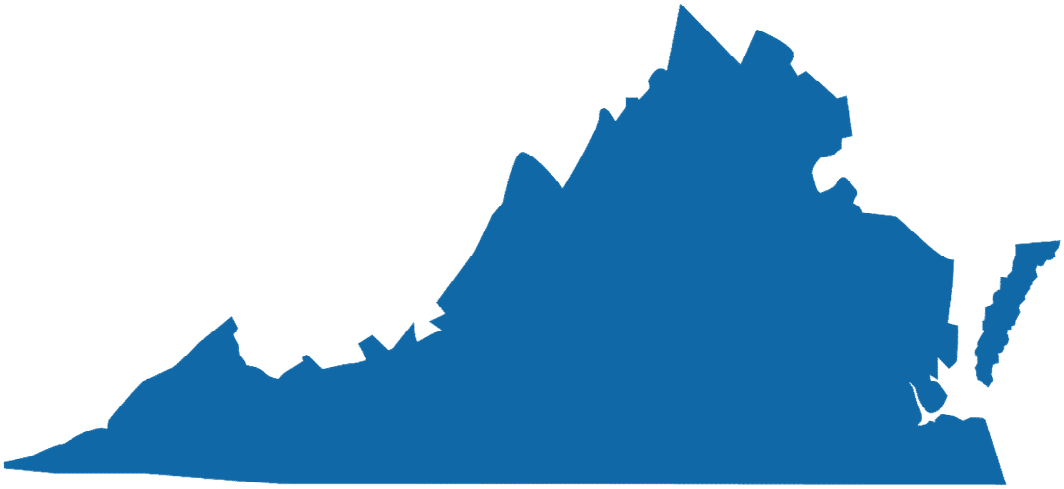
VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

Enforcement Manual



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Chapter One – Enforcement Policy

This Civil Enforcement Manual (Manual) establishes internal instructions and procedures for staff to process enforcement actions in a consistent and timely manner across all media programs and is not intended interpret or implement statutes or the agency's rules or regulations.[1]

Enforcement Mission and Goals

DEQ's enforcement mission is to ensure compliance with Virginia's environmental requirements in all of its enforcement actions, and to encourage environmental stewardship. This mission supports DEQ's statutory policy "to protect the environment of Virginia in order to promote the health and well-being of the Commonwealth's citizens."[2]

To carry out its enforcement mission, DEQ has established the following goals:

- To take enforcement actions that are timely and appropriate, consistent and certain, and reasonable, fair and effective;
- To bring parties into compliance and stop continuing or repeated violations;
- To remediate the environmental impact of violations;
- To recover civil charges and penalties where appropriate, including amounts sufficient to remove the economic benefit of noncompliance;
- To deter future violations;
- To conduct enforcement actions courteously and professionally;
- To assist the regulated community in achieving and maintaining compliance with environmental requirements, and to promote environmental stewardship; and
- To earn public confidence and promote public participation in the agency's enforcement program.

Enforcement Philosophy

DEQ's enforcement program acts to protect human health and the environment and to assure the integrity of the agency's regulatory programs. It promotes the understanding that the common good lies in environmental compliance and stewardship, and that noncompliance is more costly than compliance. DEQ uses a range of enforcement methods and selects the most appropriate method for each action. DEQ ordinarily begins each enforcement action with the least adversarial method that is appropriate for the case.

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[1] The sole exception is Air Check Virginia, Northern Virginia's Vehicle Emissions Inspection Program, which is limited to DEQ's Northern Regional Office and has its own uniquely tailored enforcement procedures.

[2] Va. Code § 10.1-1183. See also Va. Const. Article XI, Section 1, "To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be... the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth."

The Virginia Code directs DEQ's enforcement program to be timely, or "expeditious."[3] The agency's response to violations should be swift, certain, and escalate rapidly for those who remain noncompliant. The enforcement program needs to be well organized and resourceful in the fulfillment of its mission. Appropriate enforcement means that the enforcement action addresses each violation, and that the enforcement response is proportional to the violation. Timely and appropriate enforcement sends messages of deterrence and fairness, both to the regulated party and the community.

The Virginia Code also directs that DEQ 's enforcement program be "consistent" and "comprehensive."[4] Consistency means that all members of the regulated community (public and private) and the public at large can expect similar responses to comparable violations given similar impacts on human health and the environment, regardless of the region or media in which they occur. Still, DEQ recognizes that each case is fact specific. While consistency is always a factor in an enforcement action, it does not mean adherence to past decisions that may no longer be appropriate. To be comprehensive, the enforcement program includes every DEQ media program in which enforcement has a part and should monitor cases to ensure a full return to compliance, including any remediation, and termination of the enforcement action.

