



## Vermont Wetlands Program Guidance #5:

### Wetland Investigations and Compliance Interim Guidance

#### Purpose:

The overarching goal of the Vermont Wetlands Program (Program) is to protect wetlands and the functions and values they provide. The enforcement and compliance components of the Program seek to promote Program integrity by increasing and maintaining compliance with the Vermont Wetland Rules (VWR). This document provides guidance to District Wetland Ecologists (DWE) to ensure the consistent and timely investigation of incidents and return to compliance. This document also provides wetland-specific details for the Department's Strategic Overlay.

#### Definitions:

Complaint: an unconfirmed allegation of a violation received from the public, staff, another agency, etc. which is recorded in the incident reporting database, Bear.

Incident: an entry in Bear. An incident may be a complaint, observation, alleged violation, confirmed violation, or an instance where no violation is found.

#### Roles and Responsibilities:

A lead investigator is assigned to each incident in Bear. The lead investigator is responsible for compelling a return to compliance, closing the incident in Bear in a timely manner and drafting a referral (when applicable). Further details on the lead's responsibilities are below. The EEO will reach out to the District Wetlands Ecologist when technical wetland expertise or rule interpretation is needed.

Responsibilities for the lead investigator, assigned in Bear:

- 1) Sole point of contact with the respondent;
- 2) Issuance of NOAV (if applicable)
- 3) Uploading all documentation of the incident into Bear;
- 4) Ensuring a return to compliance is obtained;
- 5) Compiling and drafting referral documents for referral for formal enforcement.

**A. Lead Assignment:** Wetland complaints received by ANR will be assigned a lead investigator. If the wetland is not clearly contiguous to a VSWI mapped wetland, the DWE is assigned the lead. DWE may assign themselves as lead using the checkbox in Bear.

**B. Coordination with Enforcement Division Staff:** See appendix B.

## **Tools:**

Various tools can and will be used to help resolve an incident including:

- A. Notice of Alleged Violations (NOAVs):** NOAVs document a potential violation, notify the potential violator of directives and timeframe by which to return to compliance, and alert the respondent to the consequences of a lack of return to compliance. Only the lead investigator should issue the NOAV (coordinating as necessary prior to issuance).
- B. After the Fact Permits:** ATF permits are only appropriate when a project, as built or with restoration, meets the standards of avoidance, minimization and no undue-adverse impacts as listed in Section 9 of the Vermont Wetland Rules. ATF permits are a programmatic means of bringing a project into compliance, and can also be used in conjunction with other enforcement tools where appropriate.
- C. 1272 Orders:** 10 V.S.A. Section 1272 orders allow for activities that may result in discharges to state waters. The Program has used 1272 orders in the past to dictate conditions for restoration to environmental violations that may not require an ATF Permit, or Assurance of Discontinuance (AOD). Because this is an enforceable document, this can potentially be a helpful tool in cases where a person is willing to do the restoration work and needs clear, enforceable directions. This document can be issued by the WSMD. This option is used sparingly.
- D. Administrative Orders (AOs):** AOs are generally issued by the Agency of Natural Resources Office of the General Counsel. AOs are court approved orders usually requiring the cessation of work. This is used in case of emergency, to stop work that is resulting in ongoing harm to the environment. Requests for AOs are processed as a formal enforcement request and moved through the Enforcement Referral Review Committee (ERRC). This document may include financial penalties and compliance directives.
- E. Assurance of Discontinuance (AOD):** AODs are the equivalent of a settlement agreement between the Agency and the respondent. This document is something we work on with the Office of General Counsel attorney after an incident has been fully investigated and documented and approved by the Enforcement Referral Review Committee. It includes financial penalties and final compliance directives, if any.

Requests for AODs need to be written up as a formal enforcement request and be approved by the Enforcement Referral Review Committee.

- F. Citations:** Citations are used in situations where the violation has been fully resolved, and the activity may not rise to the level of a full enforcement case per the Department or Program Strategic Overlay. Citation amounts can be found in statute (10 VSA § 6025). Citation requests are sent to the Chief EEO for issuance.
- G. Warning Letters:** Warning letters can only be used when an Ecologist believes a violation is likely to occur, not when one has been observed. Tracking these incidents in the Wetlands Database is critical for pursuing future enforcement if these reminders are not heeded.
- H. Compliance Letters:** Letters sent to the respondent when the Ecologist believes a violation has occurred but would like to use an alternative to an NOAV. May be followed up with an NOAV.

