

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION
CONSTRUCTION DIRECTIVE
MEMORANDUM**

GENERAL SUBJECT:	<u>ENVIRONMENTAL AND SAFETY RESPONSIBILITY</u>	NUMBER:	<u>CD-2008-07</u>
		DATE:	<u>MARCH 13, 2008</u>
SPECIFIC SUBJECT:	<u>IMPROVING COMPLIANCE WITH ENVIRONMENTAL AND SAFETY LAWS</u>	SUPERSEDES:	<u>CD-2002-9</u>
DATE EFFECTIVE:	<u>IMMEDIATELY</u>	SUNSET/ EXPIRES:	<u>MARCH 13, 2013</u>

Original with signature on file in the office of the
Scheduling & Contract Division

**W. BYRON COBURN, JR., P.E.
STATE CONSTRUCTION ENGINEER**

DIRECTED TO - DISTRICT ADMINISTRATORS

The Department firmly believes in and is thoroughly committed to environmental stewardship and safety. Violations of the contract in these areas, especially repeated violations need to be quickly, firmly, and uniformly dealt with. Outlined herein are procedures for dealing with issues of environmental or safety noncompliance by the Contractor.

The Contractor is required by the Specifications to comply with all federal, state, and local laws and regulations in accordance with the requirements of Section 107 of the Road and Bridge Specifications. If any regulatory agency, such as, but not limited to, the Virginia Department of Environmental Quality (DEQ), the Virginia Department of Professional and Occupational Resources (DPOR), the Virginia Department of Conservation and Recreation (DCR), the Occupational Safety and Health Administration (OSHA), or the Virginia Occupational Safety and Health Compliance Program (VOSHCP), issues a Notice of Violation, Notice to Comply, Notice to Suspend Work, Notice of Non-Conformity, or a Notice to Cease Work, or any variation of these notices due to the Contractor's non-compliance with the laws, rules, regulations, policies or provisions of the issuing agency or if a VDOT representative advises the Contractor of an item(s) that is non-compliant with the VDOT Road and Bridge Standards, VDOT Road and Bridge Specifications, contractual requirements, permit conditions, federal or state law, or federal or state regulations, there are certain steps that must be taken immediately to document the non-compliance. The term "notice" as used in this memorandum shall mean any of the above mentioned "Notice" documents issued by a local, state or federal regulatory agency having jurisdiction over the activities being performed as part of a Department awarded contract.

The term "non-compliance" as issued by a VDOT representative is defined as documented evidence of an act, omission, or other action by the Contractor that causes:

- 1) Off-site damage in the form of sedimentation, unauthorized dewatering or pollutant discharge, erosion, flooding, encroachment outside of the project/permit limits, or a permit condition deficiency or violation

- 2) On-site damage in the form of significant erosion, flooding, sedimentation, or a permit condition deficiency
- 3) A situation that endangers the public or worker safety
- 4) A repeat deficiency of related specifications
- 5) Imminent danger of on-site or off-site damage or injury occurring
- 6) Failure to comply with the terms and conditions of the Contract

The term "non-compliance" as issued by other state or federal regulatory agencies shall be defined by the agency issuing the notice.

If the Contractor's pollutant discharge/release is considered a hazardous material, DEQ and the Department of Emergency Management must be notified immediately. DEQ must pre-approve all subsequent site investigations and corrective actions. If an acute hazard (fire, explosion, environmental emergency, etc.) occurs as a result of work performed, omitted or neglected by the Contractor, the Contractor must take immediate action to abate the hazard, regardless of whether DEQ has pre-approved the corrective work or action.

PROCEDURES

The following procedures provide both the Contractor and VDOT employees the required documentation process for addressing non-compliance notices issued by a regulatory agency or VDOT. These procedures are not intended to be all-inclusive or address every potential non-compliance scenario. It is important to note that the issuance or timing of issuance of any directive from an authorized VDOT representative or regulatory agency cannot be used as a defense against damages caused by the actions/inactions of the Contractor. A Contractor's actions or inaction to remain in or obtain compliance may dictate the extent to which potential damage claims may be brought against the Contractor. Depending on the type and severity of the violation additional items and steps may be taken to ensure subsequent comprehensive compliance with the contract.

In all cases relevant to damages off-site, the District Administrator or his designee will aggressively pursue all avenues at his disposal to require the Contractor to take immediate action to stop such damages from continuing to occur by continuous monitoring the Contractor's efforts to ensure that damages are not exacerbated. Anytime the Contractor is not responsive or is unable to stop damages from occurring, the District Administrator or his designee will employ state forces to provide remedy. Once damages off-site have occurred, it may be necessary to construct or install controls or take other remedial actions that are not within the original contract documents. In addition, immediate remedy of damages offsite may be delayed due to the need to obtain access rights from adjacent property owners. The District Administrator or his designee will aggressively pursue agreements with property owners who have sustained such damages in order to achieve timely remedy and take corrective actions as soon as access rights are obtained.