DEQ believes that reasonableness and fairness result when enforcement is pursued appropriately and consistently within the bounds of law and regulations. DEQ is open to arguments made in good faith, based on fact, law, or policy that there has been no violation, that one situation is distinguishable from another, or that a civil charge should be reduced or abated. The DEQ enforcement program must meet these standards to fulfill its statutory obligations and to earn credibility with the regulated community and the public. DEQ's enforcement program is continually subject to review, oversight, and public scrutiny to confirm that it is effectively carrying out its mission and goals.

Identifying Violations and Their Priority

Enforceable environmental requirements are established through laws, regulations, permits, and administrative or judicial orders. Possible violations of environmental requirements are identified by many means such as inspections, record reviews, self-reporting, and information supplied by concerned citizens. DEQ compliance and/or Pollution Response Program (PREP) staff assess information about possible violations and usually formulate the agency's first response.

All environmental violations are subject to enforcement; however, DEQ classifies violations based upon their seriousness (i.e., duration, magnitude, culpability) and their impact or threat of impact on human health, the environment, and the regulatory program. Because many programs are based on federal requirements, DEQ has adopted U.S. Environmental Protection Agency (EPA) terminology for classifying noncompliance in programs that EPA has authorized. Staff also use these systems of classifying violations to set priorities for enforcement actions. This does not imply that lower priority violations are not subject to enforcement. It only indicates that

[3] Va. Code § 10.1-1183 (10).
[4] Va. Code § 10.1-1183 (10), (12).

DEQ addresses enforcement matters based on their environmental and programmatic significance.

Overview of Enforcement Actions

DEQ uses a variety of methods to enforce environmental requirements and to bring responsible parties into compliance. These methods are categorized as "informal" and "formal." Informal measures are the least adversarial and include notifying a facility owner or operator of alleged violations verbally or in writing (e.g., through telephone conversations, informal meetings, inspection reports, or NOAVs) and seeking corrective action without further enforcement action. DEQ encourages meetings and other informal contacts to bring responsible parties into compliance expeditiously and to reach a mutual understanding regarding future compliance expectations.

Less adversarial informal methods are appropriate for violations without a high level of environmental or regulatory harm and where parties do not have a history of noncompliance. For more serious violations or for parties with a history of noncompliance, DEQ uses notices of alleged violation (warning letters and notices of violation) to warn of potential formal enforcement. In limited circumstances, DEQ may use a letter of agreement (an informal measure) to memorialize an understanding with a responsible party following a notice of alleged violation.

Formal enforcement methods involve additional administrative or judicial process and usually result in an order or agreement that is legally enforceable. Formal administrative enforcement measures include Consent Orders (or Consent Special Orders), Executive Compliance Agreements, Case Decisions, 1186 Special Orders, Formal Hearing Orders, and Emergency Orders. Judicial actions are undertaken by the Office of the Attorney General (civil and criminal), the U.S. Attorney's Office (criminal) and the local Office of the Commonwealth's Attorney (criminal). In certain cases, such as in EPA-authorized programs, DEQ may also refer the alleged violations to EPA for federal administrative or judicial action. Final orders, whether judicial or administrative, may include appropriate civil charges or civil penalties.

The Virginia Code grants authority for additional measures to support enforcement actions. These include inspection warrants and requests for information by DEQ.

Incentives for Identifying and Resolving Violations

DEQ encourages the regulated community to be proactive in identifying and resolving potential noncompliance. DEQ encourages proactive compliance through information sharing, technical assistance, VEEP incentives, compliance assistance programs, and environmental management systems. These normally take place outside the enforcement process; however, DEQ encourages all enforcement staff to be alert to these opportunities and promote their use. Within the enforcement process, there are separate provisions such as the Process for Early Dispute Resolution; a limited privilege and immunity for violations found, disclosed and promptly corrected as a result of voluntary environmental assessments; and the opportunity to mitigate civil charges through appropriate Supplemental Environmental Projects.

Central Office and Regional Office Collaboration

The Central Office and each of the Regional Offices play key roles in implementing DEQ's enforcement mission and goals. Open communication and mutual support are essential. DEQ enforcement is decentralized, and most enforcement occurs in the DEQ Regional Offices. The Regional Offices are the primary contacts for the regulated community and the public. In most cases, regional staff are the first to address suspected noncompliance and are responsible for initiating, negotiating and concluding enforcement actions, assuring that responsible parties comply with agreements and orders, and return to compliance. Regional Office staff work directly with permittees, attorneys, consultants, and others to resolve issues of noncompliance, and to promote proactive compliance and environmental stewardship. Regional Office enforcement staff also provide assistance to DEQ permitting, compliance and other staff. The Regional Offices develop, issue, and monitor enforcement documents, such as Enforcement Recommendation Plans and Consent Orders, in accordance with this Enforcement Manual.