## Investigation and Decision Process

### Step I: Receive incident.

There are three ways the Program identifies incidents. Below is their intake procedure. Intake should be completed within one week of receiving the incident.

#### 1. Complaint Received from public

- a) Check to see if this incident is already being investigated via BEAR. All complaints are required to be entered into BEAR and can be entered using the wetlands database.
- b) If the complaint is not in BEAR, enter the incident in BEAR via the wetlands database as the information is provided. For field days see Appendix A which is a printable form version of the online form for when the Ecologist does not have internet access. Fill the complaint form out for the complainant, using the complainant's contact info and name (if provided). Check the "request to be assigned box?" if the wetland is not clearly mapped or if you would like to be the lead regardless. It is helpful to add in the comments section whether the wetland is mapped.
  - i. Another option may be to send the complainant to the online complaint page to fill out the information directly. This should not be the default, but may be an option for DEC internal incidents, if the DWE unprepared to take the incident details, or if the complainant has a lot of information that may be better documented first-hand.

- ii. For extremely time-sensitive incidents, emailing the ECD Administrative Assistant with information about the project is an option to record a complaint in BEAR. This method should be used sparingly.

## 2. Ecologist discovers an alleged violation<sup>1</sup> in the field

- a) Check in BEAR and wetlands database to see if this incident is already being investigated.
- b) Enter the incident in the wetlands database and request to be assigned as the investigator if it is not multijurisdictional.
- c) For multijurisdictional incidents, coordinate with EEO as requested.

## 3. Incident originates with the Environmental Compliance Division

- a) Incident will already be in BEAR
- b) Check to see if the incident was properly assigned (see flow chart and roles and responsibilities section)
- c) Enter incident number into the wetland database system with the appropriate project file, where applicable. Otherwise, create a new project number to associate with incident.

### Step 2: Determine if there is a violation

For all incidents, a determination must be made as to whether a violation is present. The lead investigator should complete this step to the best of their ability within 2 months of assignment, unless awaiting more information from EEO or unless there are seasonal constraints. A violation requires that there is both a jurisdictional wetland and an unauthorized activity in said wetland or buffer zone. Besides the usual investigation of “who did what when”, the following information is specific for wetland investigations.

- A. Desktop Review: A desktop review yields information about the property in question such as wetland mapping, hydric soils, aerial photos that depict wetlands, permits, previous site visits and directives, or calls on jurisdiction. At times a desktop review may be sufficient for finding positive evidence of the presence of wetlands, but in most cases field verification of wetland and wetland classification is required. An on-site an assessment of an activity can determine whether that activity complies with the Vermont Wetland Rules. Desktop reviews can reveal projects/violations that the Program has already reviewed and provided guidance.

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<sup>1</sup> DWE are required to investigate all complaints received. Complaints are the priority but a DWE may add violations that they find when they are new, egregious, associated with a previous jurisdictional decision or permit.

B. Field Review: Field reviews will range from “drive-bys”, unexpected discoveries of violations during routine site visits, to strategically planned and coordinated site visits that include EEO’s, law enforcement officers, lawyers and consultants. In all field review situations the following information is required to determine if there is a violation:

1. Presence/absence of jurisdictional wetland:

- i. Is it a wetland? For all wetlands look at dominant vegetation, soil, hydrology, approximate wetland boundary as per the Army Corp of Engineers (ACOE) Delineation Manual.
- ii. Is it a jurisdictional wetland? Check for presence or continuity in the case of mapped wetlands. For wetlands that meet the Section 4.6 Presumptions but are not mapped, collect the information needed for the Class II Report (DWE only).

2. Presence/absence of jurisdictional activity:

- iii. What is the activity- is it an allowed use or an activity that needed a permit (EEOs confirm with DWE)?
- iv. Where is the activity in relation to the wetland? Is the activity in the wetland or 50-foot buffer?

