all approvals are in place, the Stormwater Compliance and Enforcement Manager coordinate with the Office of the Director and the Office of the Attorney General to proceed with plans for a formal hearing. Guidelines applicable to formal hearings are found at Attachment 11 and 11A of this Manual.

### **The Emergency Special Order Process**

- The Stormwater Compliance and Enforcement Manager will coordinate with the Division Director, Stormwater Compliance Manager, Director, and the Office of the Attorney General.
- After all approvals are in place, proceed with the issuance of the Emergency Special Order and with plans for a formal hearing subsequent to the issuance of the Order. Guidelines applicable to formal hearings are found at Attachment 11 and 11 A of this Manual.

# EXAMPLE SPECIAL ORDER

## SOIL AND WATER CONSERVATION BOARD ENFORCEMENT ACTION

### SPECIAL ORDER

#### ISSUED TO

*[REGULATED PARTY]*

#### FOR

*[CONSTRUCTION SITE]*  
*(VPDES PERMIT NO. VAR-----)*

#### **SECTION A: Purpose**

This is a Special Order issued under the authority of Va. Code §§ 10.1-603.2:1.1, -603.2:1.3, and -603.2:1.7 by the Soil and Water Conservation Board to *[Regulated Party]* regarding the *[Name of Construction Site]* for violations of the Virginia Stormwater Management Act and Regulations.

#### **SECTION B: Definitions:**

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. “Va. Code” means the Code of Virginia (1950), as amended.
2. “Board” means the Soil and Water Conservation Board, a permanent citizens’ board of the Commonwealth of Virginia as described in Va. Code §§ 10.1-104.1, -503, and –603.2:1.
3. “Department” or “DCR” means the Department of Conservation and Recreation, an agency of the Commonwealth of Virginia as described in Va. Code §§ 10.1-101 and –104.1.
4. “Director” means the Director of the Department of Conservation and Recreation.

5. “Order” means this document, also known as a Special Order.

*[This section includes other definitions as appropriate.]*

### **SECTION C: Findings of Fact and Conclusions of Law**

1. *[This section includes an account of the facts and citations to applicable law.]*

### **SECTION D: Agreement and Order**

Accordingly the Board, by virtue of the authority granted in Va. Code §10.1-603.2:1.7, orders ***[Regulated Party]*** to perform the actions described in Appendix A of this Order.

### **SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend the Order on its own motion after providing ***[Regulated Party]*** notice and opportunity to be heard.
2. This Order addresses and resolves those violations specifically addressed herein. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility as may be authorized by law; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.
3. ***[Regulated Party]*** has been afforded fair and due process under the Administrative Process Act, Va. Code § 2.2 - 4000 *et seq.*, and the Virginia Stormwater Management Act.
4. Failure by ***[Regulated Party]*** to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
5. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
6. ***[Regulated Party]*** shall be responsible for its failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. ***[Regulated Party]*** shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. ***[Regulated Party]*** shall notify the Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order.

Such notice shall set forth:

- a. the reasons for the delay or noncompliance;
- b. the projected duration of any such delay or noncompliance;
- c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
- d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Director within 48 hours of learning of any condition above, which **[Regulated Party]** intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

7. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.
8. This Order shall become effective upon execution by the Board.
9. This Order shall continue in effect until the Director or the Board terminates the Order in his or its sole discretion upon 30 days written notice to **[Regulated Party]**. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve **[Regulated Party]** from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

And it is so ORDERED this day of \_\_\_\_\_, 2005.

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Joseph H. Maroon,  
Director, Department of  
Conservation and Recreation

**APPENDIX A  
SCHEDULE OF COMPLIANCE**

**[Regulated Party]** shall:

1. **[Includes corrective measures, as well as deadlines for completing the measures.]**
- 2.
- 3.