Central Office coordinates statewide implementation of DEQ's enforcement programs through:

- Developing enforcement policies, procedures, plans and similar documents (in coordination with the Regional Office);
- Providing or arranging for training, providing information, and forums to coordinate enforcement activities;
- Developing reports and tracking mechanisms;
- Conducting adversarial administrative actions in accordance with Va. Code § 2.2-4019 (in coordination with Regional Office staff);
- Serving as liaison to the Office of the Attorney General and preparing referral documents for cases sent to that office;
- Coordinating enforcement and grant activities with US EPA;
- Reviewing or auditing enforcement implementation; and
- Promoting proactive compliance and environmental stewardship.

Central Office and the Regional Offices ensure consistent applications of state laws and regulations. In individual enforcement actions, Central Office staff provide case-by-case advice and consultation to the Regional Offices in accordance with this Enforcement Manual. Central Office may also take the lead in individual enforcement actions as part of OneDEQ or when directed by the DEQ Director. Regional Office staff are encouraged to consult with Central Office on multi-media enforcement actions.

OneDEQ Workload Evaluation and Distribution

The purpose of OneDEQ is to work as one team to provide consistent measures of quality, quantity, and timeliness in enforcement action processing, compliance/enforcement presence, and case resolution. As part of the overall Agency efforts to improve efficiency in the resolution of enforcement actions, the Agency will manage the distribution of workload on a real-time basis and set uniform performance expectations on a state-wide basis to provide the Commonwealth effective and efficient service. Once the Regional Office has reached a case load for each

enforcement staff member that results in a reduction in efficiency (e.g., failing to meet the performance expectations in Chapter 3), the Regional Director and the Director of Enforcement should collaborate on the transfer of those cases to the Central Office enforcement staff for resolution (Day 270). Workload allocation and distribution of cases may also change if a change in venue would better serve the public.

Chapter Two – General Enforcement Procedures

Introduction

This chapter provides the procedures that DEQ staff use to address alleged violations of enforceable environmental requirements,[5] including:

- Notifying Responsible Parties
- Referring enforcement actions and deciding on a path for resolution;
- Resolving enforcement actions with or without Responsible Party consent;
- Special procedures for underground storage tanks (USTs) and for sanitary sewer overflows (SSOs);
- Monitoring consent orders, ECA, and letters of agreement; and
- Closing/terminating enforcement actions.

DEQ staff consider a full range of enforcement tools and select that which is most appropriate to achieve the desired outcome. Enforcement tools are generally utilized in increasing order of severity. While staff begin with the least adversarial method appropriate to the enforcement action, enforcement strategy and methods to resolve a particular enforcement action are wholly in DEQ's discretion. DEQ encourages staff discussion across all levels. Discussion with staff from media-specific programs and those focused on enforcement, be that in Regional or Central Offices, may be necessary to ensure that enforcement actions support the goals listed in Chapter 1.

Retention Schedules and FOIA in Enforcement Actions

The documents and enforcement tools discussed in this chapter and Chapter 4 are subject to enforcement-specific and general retention policies.[6] Information regarding document production and Freedom of Information Act (FOIA) requests can be found in DEQ's Manual for Processing Information Requests Pursuant to the Virginia Freedom of Information Act[7] and the Virginia FOIA.[8] Enforcement staff should follow the regulations, agency retention policies, and the FOIA Manual to answer any questions or address any concerns regarding record retention and FOIA requests. If, after review, questions or concerns remain, such questions should be directed to the agency's FOIA Officer.

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[5] "Enforceable environmental requirements" or "environmental requirements" mean the statutes, regulations, case decisions, including but not limited to permits and consent orders, decrees, or certifications that are enforceable by one of the three citizen boards: State Air Pollution Control Board, State Water Control Board or Virginia Waste Management Board or by DEQ.