C. Determination Results:

1. No, there is not a violation – **Go to Step 7**. Either there is no jurisdictional wetland or the activity is not jurisdictional (outside of wetland/buffer or considered an allowed use).

- o Communicate with complainant and respondent if in touch
- o Enter in Wetland Database as non-wetland and close out as “*no violation found*” which routes to BEAR.

2. Yes, there is a violation or high probability of a violation– **Go to Step 3**

### Step 3: Document the Violation

This step should occur simultaneously with Step 2. It is not acceptable to file documentation months after the investigation or after an NOAV is issued. The following documentation should be part of the project file:

- Map of project area: Map should include VSWI, hydric soils, advisory layer. The map should also include the approximate wetland location drawn based on aerial photo interpretation or field review and the location of the activity in relation to the wetland.
- Interactions included in database (DWE) or summary of events (EEO).
- All photos of the wetland and the activity in question with dates, and notes on where the photos were taken, and what direction (may use maps to document this).
- All notes regarding any conversation or interaction with the landowner, responsible party, etc. including who was there and the date. This may be recorded in the Interactions tab in the database for DWE.

- Notes regarding the wetland – soils, vegetation, hydrology, approximate wetland line
- Notes regarding function and value, and why wetland may meet Section 4.6 presumption
- Notes regarding the activity, (who, what, when, where, why including approximate area of disturbance, pre-disturbance conditions, intersection with the Rules).
- Any correspondence with the responsible party or their representatives (e-mails, letters, notes on phone calls, notes on site visits)
- Documentation of any decisions in term of restoration, permitting, next steps and due dates.

Alleging an environmental violation is a most serious matter. Documentation must be clearly recorded on the wetland jurisdiction and the activity before seeking any compliance. If enforcement tools are needed and there is no clear record of the violation the case may need to be dropped which wastes resources and harms Program integrity.

#### Step 4: Select Path to Compliance.

At this Step you have an understanding of the full scope of the violation, and have investigations done by the Ecologist and/or the EEO. Correction of the violation and repairing the natural resource is the first priority for the Department for the respondent. Avenues to meet compliance directives may differ depending on the level of cooperation, and on severity and complexity of the violation. Different tools for enforcement and bringing a site into compliance are to be used, and the Wetland Strategic Overlay helps to determine this next step. At any time, the situation may escalate the incident into formal enforcement. Once full compliance is reached or stalled, the outcome is reassessed and moved to formal enforcement.

Options include:

- A. **No Action:** In this instance the DWE does not follow up with the respondent and does not compel compliance. This option will never be used when a violation keys out as a case or citation under the SO. This decision must be documented in the databases and properly closed out in BEAR (Code: 3a Violation Found – No Action Taken). The following scenarios are good reasons on their own or in combination to exercise the “No Action” option:
  1. The violation discovered is more than 2 years old, is stable, and not causing additional harm beyond the original activity;
  2. Violation is uncertain and respondent is unknown after an initial investigation;
  3. Alleged violation is minor and was not a received complaint.
  
- B. **Compliance Letter only:** the DWE sends one letter to the respondent. The letter should include a map of the wetland area on the parcel to prevent any additional

encroachments. This option is used in instances where the violation is minor and it is likely that passive regrowth would allow the site to restore. For example, a compliance letter may be used for passive restoration where the respondent need only to allow a cleared area to naturally revegetate. One follow-up visit within a year and a half is recommended for passive restoration. Do not close out in wetland database unless you verify compliance. If compliance isn't reached in 5 years, close out in BEAR (Code: 3a Violation Found – No Action Taken). Once compliance is obtained, refer to the SO to determine if a case or citation is warranted.

C. **Full Restoration:** Use this option when wetland impacts could have been avoided and can be reversed. An NOAV with directives is recommended. In more complicated situations, require a restoration plan and long-term monitoring. Track the directive in the compliance part of the wetlands database (DWE). [Close out in BEAR](#) or through the wetlands database when complete. Use the SO to determine whether to refer as a case if directives are not timely met or determine whether to refer as a case or citation once compliance is obtained.