In all cases relevant to non-compliance of the Contractor, the District Administrator or his designee, with assistance from District Environmental Monitor staff or the Statewide Safety Compliance Manager, shall document and record all site-specific conditions on a continuous basis until compliance is achieved. Such documentation shall include, but is not limited to:

- Recorded times and dates of all actions
- Written records of communication
- Inspector log books and reports
- Written reports with signed receipts by the Contractor
- Environmental Compliance Reports

- Photographs (digital or film) and/or videos with date and time imbedded in the images
- Pre- and post-damage survey records

(A) FIRST NOTICE OF NON-COMPLIANCE ISSUED BY A REGULATORY AGENCY

The Construction Inspector will notify the Contractor of any notices issued by regulatory agencies immediately upon receipt. The inspector will document the agency's name and the official who issued the notice, time and date of issuance, required date of compliance, how the notice was presented to the Contractor, and any facts the inspector is aware of, leading up to and including the issuance of the actual notice. The inspector will also retain a copy of the actual notice

The Construction Inspector will document the Contractor's action(s), if any, upon receipt of the notice given:

- If the Contractor took *immediate* action and corrected the non-compliance in accordance with
- VDOT specifications and standards and/or the laws and regulations of the issuing agency, no further action is necessary beyond completing documentation of all parties' actions until compliant status is obtained.
- If the Contractor did not take immediate action to comply, the District Administrator or his designee will issue a written order to the Contractor to stop work in part or on all project activities depending upon the severity of the non-compliance in order to correct all non-compliant items.

The Contractor is to begin work on correcting the non-compliance immediately upon receipt of the written work stoppage order. The determination as to whether or not all work is to be suspended will depend on the severity of the non-compliance (i.e. Does the non-compliance have the potential of causing off-site damage, damage to natural resources, endanger the safety of the public or personnel working on the project, or has the Contractor been cited for non-compliance on this project previously?), and whether the Contractor is diligently pursuing correcting the non-compliance.

If a regulatory agency cites a violation and requires the Contractor to substitute or introduce a material or item that is not a part of the existing contract the District Administrator or his designee will ask for documentation from the agency showing that the existing measures (if properly installed) failed requiring the need for the non contract material(s) or item(s).. If the documentation shows the existing measures failed despite being properly installed, the District Administrator or his designee will direct the Contractor to submit a work order to address the agency's requirement. If the measures did not fail, the VDOT project staff will not change the contract without consulting the District Environmental Monitor or Statewide Safety Compliance Manager.

- The Construction Inspector, with assistance from the district will inspect, monitor, and document actions.
- Time limits for correction for non-compliance will be determined by the date listed in the written notice along with the nature and severity of the non-compliance.
- Non-compliance with an environmental permit or with the Virginia Erosion and Sediment Control Law must be corrected within the amount of time listed on the written notice to comply or stop work order issued by the Regulatory Agency. If the Contractor cannot comply with the time limits in the notice, then the Contractor shall submit an anticipated completion date to the Inspector, who will notify the Permit Holder and the District Administrator or his designee of the anticipated delay and reasons of non-compliance with the notice.
- Non-compliance with safety that endangers workers or the public must be corrected immediately.
- Non-compliance with safety that is not causing imminent danger to workers or the motoring public must be corrected by the next calendar day.

The Department will issue the back-to-work order after the Regulatory Agency that issued the noncompliance notice agrees that the Contractor is back in compliance.

(B) NON-COMPLIANCE NOTED BY A VDOT REPRESENTATIVE:

The Construction Inspector will be responsible for documenting the non-compliance as it relates to the VDOT Road and Bridge Standards, Road and Bridge Specifications, contractual requirements, or environmental permits. The Inspector will document the basis for the non-compliance including how and by whom the Contractor was notified. The Area Construction Engineer will give written notification of a noncompliant item and the timeframe for corrections. The Construction Inspector will record the Contractor's immediate action(s), if any, upon receipt of the notice given.

The Contractor is to begin work on correcting the non-compliance immediately upon receipt of the written notice.

- If the Contractor takes immediate action and corrects the non-compliance in accordance with the VDOT specifications and standards, no further action is necessary other than complete documentation of remedial actions.
- If the Contractor does not take immediate action to comply; the Area Construction Engineer will issue a written order to the Contractor to stop work in part or on all project activities depending upon the severity of the non-compliance in order to correct all non-compliant items.
- The determination as to whether or not all work is to be suspended will depend on the severity of the non-compliance (i.e. Does the non-compliance have the potential of causing off-site damage, damage to natural resources, endangers the safety of the public or personnel working on the project, or has the Contractor been cited for non-compliance on this project previously?), and whether the Contractor is diligently pursuing correcting the non-compliance.
- The Inspector, with assistance from the District Environmental Monitor, or Statewide Safety Compliance Manager will inspect, monitor, and document the corrective actions.

The Area Construction Engineer will issue the back-to-work order after he determines that the Contractor is back in compliance.