[6] The Library of Virginia Records Specific Retention Schedule NO. 440-003 and General Retention Schedule No. 101

[7] FOIA Manual: https://townhall.virginia.gov/L/GetFile.cfm?File=C:%5CTownHall%5Cdocroot%5CGuidanceDocs%5C440%5CGDoc_DEQ_5636_v3.pdf

[8] VA FOIA Act: https://law.lis.virginia.gov/vacode/title2.2/chapter37/

Notifying Responsible Parties

Determining the correct Responsible Party is often straightforward and done through program staff and common procedures. Compliance and Enforcement staff must consult the State Corporation Commission (SCC) database and employ other resources as necessary to ensure Responsible Parties are active legal entities.[9] In addition, staff should review DEQ databases to ensure DEQ documentation supports the Responsible Party determination (e.g., permitted entity in the database is the same as Responsible Party identified in the Notice of Alleged Violation (NOAV) for permit violations). The regulations governing the respective program often discuss liable parties to varying degrees of specificity. NOAVs are a written notification from DEQ to a Responsible Party, alleging that a Responsible Party may be in violation of a permit requirement, regulation, and/or statute. Inspection reports, request for corrective actions, warning letters, and notices of violation (NOV), etc. are all types of NOAVs, and are not case decisions.[10] An NOV is an elevated NOAV and is the referral from Compliance to Enforcement.

There may be enforcement actions where multi-party liability, vicarious liability, or other third-party relationships should be examined to ensure that the enforcement action can achieve its intended goals through the named Responsible Party. Where these issues arise, additional steps should be taken prior to issuance of the NOAV to determine whether (i) an additional Responsible Party should be named, (ii) the named Responsible Party should be removed and a new Responsible Party named, or (iii) the capacity in which the legal entity or its agents may be liable is accurately reflected in the named Responsible Party. Further research may be needed to determine the status of the legal entity and the capacity in which its agents are acting at the time that the NOAV is issued. Questions and concerns regarding liability and the Responsible Party should be addressed with a staff member's Regional Enforcement Manager or Central Office Division of Enforcement as appropriate.

Prior to NOV issuance, compliance and enforcement staff (and permitting staff, when necessary) should coordinate a review of the NOV for accuracy and defensibility. At a minimum, enforcement staff should review the following NOV components: the observations/alleged violations, supporting documentation, cited legal requirements, the named Responsible Party, the Responsible Party address, the identifying information of the site (where unpermitted), the enforcement authorities, and the permit number.

Enforcement Referrals

After referral, enforcement staff have the responsibility for resolving the enforcement action. Enforcement staff will evaluate the NOV and the file of record to determine the appropriate enforcement response. Enforcement and Compliance staff support each other, collaborate, continue compliance activities (unless otherwise agreed), and communicate regularly to ensure

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[9] A legal entity may be registered in a state other than Virginia. If a company is not in the Virginia SCC database, enforcement staff should check with the company to see if it is registered elsewhere. If the legal entity is not active in the SCC database, enforcement staff should check with the Regional Enforcement Manager or Central Office to see if the issue can be resolved.

[10] See, Va Code 10.1-1309(A)(vi); 10.1-1455(G); 62.1-44.15(8a).

an enforcement action is appropriately resolved. Though the NOV is a compliance document and should be entered into DEQ's Enterprise Content Management system (ECM) under the appropriate compliance retention schedule at the time of referral. The NOV should also be stored in ECM by using the enforcement retention schedule (ECM 123-1) in order to maintain a complete enforcement record. Enforcement staff should also link the NOV to the enforcement action in DEQ's Comprehensive Environmental Data System (CEDS) by entering the Enforcement Action number as the CEDS File Number, and the permit/registration number of the facility as the case number where applicable. Enforcement staff must regularly update CEDS with the status of the enforcement action and any pending resolution.

If a Responsible Party asserts that an NOV is erroneous or requests that DEQ rescind an NOV, enforcement staff should coordinate with the compliance program staff, who issued the NOV and decide on an appropriate response. In most situations, if DEQ decides to send a revised NOV or letter rescinding the NOV it will be sent by the staff who issued the original NOV. If a Responsible Party demonstrates that an NOV is erroneous in part, then a "Corrected NOV" should be sent to the Responsible Party. In the highly unusual case that an NOV is completely in error, then a letter rescinding the NOV should be sent.[11] If DEQ staff and the Responsible Party are unable to resolve a disagreement about observations or legal requirements cited in an NOV, the Responsible Party can elevate the issue through the Process for Early Dispute Resolution.

Process for Early Dispute Resolution

Pursuant to Chapter 706 of the 2005 Acts of Assembly, the Director of DEQ has developed the Process for Early Dispute Resolution (PEDR) to help identify and resolve disagreements regarding the issuance of NOAVs.[12] The Process for Early Dispute Resolution is initiated at the Responsible Party's request. While the Process for Early Dispute Resolution is being utilized, DEQ continues to perform all necessary inspections and record alleged violations but does not, except in enforcement actions of emergency, issue NOVs to the Responsible Party for the same or a substantially related alleged violation that is the subject of the Process for Early Dispute Resolution. If the issuance of the NOV is found to be appropriate following the Process for Early Dispute Resolution, enforcement staff begin drafting on an Enforcement Recommendation Plan. If the issuance of the NOV is found to be inappropriate and no further DEQ action is warranted, the enforcement action should be closed.