D. **ATF permitting with or without restoration:** This is when the project as a whole or with restoration can be permitted. This requires the respondent to prove no undue adverse impact as result of the project ultimate outcome and satisfies the avoidance and minimization requirements.

NOTE: In some cases, there is an advantage to being able to condition past and future activities related to the project. For example; requiring landscaping to prevent future encroachment into buffers. The Program may go this direction if there aren't other options, and if full restoration may cause more harm.

- For those ATF permits that require restoration, it is appropriate that a restoration plan be submitted with the permit application and that it becomes part of the condition of the permit. Permitting fees are charged for those areas that are restored (0.75/sqft wetland), as well as those that are proposed to remain (1.50/sqft wetland).
- For those ATF Permit Amendments – where the as-built project exceeds the previously approved limits of disturbance – the ATF fee applies (1.50/sqft wetland).

Use the SO to determine whether to refer as a case if directives are not timely met or determine whether to refer as a case or citation once compliance is obtained.

E. **Case Referral:** Large, egregious complicated violations which obviously key out as a case using the SO may be referred as a case immediately. See Wetland Program

Manager and Chief Environmental Enforcement Officer before making this determination. **Go to Step 7 part C.**

- F. **Emergency Order:** Used when a violation needs immediate action to prevent harm to human health and safety or the environment. See Wetland Program Manager and Chief Environmental Enforcement Officer for more information. **Go to Step 7 part C.**

Timebound directives must be added to the compliance tab of the project in the Wetlands Database. This will allow the DWE to track the compliance deadlines in the Ecologist Dashboard. Best practice includes creating an Outlook calendar invitation or other pop-up notification of directive deadlines to ensure timely follow-up with the respondent.

### **Step 5: Communicate with the Respondent.**

The violation and any directives for obtaining compliance must be communicated to the respondent either verbally or in writing if compliance is being sought. Communications for a violation which may involve a citation or other enforcement action are to be made in writing. The lead investigator should complete this communication within a week of completing steps 2 and 3. Directives need to include dates to keep the project on task and expectations clear.

- A. **Verbal Notification** – In safe situations, the Ecologist may notify the violator verbally of the potential violation and actions requested. A verbal notification must be documented in the databases. Verbal notifications shall be followed up with a written notification to the violator in the following formats outlined in B-D.
- B. **Email Notification** – Provide a respondent with an email which describes the violation and actions requested by a date certain. The action requested may be for them to provide you with their restoration timeline. If there is no response or the situation otherwise changes, an NOAV may be issued. The email must be documented in the databases.
- C. **Compliance Letter** – Use the compliance letter template and send certified mail. Document the action.
- D. **NOAVs** – Notice of Alleged Violations. To determine if an NOAV is necessary refer to the [2017 DEC Guidance for NOAV](#) and/or coordinate with the EEO to determine if an NOAV should be issued. When resistance is received in correcting a violation, an NOAV is recommended. The NOAV must include the compliance directives with a timeline.



1. EEO-issued NOAV: EEOs who are the lead investigator may consult with the DWE prior to issuance of an NOAV or will include a vague wetland directive of contacting the wetland ecologists for details. The former is recommended. Record compliance directives and dates in the *Compliance* tab in the Wetland Database.
2. Program-issued NOAV: DWE who are the lead investigator shall fill out the NOAV Shell and route up through the Program Manager for Director/Deputy Director to sign. Include compliance directives and reasonable response dates. Record compliance directives and dates in the *Compliance* tab in the Wetland Database, and add an NOAV date in the BEAR portion of the wetlands database.

### Step 6: Follow up on Directives.

The lead investigator ensures that compliance directives are met in the timeframe required. If the directives are technical in nature, the EEO will reach out to the DWE to confirm. The lead investigator shall follow up with respondent on compliance directives at a minimum when directives are over 1 month past due, for 75% of investigations and within one week of receiving a response or directive work products from the respondent. Follow up may take a variety of forms:

- Additional site visits
- Phone call/email
- Request for evidence of compliance (photographs, observations by other DEC staff)

Follow up must be documented in the databases. The information gathered in this follow-up may change the nature of the case which could change the ultimate resolution.