**APPENDIX B**

**INTERIM EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS**

**ALEXANDRIA SANITATION AUTHORITY**

**ASA ADVANCED WASTEWATER TREATMENT PLANT**

During the period beginning with the effective date of this Order and lasting until the Permit compliance deadline in the schedule provided under item two in Appendix A of this Order, Alexandria Sanitation Authority shall limit the discharge from outfall 001 at the Facility in accordance with the VPDES Permit No. VA0025160, except as specified below. These interim limits shall retroactively apply, if applicable, as of the first day of the month in which this Order becomes effective. These requirements shall be construed in light of the Board’s Permit Regulation.

PARAMETER	DISCHARGE LIMITATIONS					MONITORING REQUIREMENTS		
	<u>Monthly Average</u>		<u>Weekly Average</u>		<u>Minimum</u>	<u>Maximum</u>	<u>Frequency</u>	<u>Sample Type</u>
TSS	12 mg/l	2450 kg/d	18 mg/l	3674 kg/d	N/A	N/A	1/D	24HC
CBOD <sub>5</sub>	10 mg/l	2041 kg/d	15 mg/l	3062 kg/d	NA	NA	1/D	24HC
Phosphorus	0.4 mg/l	81 kg/d	0.6 mg/l	122 kg/d	N/A	N/A	1/D	24HC

N/A = Not Applicable

N/L = No Limit

1/D = Once per day

24HC = A flow proportional composite sample collected manually or automatically, and discretely or continuously, for the entire discharge of the monitored 24-hour period.



**GUIDELINES APPLICABLE TO LITIGATION REFERRALS**

The Office of the Attorney General of Virginia represents the Board, the Director, and DCR in any civil action to impose civil judicial sanctions. Requests for representation in a civil action must come from either the Board or the Director, or both.

Prior to initiating any request for representation, DCR staff will meet informally with Agency Counsel to discuss all aspects of the case in question and determine whether or not it is suitable for referral to the Attorney General for civil action. As a part of the informal discussions, DCR staff will provide the Agency Counsel with any files, documents, photographs, or other evidence necessary to make an informed decision regarding the request. If, after having discussed all aspects of the case, all concerned agree that it should be referred for civil action, DCR will submit a referral package to the Attorney General with a formal, written request from the Board or Director, or both, for representation.

Attachment 8A is a generic example of the Memorandum in Support of Litigation that DCR will provide to the Office of the Attorney General as part of the referral package.

**Attachment 8A**

*[PRINT ON LETTERHEAD]*

To: *[DCR DIRECTOR]*

From: *[COMPLIANCE AND ENFORCEMENT MANAGER]*

Through:

Date:

Re: *[CASE NAME]*

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**MEMORANDUM IN SUPPORT OF LITIGATION**  
**Confidential -- Prepared in Anticipation of Litigation**  
**Exempt from FOIA Pursuant to Section 2.2-3705.1.3 of the Code of Virginia**

**1. Identity of the Defendants**

- a. The Defendants are *[ ]* located at *[ ]* *[Phone and fax numbers for the companies]*  
*[Registered to do business in Virginia?].*
- b. *[Defendants' Attorney]*
- c. *[Subject of the litigation]*

**2. General Description of the Violations and the Relief Sought**

**3. Prior History**

**4. Current Violations**

**5. Possible Witnesses**

**Defense**

**DCR**

**6. Regulatory and/or Operational Relief Sought**

**7. Civil Penalties**

**8. Injunctive Relief**

**10. Settlement**

**11. Interested Parties**

**12. Files**

**13. Client Contact**

**GUIDELINES APPLICABLE TO INFORMAL FACT-FINDING PROCEEDINGS**

When acting in an adjudicatory or decision-making role with respect to enforcement actions, DCR is subject to the procedures outlined in the Virginia Administrative Process Act.<sup>1</sup> Accordingly, DCR conducts informal fact-finding proceedings in order to hear all of the facts and circumstances surrounding a case before making any “case decision.”<sup>2</sup> As part of its decision-making process, DCR may rely upon public data, documents, and other information and will notify all parties prior to the proceeding of any information upon which DCR intends to rely in arriving at a decision.<sup>3</sup>

