

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF TRANSPORTATION

# CONSTRUCTION DIVISION MEMORANDUM

<b>GENERAL SUBJECT:</b>	<u>Environmental and Safety Responsibility</u>	<b>NUMBER:</b>	<u>CD-2002-9</u>
		<b>DATE:</b>	<u>October 29, 2002</u>
<b>SPECIFIC SUBJECT:</b>	<u>Improving Compliance with Environmental and Safety Laws</u>	<b>SUPERSEDES:</b>	<u>N/A</u>
		<b>SUNSET/ EXPIRES:</b>	<u>December 31, 2007</u>

Original w/Signature on file in Construction Division

**C. F. GEE**  
**CHIEF OF OPERATIONS**

## 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 non-compliance 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 Department of Environmental Quality (DEQ), the Department of Professional and Occupational Resources (DPOR), the 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 VDOT Road and Bridge Standards, 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 documents issued by a local, state or federal regulatory agency having jurisdiction over the activities being preformed 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; or,
- 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 investigation and corrective actions. If an acute hazard (fire, explosion, environmental emergency, etc.) occurs as a result of work performed 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 either 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 order 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 comprehensive compliance with the contract.

In all cases relevant to damages off-site, the Chief of Operations 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 of the Contractor's efforts in order to ensure that damages are not exacerbated. At any time the Contractor is not responsive or is unable to stop damages from occurring, the Engineer 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 Chief of Operations or his representative 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 Chief of Operations, with assistance from District Environmental Monitor staff or the District Safety Engineer, 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 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 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 Chief of Operations 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 Chief of Operations will ask for documentation from the agency showing that the existing measures (if properly installed) failed. If the documentation shows the existing measures failed, a work order will be submitted 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 District Safety Engineer.

- The 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 Chief of Operations 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 non-compliance 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 Road and Bridge Standards, Road and Bridge Specifications, contractual requirements, or environmental permits. The Inspector will document the basis for the non-compliance and how and by whom the Contractor was notified. The Resident Engineer will give written notification of a non-compliant 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 order.

- If the Contractor takes immediate action and corrected the non-compliance in accordance with VDOT specifications and standards, no further action is necessary other than complete documentation of remedial actions.
- If the Contractor did not take immediate action to comply, the 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 District Safety Engineer will inspect, monitor, and document corrective actions.

The Resident 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 Resident 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. 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 District Safety Engineer 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 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 safety removed from the project.

When the Contractor is given a second written notification of non-compliance, the Department will take the Contractor off the bidder's list for a period of six months. The Resident 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**

The Contractor will be required to review his work practices and processes as part of his progress schedule at a conference called by the Chief of Operations or his representative.

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 Chief of Operations. 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 designate an individual whose responsibility will be stormwater management to inspect and oversee all land disturbing activities.

VDOT will recheck the Contractor's certifications and may de-certify his erosion and sediment control contractor 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 Chief of Operations or his representative.
- VDOT will recheck his certifications and may de-certify his erosion and sediment control contractor or safety officer.

#### **(E) REPEATED OR EGREGIOUS NON-COMPLIANCE**

For repeated or egregious non-compliance, the Chief of Operations 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 Director of Planning and the Environment.

Process for Appeal to the Director of 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, submit a notice of appeal in writing to the Director of 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 Director of 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 Resident Engineer will be responsible for keeping all documentation and accurate cost information associated with any investigation that results from any notice or VDOT Safety or Environmental Compliance Report.

DWN

c: Mr. Philip A. Shucet  
Mr. Claude D. Garver, Jr.  
Mr. Malcolm T. Kerley  
Commissioners Staff  
Division Administrators  
District Construction Engineers  
District Maintenance Engineers  
District Materials Engineers  
District Equal Opportunity Managers  
District Contract Administrators  
Resident Engineers  
Project Engineers  
Project Inspectors  
Federal Highway Administration  
Virginia Department of Minority Business Enterprise  
Virginia Road and Transportation Builders Association  
Old Dominion Highway Contractors Association  
Virginia Asphalt Association  
Virginia Aggregates Association Inc.  
American Concrete Pavement Association  
Virginia Ready-Mixed Concrete Association  
Precast Concrete Association of Virginia