If compliance has not been obtained after the follow-up, the investigator should send additional correspondence with the respondent to encourage compliance. If unsuccessful, the investigator may consult the SO to determine if a case referral is appropriate.

### Step 7: Resolve the Violation

Review the Strategic Overlay again to decide whether the resolution will be to refer to the Enforcement Referral Review Committee (ERRC), to request a citation, or have no formal action. If compliance has been met and the incident is not a citation or case, **skip to Step 8.**

- A. **No Formal Enforcement Action:** If compliance has not been met and the incident does not warrant a citation or a case referral, go back to Step 5 and continue to encourage compliance (low priority). Extenuating circumstances may warrant a deviation from the SO Matrix outcome recommendation after consultation with the Program Manager and Director. Potential extenuating circumstances for wetland incidents are outlined in the next section below.

- B. **Issue a Citation:** Citations may only issued when compliance has been achieved and no additional work is required. Citations represents a final action in an enforcement case. The respondent will have an enforcement action on their record, which can serve to document prior violations should they repeat an offence. Considerations for citations are documented in the SO matrix.
1. Write up a citation request using the citation [instructions](#)
  2. Citations need to be requested within 1-2 months of a return to compliance. For example, once an ATF permit is issued, a citation request can be submitted since compliance is reached. If a respondent needs to monitor restoration success and possibly replant and there is no permit condition requiring it, the citation request should wait until the restoration appears to be successful.
- C. **Refer for Formal Enforcement:** Considerations for formal enforcement are documented in the SO Matrix.
1. Referral by EEO: The EEO will require a report summary and the data you gathered in Step 3. Often these can be put together as a [report memo](#) with attachments and sent to the EEO to put into their report.
  2. Referral by Program: A [referral memo](#) is submitted to the ERRC by the Wetlands Manager after approval by the Director. The memo will need to be accompanied with a report summary and the data you gathered in Step 3. To initiate a referral, send your report summary to the Manager so they can write up the memo.

### Step 8: Close the Investigation.

Confirm that the area has been restored or that a permit has been issued, similar to Step 6, and note in the Wetland Database. Follow up in BEAR and apply the appropriate closure code. Referrals shall be closed by the Program Manager. Add any documentation of the closure in the project file (letters, photographs etc). The lead investigator is expected to close violations within a year of the investigation conclusion.

### Step 9: Follow up on Enforcement Action.

Ecologists are responsible for tracking non-monetary compliance of 1272 Orders, AOs and AODs. If deadlines are not met, the respondent is considered in contempt of the Order and the litigating attorney must be notified. DWE are expected to notify their manager of any contempt of court within three weeks of the due date.

Ecologists are encouraged to “check-in” on closed investigations via drive-by, but there is no mandate to do so.

## Strategic Overlay Matrix: Wetland Specific Guidance

- A. **General Guidance:** the SO Matrix is set up as a three-step process. Step 1 requires the user define the violation category. This is fairly straightforward, with one clarification. Violation

activities which qualify as a general permit shall be considered a “Statute, Permit or Rule Violation – other than recordkeeping...” and not “Permit not obtained” because there is a permit for their activity and they failed to follow the permit requirement of first obtaining authorization by the Program.

Step 2 prompts the user to consider the harm associated with the violation. The overarching definition of “substantial harm” from the “SO Matrix Rollout” document sent March 11, 2021 refers to (a) physical injury to a human being or demonstrable substantial risk of serious personal injury to a human being; or (b) substantial damage to wildlife, flora, aquatic life, habitat, livestock, or agricultural crops. There is no specified definition for harm in the Rollout document, but here is the definition from the Merriam-Webster dictionary: “physical or mental damage or injury: something that causes someone or something to be hurt, broken, made less valuable or successful, etc.” Using these overarching definitions, we are able to provide specific guidance for these two categories of harm to the wetland and environment. EEOs need to consult with the DWE to determine which category to use when the violation does not clearly fit into one of the examples provided.