[11] NOV correction or rescission is very unusual, and is only appropriate when the NOV as issued was wrong – it is not to be used as a negotiation tool or where there are genuine disagreements as to interpretation of facts or law.
[12] The requirement for PEDR is found in 2005 Acts c. 706. clause 2 at the end of the Act. It is not codified. Agency Policy Statement No. 8-2205 provides additional information on the PEDR.

Enforcement Recommendation Plan

An Enforcement Recommendation Plan (ERP) explains a proposed strategy to resolve an enforcement action. In the ERP, enforcement staff provide a thorough, consistent, and well-reasoned analysis to support the enforcement approach, corrective action that will be required, and civil charges imposed. To assist with case management, inspectors and any witnesses (and their affiliation) should be identified by name. Once approved, the ERP authorizes enforcement staff to proceed under its terms.[13]

The ERP should:

- Identify the facility or source of the alleged violation and its location;
- State whether the Responsible Party is in the Virginia Environmental Excellence Program, and if so, at what level;[14]
- Identify the Responsible Party;
- Identify the permit, registration, or Pollution Complaint or Incident Response number;
- Identify the media (air, water, waste) or program;
- State whether the violation is High Priority Violation (HPV) or Significant Noncompliance (SNC);
- Identify any state waters affected;
- Cite the applicable legal requirements[15] and describe the alleged violations;
- Provide a case summary, including relevant NOVs and Warning Letters;
- Explain deviations from the NOVs and any additional violations;
- Where appropriate, attach the civil charge worksheet(s), and discuss civil charge line items (in the text or on the worksheet(s)), including the economic benefit of noncompliance;
- Recommend a preferred course of action; and
- Where appropriate, attach a completed Supplemental Environmental Project (SEP) Analysis Addendum (*See* Chapter 5) with a recommendation regarding the SEP.

Regional Office staff are encouraged to collaborate with Central Office on enforcement strategy. Regional program staff must ensure that facts in the ERP are correct and any proposed corrective action will return the Responsible Party to compliance.

During negotiations with the Responsible Party, new violations may be alleged or additional information may be provided that requires changes to the ERP (e.g., subsequent inspection reports with new or ongoing violations). In instances where new violations are alleged, additional information is provided, civil charges are adjusted, or negotiations lead to significant changes to the Order or LOA, an ERP Addendum must be prepared, not a new ERP, to document

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[13] The authority to approve an ERP is based on the Agency's delegation of authority. .

[14] A person or facility must have a "record of sustained compliance" for VEEP membership. *See* Va. Code §§ 10.1-1187.1; -1187.3.

[15] In ERPs, the alleged violations should be described briefly; the full legal requirements need not be set out.

the changes and provide justification. If enforcement staff believe reductions to the calculated civil charge may be appropriate, staff should consult Chapter 4 and follow the procedures contained therein.

Enforcement Recommendation Plan Exceptions

Enforcement recommendation plans are not required when a proposed civil charge is $15,000 or less. Enforcement staff are still required to complete a civil charge worksheet with a detailed and reasoned analysis that supports the Agency's case decision and explains any deviations from the NOV(s) or additional violations. Coordination and/or collaboration with Central Office is not required for these enforcement actions unless the activity is designated as Significant Noncompliance or a High Priority Violation.

Enforcement Procedures by Consent

Letter of Agreement

A Letter of Agreement (LOA) is an informal enforcement tool that represents an agreement between the Responsible Party and the DEQ following the issuance of a NOV to return the Responsible Party to compliance within 12 months of the issuance date of the LOA. The use of an LOA is available only in very limited circumstances. Although DEQ has authority to enter into agreements (S*ee* Va. Code § 10.1-1186(2)), an LOA is not explicitly recognized in the Va. Code and does not establish independent environmental requirements. An LOA does, however, provide a clear record that the Responsible Party understands its responsibilities for returning to compliance.

An LOA is not meant to be a case decision and does not discharge liability for alleged violations. It is not subject to public notice and comment and is effective from the date of the Responsible Party's signature.

Circumstances for using a Letter of Agreement

An LOA serves only to establish specific requirements to return a Responsible Party to compliance and is effective in resolving alleged noncompliance in relatively limited circumstances, including: 1) relatively minor violations that can be corrected in 12 months or fewer; 2) civil charges are either not appropriate or *de minimis*; and 3) there is no economic benefit or illegal competitive advantage gained from the alleged noncompliance, and (4) the Responsible Party is cooperative and confidence exists that the corrective action required in the LOA is achievable within the prescribed time.