DCR may hold the proceeding on its own initiative or at the request of a party seeking the case decision (*i.e.*, regulated party).<sup>4</sup> In either instance, the regulated party is entitled to the following rights under the Virginia Administrative Process Act: (i) to reasonable notice of the proceedings; (ii) to appear, in person or by counsel or other qualified representative for the informal presentation of factual data, argument or proof in connection with any case; (iii) to notice of any contrary fact basis or information in the possession of DCR that can be relied upon in making an adverse decision; (iv) to a prompt decision by DCR; and (v) to be informed, briefly and in writing, of the factual or procedural basis for an adverse decision.<sup>5</sup>

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<sup>1</sup> Va. Code § 2.2-4000, *et seq.*

<sup>2</sup> The Virginia Administrative Process Act, Va. Code § 2.2-4001, defines “case decision” as “any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.”

As a practical matter, DCR is most likely to use the informal fact-finding proceeding to resolve outstanding issues, but the Board may also hold such proceedings in order to render case decisions, as it deems necessary.

<sup>3</sup> Va. Code § 2.2-4019.B.

<sup>4</sup> The regulated party and the agency may agree to waive the informal fact-finding proceeding and go directly to a formal hearing. In addition, the Virginia Stormwater Management Act requires that DCR conduct a formal hearing under certain circumstances as described in Attachment 10 of this Manual.

<sup>5</sup> Va. Code § 2.2-4019.A.

DCR may appoint a staff member or other person acting on DCR's behalf to preside over the informal fact-finding proceeding,<sup>6</sup> but no one who is or has been substantively involved with the case may preside. The "Presiding Officer" is responsible for resolving any issues that arise prior to the proceeding (*e.g.*, date changes, submissions, *etc.*), conducting the proceeding, and recommending a decision to the Director of DCR.<sup>7</sup> The individual appointed to serve as Presiding Officer should have some knowledge of the applicable laws and regulations. Pursuant to Va. Code § 2.2-4022, the Presiding Officer, through the Director of DCR, may issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence.<sup>8</sup>

It is the Director's responsibility to decide the case based on the record, submissions, and recommendations generated from the fact-finding proceeding.<sup>9</sup> The case decision that results from an informal fact-finding proceeding is a determination whether or not the regulated party is in compliance with a law, regulation, or permit requirement within the Board's jurisdiction to enforce. As such, the decision includes no monetary sanction nor directs any action on the part of the regulated party.

The Virginia Administrative Process Act requires that the decision-maker render the case decision within 90 days of the proceeding, although the parties may agree to a later date.<sup>10</sup> Agreements to extend the deadline for the decision 90 days should be in writing. The regulated party has the right to appeal an adverse case decision to the appropriate court.<sup>11</sup>

Attachment 9A to this Manual is an outline of the process for informal fact-finding proceedings.

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<sup>6</sup> Va. Code §2.2-4001. The regulated party and DCR may agree at the outset that DCR employ a hearing officer to preside over the informal fact-finding proceeding. Such agreement may be revoked only by mutual consent. Pursuant to Va. Code § 2.2-4024, the Executive Secretary of the Supreme Court prepares and maintains a list of attorneys qualified to preside over informal and formal administrative proceedings. Upon the Director's request, the Executive Secretary selects a hearing officer from the list to preside over the informal fact-finding proceeding.

<sup>7</sup> If a hearing officer acts as Presiding Officer, the appointment letter for the hearing officer should state whether, in addition to conducting the proceeding, he or she is empowered to make a recommendation to the Director.

<sup>8</sup> The Director must sign subpoenas.

<sup>9</sup> The Director may delegate the decision-making responsibility to another (*e.g.*, the Presiding Officer), but such delegation should be in writing.