- 1) Threat to harm or caused harm to the environment includes:
  - Activities within a wetland where a permit was not obtained before the activity took place.
  - Undue adverse impact to a wetland through activities occurring within a wetland or its 50ft buffer zone. (e.g. if the respondent needs to restore portions of the project which did not need to be impacted for an ATF permit; not all minimization measures [such as silt fence use] were practiced during the time of construction)
  - Activities which received an ATF permit and had to include compensation for wetland functional loss.
  - Impacts beyond the permitted impacts.
  - Failure to report and act on invasive plant management activities conditioned in the permit.
- 2) Threat or harm to public health and safety includes:
  - Uncontrolled release of impoundments
  - Creation of unsafe impoundments
  - Dumping of toxic or biological waste materials
- 3) Substantial harm to the environment includes:
  - Activities which cannot be restored and were undue<sup>2</sup>. Wouldn't have been permit issued in this way. 10 year recovery. Evidence of deposition.

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<sup>2</sup> As described in the Vermont Wetland Rules section 9. Generally meaning “unnecessarily occurring within a wetland”. Activities which are not water based are presumed to be undue.

- Activities with directives which will take considerable time to restore (e.g. forested wetland clearing) over 5,000 sqft of wetland or buffer area.
- 4) Substantial harm to public health and safety includes:
  - Washout of a road or building due to an uncontrolled release of an impoundment
  - Violations which are directly attributed to a person becoming ill or injured
- 5) No harm includes:
  - Failure to submit or delayed submittal of reports on recording with the town, start work notification and construction completion certification.
  - Activities within previously severely managed buffer only (e.g. shed added to parking lot)

Step 3. Most of the criteria under consideration for step 3 are self-explanatory. This section can benefit from ECD experience when determining which categories are relevant.

- 1) Violations of long duration: a violation is considered of long duration when it remains un-resolved for a complete growing season or a year or more after program contact.
- 2) Clear evidence the respondent knew the violation existed includes:
  - a. Existing wetland permits
  - b. Written correspondence where wetland regulations were mentioned

**B. Deviations from the SO Matrix:** The SO Matrix is a guidance tool and is not intended to 'box in' any outcome. Extenuating circumstances do occur and may warrant an occasional deviation from the SO. Proposed deviations must be discussed with the Program Manager and then seek approval from the Division Director. The following circumstances may be considered for deviation:

- 1) Landownership has changed to an entity who did not cause the violation
- 2) Violation is over 2 years old, stable, and restoration would cause environmental harm (e.g. forested buffer would need to be cleared).

## Appendix A:

### Environmental Violation Report Form

<http://dec.vermont.gov/content/environmental-violation-report> or 802-828-1254

Date or time period violation observed:\*

Town where violation occurred:\*

Description of violation:\*

Directions to subject site:\*

Name and address of violator(s), if known:

Complainant name: (Do not fill out if they wish to remain anonymous)

Complainant mailing address:

Complainant phone number:

Complainant email address:

Best time of day to call Complainant (if they choose):