DEQ does not use LOAs for:

- Priority noncompliance, including HPVs (Air), SNCs (Hazardous Waste and Virginia Pollutant Discharge Elimination System, or VPDES);
- Severity Level III violations (Solid Waste);

- Setting interim effluent or withdrawal limits (Water) or emissions limits (Air);
- A Responsible Party that has the same or substantially similar alleged violations in the last 12 months;[16]
- Operating without a permit or pending permit issuance;
- Violations of RCRA Subtitle C requirements; or
- Where the assessment of a civil charge is appropriate and consistent with other enforcement actions.

Elements of a Letter of Agreement

An LOA includes reference to the governing statute, relevant background, and alleged violations, the agreed corrective actions and schedule to return to compliance, an affirmative statement that the LOA is not a case decision, and signatures. The agreed actions are numbered, and, except for the 12-month limitation, the actions are similar to those in the schedule of compliance of a consent order. **Since LOAs are not case decisions, they must not include a finding or determination that a violation has occurred and civil charges cannot be assessed.**

Monitoring and Terminating a Letter of Agreement

An LOA is monitored for compliance as any other enforcement action.[17] If the Responsible Party satisfactorily completes the terms of the LOA the enforcement action is closed. The enforcement specialist should notify the Responsible Party that the successful completion of the terms of the LOA in writing by sending a Termination Letter. If the Responsible Party fails to comply with the terms of an LOA, Enforcement staff should open a new enforcement action which should include a civil charge. A new NOV may be issued, as appropriate, citing the original and any subsequent alleged violations that occurred after LOA execution. Failure to comply with the terms of an LOA is not a separate alleged violation and **must not** be included as an alleged violation in the subsequent NOV. [18] The LOA should be referenced as supporting information in the NOV and as part of the civil charge analysis regarding culpability.

[16] For water programs that means the 12-month period preceding the point accumulation period that led to the referral.
[17] If an LOA is drafted by the compliance staff, compliance staff are responsible for monitoring.
[18] The presence of an LOA should be clearly referenced in any subsequent ERP and consent order.

Consent Orders

A consent order[19] is an administrative order issued by DEQ to a Responsible Party with its consent. Consent orders are case decisions,[20] are authorized by statute,[21] can be enforced in court, and may include civil charges and/or specified actions that a Responsible Party must perform to return to compliance with environmental requirements. DEQ uses consent orders with private entities and federal or local government agencies. For state agencies, DEQ uses Executive Compliance Agreements (ECAs). Enforcement staff develop consent orders, usually after meeting with the Responsible Party, and in accordance with this enforcement manual.

Circumstances for Consent Orders

DEQ uses consent orders to establish an enforceable schedule that compels the Responsible Party to return to compliance in an expeditious manner by:

- Complying with statutes, regulations, permit conditions, orders, and enforceable certifications;
- Applying for and obtaining a permit or coverage under a permit;
- Installing, testing, or implementing new control technology;
- Complying with a schedule for facility upgrades, modifications, startups, and shakeouts;
- Performing a site assessment and clean up or remediation;
- Restoring wetlands and streams, or purchasing compensatory mitigation credits;
- Purchasing nutrient credits or including other offsite measures to compensate for nutrient control deficiencies;[22]
- Setting interim effluent or emissions limits;
- Assessing civil charges for past violations of enforceable environmental requirements, including the recovery of economic benefit;
- Undertaking and completing a SEP as proposed by the Responsible Party and approved by DEQ;
- Recovering appropriate fees and other costs; or
- Performing any other action to return to compliance.

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[19] Though Remediation Consent Orders are administrative orders developed by the Division of Land Revitalization and Remediation to remediate property, the development of Remediation Consent Orders do not fall under this guidance.

[20] Case Decision means 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. Va. Code § 2.2-4001.

[21] Va. Code §§ 10.1-1309, -1316(C) (Air); § 10.1-1455(F) (Waste); § 62.1-44.15(8d) (Water and UST); § 62.1-44.34:20(D) (Oil); § 62.15:25(6) (Stormwater); § 62.1-268 (Ground Water); and § 10.1-1197.9(C)(3) (Renewable Energy).

[22] This applies only to construction stormwater activities. *See* Va. Code § 62.1-44.15:35. DEQ may include the use of nutrient credits or other offsite measures in resolving enforcement actions to compensate for (i) nutrient control deficiencies occurring during the period of noncompliance and (ii) permanent nutrient control deficiencies.