<sup>10</sup> If a hearing officer serves as Presiding Officer and is empowered to make a recommendation, he or she must provide the recommendation with 90 days of the proceeding. The Director has an additional 30 days from the receipt of the recommendation to render a decision; otherwise, the Director has 90 days to decide.

<sup>11</sup> The Virginia Supreme Court rules govern the appeal. See Va. Code § 2.2 – 4026 and Virginia Supreme Court Rule 2A:2.



**PROCESS FOR INFORMAL FACT-FINDING PROCEEDING**

**I. Preparing for the Proceeding**

**A. Scheduling, Notice, Location**

1. DCR staff contacts the regulated party in order to reach agreement on the date, time, and place of the proceeding.<sup>1</sup>
2. DCR staff notifies the regulated party by letter (Notice Letter) of DCR's intention to conduct the informal fact-finding proceeding. The Notice Letter includes the following information: (i) the date, time, and place for the proceeding; (ii) a list of the regulated party's rights pursuant to the Virginia Administrative Process Act<sup>2</sup>; (iii) an explanation of the purpose of the proceeding including the applicable facts and law with respect to each allegation; (iv) a citation to DCR's legal authority for rendering a case decision on the alleged violations; and (v) a description of any public data, document or information upon which DCR intends to rely at the proceeding.<sup>3</sup>
3. DCR staff ensures delivery of the Notice Letter to the Regulated Party 30 days prior to the scheduled date for the proceeding by one of the following three methods: (i) certified mail, return receipt requested; (ii) service of process; or (iii) by hand.
4. DCR staff prepares and submits DCR's proposed findings of fact and conclusions of law to the Presiding Officer.

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<sup>1</sup> Absent an agreement with the regulated party, the proceeding will be conducted in the county or city where the regulated party either (i) resides; (ii) regularly or systematically conducts affairs or business activity; (iii) has any property affected by the administrative action; or (iv) if the preceding do not apply, in the county or city where the violations are alleged to have occurred. Va. Code §§ 2.2-4003 and 8.01-261.

<sup>2</sup> Virginia Code § 2.2-4019.

<sup>3</sup> Virginia Code § 2.2-4019.B.

5. DCR staff arranges for a room in which to conduct the proceeding and for any equipment needed for the presentation.
6. DCR staff arranges to record the proceeding either by making an audiotape recording or by court reporter.

**B. Presiding Officer -Appointment and Pre-proceeding Responsibilities**

1. DCR staff arranges through consultation with the Director's Office for the appointment of a Presiding Officer.
2. The Presiding Officer is responsible for coordinating dates changes and requesting any pre-proceeding submissions. *Note: The informal fact-finding process does not allow for discovery.*

**II. The Proceeding**

**A. Participants, Submissions**

1. Participants in the meeting include the Presiding Officer, the DCR staff person making the presentation for DCR, the regulated party and his or her counsel, and any witnesses.
2. The Presiding Officer directs the course of the proceeding and ensures that the record is sufficiently developed to support the case decision.
3. Participants may submit proposed findings of fact and conclusions of law at the outset of the proceeding.

**B. Order of Proceeding**

1. The Presiding Officer opens the proceeding and explains to the participants that each party will present his or her case in turn and that each may make an opening statement and call witnesses but that cross examination of witnesses is not allowed.
2. The Presiding Officer directs each party as to when to present his or her case and maintains order throughout the proceeding.
3. DCR, followed by the regulated party, gives a brief statement of the case and calls witnesses to give direct testimony. After witnesses from both sides have testified, DCR makes a brief closing argument, directly followed by the regulated party with his or her closing argument.
4. Throughout the proceeding, the Presiding Officer asks questions of witnesses to ensure that the record is fully developed and requests additional findings of fact and conclusions of law, if necessary.

5. After each side has finished making a closing argument, the Presiding Officer explains how the decision process works and requests any post-proceeding submissions.
6. The Presiding Officer adjourns the proceeding.