(C) SECOND NOTICE FOR SAME NON-COMPLIANT ITEM

If the Contractor does not achieve full compliance within the timeframe required by the Area Construction Engineer or continues to disregard the notification of non-compliance following the initial suspension of work, the Contractor will be notified a second time in writing by the Area Construction Engineer. The Construction Inspector will record the Contractor's immediate action(s), if any, upon receipt of the second notice given.

When the Contractor is given a second written notification of non-compliance, he will be taken off the bidder's list for a period of six months.

The Inspector, with assistance from the District Environmental Monitor or Statewide Safety Compliance Manager will inspect, monitor, and document actions or non-action on the part of the Contractor

- Non-compliance with an environmental permit – VDOT will remove the Contractor from the permit site and bring in state forces or another contractor to complete the work as permitted by Section 105.13 of the Road and Bridge Specifications.

Non-compliance with the Virginia Erosion and Sediment Control Law – VDOT will remove the Contractor from the non-compliant site and bring in state forces or another contractor to complete the work as permitted by Section 105.13 of the Road and Bridge Specifications. VDOT will rescind the Contractor's erosion and sediment control certification if issued by VDOT.

- Non-compliance with safety that endangers workers or the public - VDOT will remove the Contractor from the site specified as a safety concern and bring in state forces or another contractor to complete the work as permitted by Section 105.13 of the Road and Bridge Specifications. VDOT will have the Contractor's representative responsible for supervising project safety removed from the project.
- Non-compliance with safety that is not causing imminent danger to workers or the public – VDOT will have the Contractor's representative responsible for supervising project safety removed from the project.

The Area Construction Engineer will notify the District Construction Engineer who will notify the State Construction Engineer. The State Construction Engineer will take action to remove the Contractor from the bidders' list.

(D) ADDITIONAL NOTICES OF NON-COMPLIANCE

If additional notices of non-compliance are issued to the Contractor he will be required to review his work practices and processes as part of his progress schedule at a conference called by the District Administrator or his designee.

The Contractor will be required to develop a new company environmental or safety policy reflecting his concerns for protecting Virginia's natural resources or the safety of the public and his own workers to be reviewed and accepted by the State Construction Engineer. This policy shall include a training plan for employees, standard operating procedures for company employees designed to protect Virginia's natural resources or the public, and designation of an individual whose responsibility will be storm water management to inspect and oversee all land disturbing activities.

VDOT will recheck the Contractor's certifications and may de-certify his employee responsible for erosion and sediment control, or his erosion and sediment control contractor if VDOT issued the certification and/or safety officer.

The State Construction Engineer will remove the Contractor from the bidders list for 6-months.

If the Contractor receives a Second Notice of Non-Compliance for items not defined above from a VDOT representative and not related to the first notice:

- The Contractor will be required to review his work practices and processes as part of his progress schedule at a conference called by the District Administrator or his designee.
- VDOT will recheck his certifications and may de-certify his erosion and sediment control contractor and/or safety officer.

(E) REPEATED OR EGREGIOUS NON-COMPLIANCE

For repeated or egregious non-compliance, the District Administrator or his designee may proceed to immediately shut down the project, and commence debarment procedures against the Contractor.

(F) APPEAL PROCESS

The Contractor has the right to file a claim under Section 105.16 of the Road and Bridge Specifications and has the right of appeal to the Chief of Policy, Planning, and the Environment.

Process for Appeal to the Chief of Policy, Planning, and the Environment:

- If the Contractor wishes to file an appeal upon receipt of a suspension of work order as a result of a notice of non-compliance the Contractor shall, within 24-hours of receipt, submit a notice of appeal in writing to the Chief of Policy, Planning, and the Environment. The notice of appeal shall specify the type of appeal hearing the Contractor desires and who will represent him as counsel.
- In accordance with § 9-6.14:1 *et seq.* of the Code of Virginia the Chief of Policy, Planning, and the Environment will set the date, time, and place for an appeals hearing and notify all individuals to be present to present evidence.

The Area Construction Engineer will be responsible for keeping all documentation and accurate cost information associated with any investigation that result from any notice or VDOT Safety or Environmental Compliance Report.

DAS

C: Commissioner
Deputy Commissioner
Commissioner's Staff
Division Administrators
District Construction Engineers
District Maintenance Engineers
District Materials Engineers
District Preliminary Engineering Managers
District Location and Design Engineers
District Bridge Engineers
District Civil Rights Managers
District Contract Administrators
Regional Operations Directors
Residency Administrators
Area Construction Engineers
Construction Managers
Project Inspectors
Federal Highway Administration
Office of the Attorney General
Virginia Department of Minority Business Enterprise
Virginia Transportation Construction Alliance
Old Dominion Highway Contractors Association
Virginia Asphalt Association
American Concrete Pavement Association
Virginia Ready-Mixed Concrete Association
Precast Concrete Association of Virginia
Division Library