Elements of Consent Orders

A consent order includes the elements below, which are described more completely in the model consent orders. Unlike a notice of alleged violation, the findings of facts listed in a consent order are no longer considered alleged. **A finding of one or more violations of an enforceable environmental requirement is required for a consent order and the assessment of any civil charge.**

- Caption and Style – The Caption and Style includes the letterhead of the office issuing the order; a recital that it is an "Enforcement Action – Order by Consent"; the correct Responsible Party legal name; the facility or source that is the subject of the consent order; and the permit or registration number, if any, or that the facility or source is unpermitted (use the Pollution Complaint/Incident Response No., if available).
- Section A – Purpose – The Purpose recites the authority of DEQ to issue the consent order and states that the consent order is to resolve certain violations (not "alleged violations") of the law, regulations, and permit conditions. If the consent order supersedes another consent order, the Purpose states that as well.
- Section B – Definitions – Definitions are used to specify the references and meaning of terms used in the consent order. The model consent orders refer to terms as defined in law or regulation. Staff may add other appropriate definitions.
- Section C – Findings of Fact and Conclusions of Law – This section describes the jurisdictional, factual, and legal basis for the consent order. Staff are not referred to by name in consent orders, but as "DEQ staff." NOVs issued during the consent order process are cited in this section. The Findings must provide a basis for each item in the Schedule of Compliance. This section must also include a finding or conclusion that the Responsible Party has violated one or more specific, enforceable environmental requirements.
- Section D – Agreement and Order – This section sets out what the Responsible Party agrees to and is ordered to do. It typically incorporates a "Schedule of Compliance" as Appendix A (and Appendix B, etc., as needed) and orders any monetary payments that are imposed (civil charges, annual fees, permit fees, etc.). Any payment plan or SEP offset is included in this section. Putting all monetary payments into one section simplifies tracking and collecting payments as DEQ "receivables." If the consent order supersedes another one, termination of the prior consent order is effected in this section.
- Section E – Administrative Provisions – The Administrative Provisions are the "legal" provisions of the consent order. Alternative provisions are included in the model consent orders. Any changes from the model or alternative language for these provisions must be approved through the Director of Enforcement.
- Signature and Notary Statement – The consent order must be signed by a current, authorized official of the Responsible Party. On a case-by-case basis, enforcement staff may require a notary statement. The notary statement may be appropriate in situations where there is increased risk to the agency (enforcement staff have not met the Responsible Party, high profile case, there is reason to suspect signature may be

disputed, unpermitted, etc.). The type of notary statement should match the type of Responsible Party (individual, corporate, partnership, limited liability company, etc.).

- Schedule of Compliance – The schedule details what the Responsible Party must do to return the facility or source to compliance. The schedule must include firm date commitments for beginning and completing activities or a date certain for when all corrective actions must be completed. Dates for interim milestones may be dependent on DEQ review or approval (i.e., "ratchet dates"). The goal of a Schedule of Compliance is to compel a Responsible Party to return to compliance by a date certain in all enforcement actions. Staff must be sure that all violations in the Findings section are fully accounted for; DEQ may not be able to address violations cited in the consent order later.
- Other Appendices – The details of any SEP or interim effluent limits are set out in separate appendices.

Model Consent Orders

DEQ staff must use the language in model consent orders when preparing and issuing all consent orders. If the models do not address a situation, Regional Office staff should contact Central Office when drafting the consent order. Responsible Parties are invited to comment on draft orders, but the DEQ, not the Responsible Party, drafts and prepares consent orders that are signed.

Addressing Additional or Subsequent Violations

The violations in a consent order usually match those in the referring NOV(s) leading to the referral. For Virginia Pollutant Discharge Elimination System programs that use a point system, violations that occur in the 6-month or alternative window for accumulating enough points for an NOV are included in the consent order. If the Responsible Party returns to compliance before issuance of the consent order, this can be noted in the Enforcement Recommendation Plan and consent order.[23] If subsequent NOVs are issued prior to execution of the consent order, the consent order should be modified to include those violations, and the civil charge increased, as appropriate.

Sometimes, an NOV will cite observations or legal requirements that may be deemed inappropriate after the case is referred to the Division of Enforcement. As a result, the observations and legal requirements cited in the consent order may differ from what is in the NOV. The Enforcement Recommendation Plan should explain any differences in the NOV and consent order. Enforcement staff should review data systems and facility records or communicate with compliance managers, to identify all outstanding alleged violations of the Responsible Party.

[23] No civil charge is assessed for alleged violations cited in a Warning Letter that were completely resolved.