### III. Post-Proceeding Matters

#### A. Recommendation Package

1. The Presiding Officer must deliver the recommendation package to the Director of DCR and the parties within **45 days** of the informal fact-finding proceeding, unless the parties agree in writing to a later date. ***Note: If a hearing officer presides, he or she must submit the recommendation package within 90 days of the date of the proceeding.***
2. The recommendation for the case decision should include a brief summary of the issues and findings of fact and conclusions of law. The Presiding Officer may adopt either party's findings of fact and conclusions of law, in whole or in part, but is not obliged to do so. The recommendation package should also include (i) a list of all those who appeared at the proceeding, (ii) the name and address of all those on whom the final case decision should be served, and (iii) the complete record of the proceeding.

#### B. Record

1. The Presiding Officer is responsible for assembling the record.
2. Typically, the record comprises (i) the recommended case decision (*i.e.*, a brief summary of the issues and proposed findings of fact and conclusions of law); and (ii) an audiotape or transcript of the proceeding; and (iii) any submissions collected by the Presiding Officer.

### IV. The Case Decision

#### A. Deadlines for Final Decision

1. The Director has **90 days** from the date of the proceeding to render a final decision, unless the parties agree to a later date.
2. If a hearing officer presided, the Director has **30 days** from the date of receiving the recommendation package, unless the parties agree in writing to a later date. ***The hearing officer must submit the recommendation package with 90 days of the proceeding.***



**B. Contents of Final Decision**

1. The Director of DCR may afford the parties an opportunity to submit comments on or exceptions to the Presiding Officer's recommendation. ***This does not extend the deadline for rendering the final decision, unless all the parties agree to a later date.***

2. Typically, the case decision is rendered in the form of findings of fact and conclusions of law. The Director of DCR may adopt the Presiding Officer's recommendation in whole or in part or the findings of fact and conclusions of law submitted by one of the parties to the hearing, in whole or in part.

**C. Notice to the Regulated Party**

1. The Director must notify the regulated party in writing of the case decision. The Notice should be delivered by certified mail, return receipt requested, within five days of the decision and should include a copy of the final case decision (*i.e.*, a brief summary of issues and the findings of fact and conclusions of law).

2. The Notice of Decision Letter must inform the regulated party of his or her right to appeal. The following language may be included in the Notice of Decision Letter:

If you intend to appeal this decision to a Virginia court, you must provide notice to the Virginia Department of Conservation and Recreation, Office of the Director, 203 Governor Street, Suite 206, Richmond, Virginia 23219. As provided by Rule 2A:2 of the Rules of the Supreme Court of Virginia, you have 30 days from the date of service of this decision (either the date you actually received this decision or the date on which it was mailed to you, whichever occurred first) within which to file a Notice of Appeal. That period of time increases by three days if you receive the decision by mail.

Please refer to Part Two A of the Rules of the Supreme Court of Virginia for a description of the required contents of the Notice of Appeal and additional requirements governing appeals from the decisions of administrative agencies.

There is a further requirement in 2A:3 that the party include a transcript of the testimony along with notice.

**GUIDELINES APPLICABLE TO FORMAL HEARINGS**

The Virginia Stormwater Management Act requires that DCR, by delegation of the Board,<sup>1</sup> hold a formal hearing under the following circumstances:

- Prior to issuing a Special Orders;
- 45 days after issuing an Emergency Special Order;
- Prior to amending or revoking a permit;<sup>2</sup> or
- Upon the request of a permit applicant or permittee aggrieved by an action of DCR taken without a formal hearing.<sup>3</sup>

In addition to the circumstances described above, DCR may hold a formal hearing to the extent that an informal process (*e.g.*, issuance of a Consent Special Order, informal fact-finding proceeding and case decision) has failed to dispose of a case by consent.<sup>4</sup>

A party to a formal hearing is entitled to reasonable notice of (i) the hearing's time and place; (ii) the basic law under which DCR contemplates taking action; and (iii) matters of law and fact asserted or questioned by DCR. In addition, a party to a formal hearing is entitled (i) to be represented by counsel; (ii) to submit and rebut evidence; (iii) to cross examine witnesses; and (iv) to have a prompt decision regarding his or her case.