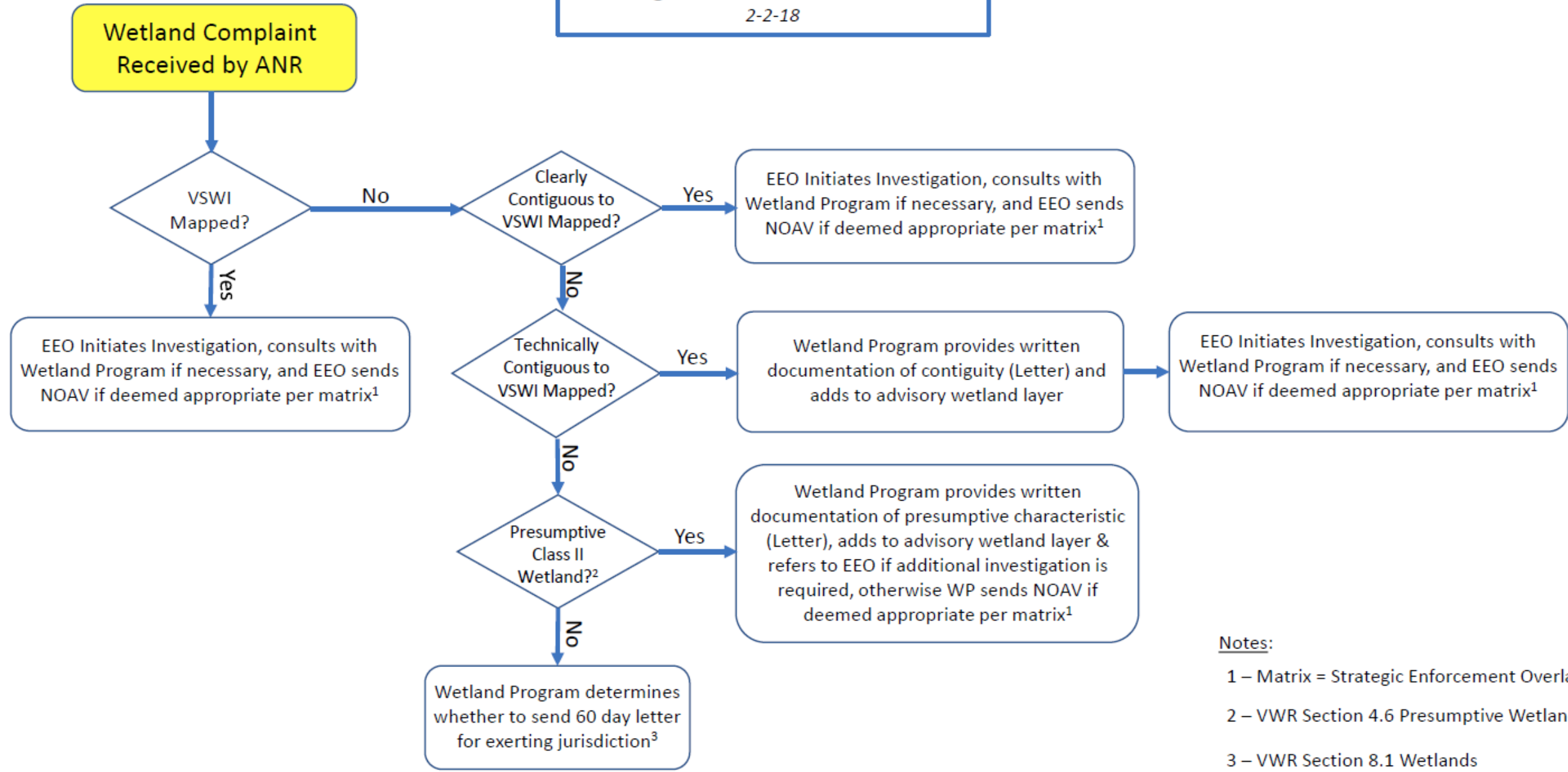
If you know of any other witnesses, please provide their name(s), and contact information:

Enter any other information/comments here (including the Ecologist who fills this out and whether they would like to be assigned to the case):

\*required field


**Appendix B: Wetland Incident Flowchart**

**Workflow for Wetland Incident Investigation and Enforcement**  
2-2-18



- Notes:
- 1 – Matrix = Strategic Enforcement Overlay
  - 2 – VWR Section 4.6 Presumptive Wetlands
  - 3 – VWR Section 8.1 Wetlands

**Appendix C: Department Strategic Overlay Matrix, 2021**



Step 1	Step 2		Step 3					Final Result
Violation Category	Violation presents the threat of substantial harm, or the violation has caused substantial harm, to public health, safety, welfare and/or to the environment	Violation presents the threat of harm, or the violation has caused harm, to public health, safety, welfare and/or to the environment	Two or more in Steps 2 + 3 = move up 1 tier					Tiers
			Failure to remediate or to cooperate with remediation efforts or to return to compliance, after notice	Multiple related violations and/or violations of long duration and/or continuous or ongoing violations (within or across Divisions)	Violation is repeated after notice	Significant economic benefit	Clear evidence that the respondent knew the violation existed. Includes intentional or willful acts such as falsification and misinformation	
Permit not obtained or Prohibited Acts								Case
Statute, Permit, or Rule Violation - other than Recordkeeping and Reporting								Case or Citation
Statute, Permit, or Rule Violation - Recordkeeping and Reporting								Citation or voluntary compliance
	Move up 2 tiers	Move up 1 tier	One or none in Steps 2 + 3 = move down 1 tier					