The full Board or, at a minimum, a quorum of the Board may preside over a formal hearing.<sup>5</sup> In addition, the Virginia Stormwater Management Act provides that the Board itself, at a regular or special meeting, or at least one member of the Board designated by the Chair, may preside over a formal hearing conducted pursuant to the Act.<sup>6</sup> Otherwise, a hearing officer selected from a list of attorneys maintained by the Executive secretary of the Virginia Supreme Court must preside over a formal hearing.<sup>7</sup>

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<sup>1</sup> At its December 8, 2004 meeting, the Board delegated to DCR by unanimous motion all administrative, programmatic, and legal authorities prescribed under Chapter 372 of the 2004 Acts of the Assembly to implement the Virginia Stormwater Management Program.

<sup>2</sup> Va. Code § 10.1-603.2:1.4 and –603.2:1.7.

<sup>3</sup> Va. Code § 10.10603.12:6.

<sup>4</sup> Va. Code § 2.2.4020.C.

<sup>5</sup> Va. Code § 2.2-4024.F. If a Board member designated by the Chair presides over the formal hearing that Board member may not participate in making the final decision resulting from the hearing.

<sup>6</sup> Va. Code § 10.1-603.12:7.

*Note: DCR must employ a hearing officer to preside over formal hearings conducted pursuant to the Virginia Stormwater Management Act, unless the Board chooses to preside at the request of the Director or on its own initiative.*

Either the Board or the hearing officer employed by the Board or DCR, depending on who presides, is charged with the following responsibilities with respect to a formal hearing:

- to establish the date, time, and place of the hearing;
- to provide notice of the hearing to all parties;
- to manage the pre-hearing exchange of information so that all parties have access to the information that may be entered into evidence and to the witnesses that may be called;
- to explain the hearing process to all parties either at a pre-hearing conference or prior to the hearing;
- to manage the transcript and record of the case; and
- on the part of a hearing officer, to make a timely recommendation to the decision-maker; or
- on the part of the Board or DCR, to make a timely decision.

At formal hearings, an Assistant Attorney General presents the case for DCR, unless the Attorney General authorizes a DCR staff person to serve in that role. The regulated party may be represented by counsel. In general, a formal hearing would proceed with the Presiding Officer's introductory remarks and disposition of preliminary motions; opening statements from DCR and the regulated party; testimony of witnesses, presentation of evidence, and cross examination by both parties; closing arguments; submission of proposed findings of fact and conclusions of law, if not previously submitted; and adjournment.

The Administrative Process Act and DCR's basic law require that a verbatim record of the hearing be taken and filed with the Board.<sup>8</sup> DCR, on its own initiative, or at the request of the Board or the Presiding Officer may employ a court reporter in order to ensure that the required verbatim record is clear and accurate.

The decision-maker, which may be either the Board or the Director depending on the circumstances, must render the case decision within 90 days of the proceeding, although the parties may agree to a later date. If a hearing officer serves as Presiding Officer and is empowered to make a recommendation to the Board or Director, he or she must provide the recommendation with 90 days of the proceeding. The Board or the Director has an additional 30 days from the receipt of the recommendation to render a decision; otherwise, the Board or the Director has 90 days to decide.<sup>9</sup> The regulated party has the right to appeal an adverse case decision to the appropriate court.<sup>10</sup>

Attachment 10A of this Manual outlines the detailed process applicable to formal hearings.

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<sup>7</sup> Va. Code § 2.2-4024.A.

<sup>8</sup> Va. Code § 2.2-4020 and § 10.1-603.12:7.

<sup>9</sup> Va. Code § 2.2-4021.

<sup>10</sup> The Virginia Supreme Court rules govern the appeal. See Va. Code § 2.2 - 4026.