Civil Charges

Consent orders may impose civil charges pursuant to the criteria in Chapter 4. If the Responsible Party voluntarily self-discloses certain violations, there may be a statutory immunity against civil charges or penalties for those violations, or mitigation based on the self-disclosure, as described in Va. Code § 10.1-1198 and -1199 and in Chapter 5 of DEQ's Enforcement Manual.
The consent order must state where the civil charges are to be deposited, in the Virginia Environmental Emergency Response Fund (VEERF), Va. Code § 10.1-2500 et seq., the Virginia Underground Petroleum Storage Tank Fund (VPSTF), Va. Code § 62.1-44.34:11, or the Virginia Stormwater Management Fund (VSMF), Va. Code § 62.1-44.15:29.[24] Civil charges collected under Articles 9, 10, and 11 of State Water Control Law are deposited to VPSTF. Civil charges collected pursuant to Articles 2.3, 2.5, and 4.02 are to be deposited in the VSMF. All other civil charges and penalties are deposited to VEERF.

Supplemental Environmental Projects

Supplemental Environmental Projects (SEPs) are environmentally beneficial projects not otherwise required by law that a Responsible Party agrees to undertake in a consent order in partial settlement of an enforcement action.[25] The procedures and forms for analyzing and approving SEPs are described in Chapter 5.[26] The model orders have language for incorporating SEPs in Section D and language for Supplemental Environmental Project appendices. Central Office concurrence is required before a SEP can be included as part of a consent order.

Preparing Draft Consent Orders; Negotiation

Negotiating an agreement with a Responsible Party involves a thorough analysis of DEQ's and the Responsible Party's interests, as well as both parties' alternatives to a negotiated resolution. Preparing a draft consent order for presentation to the Responsible Party includes:

- Reviewing the NOVs and the approved Enforcement Recommendation Plan;
- Review of the law, regulation, or permit condition at issue;
- Verifying the Responsible Party's identity and name with the State Corporation Commission, land records, or otherwise, as appropriate;
- Checking databases and/or with compliance staff for unresolved violations;
- Checking the DEQ facility or source files for additional, relevant information;
- Preparing a draft consent order using a model consent order; and

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[24] In accordance with §§ 10.1-2500, civil penalties and civil charges collected pursuant to Va. Code §§ 62.1-44.15:25, 62.1-44.15:48, 62.1-44.15:63, 62.1-44.15:74, 62.1-44.15(19), and 62.1-44.19:22 are to be deposited in the Stormwater Local Assistance Fund once the accompanying stormwater regulations are effective.
[25] Va. Code § 10.1-1186.2 states: "Make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this chapter, including, but not limited to, contracts with the United States, other states, other state agencies and governmental subdivisions of the Commonwealth."
[26] Any decision whether or not to agree to a supplemental environmental project is within the sole discretion of the applicable board, official or court and shall not be subject to appeal. Va. Code § 10.1-1186.2(E).

- Circulating the draft consent order for comment and collaboration with Regional and Central Office staff.

If the Responsible Party declines to participate in negotiations, DEQ should remind the Responsible Party in writing of options for resolution including, the Process for Early Dispute Resolution, an informal fact finding, a formal hearing as described in Chapter 6 of this Enforcement Manual, or referral to the Office of the Attorney General.

Consent Orders Negotiated by the Central Office

Most consent orders are negotiated by the Regional Office Enforcement Specialists. As discussed in Chapter One, the DEQ utilizes a OneDEQ approach to resolving enforcement actions and some enforcement actions are assigned to Central Office for resolution.

Regional Office staff should discuss potential referrals for case resolution via the adversarial process with the Central Office (no later than Day 180). Once referred for an adversarial proceeding, Central Office staff is the lead point of contact, and negotiates directly with the Responsible Party. Once executed, the monitoring of the consent order or issuance of a special order is conducted by Central Office and Central Office staff ensure the records are stored in ECM and CEDS is updated appropriately.

Central Office enforcement staff are the lead for:

- Enforcement actions involving State or Federal agencies, regardless of who the responsible party is;
- Adjudications (e.g., permit revocations, informal fact findings, formal hearing);
- Potential criminal conduct;
- Enforcement actions with a high potential for referral to the Office of the Attorney General;
- Parallel actions being undertaken with federal agencies requiring intimate coordination on substantive programmatic and legal issues;
- Comprehensive Environmental Response, Compensation, and Liability Act, commonly known as Superfund, and natural resource damage claims;
- Violations across multiple regional boundaries;
- Enforcement actions not meeting the goals established in the US EPA timely and appropriate policy or DEQ enforcement timelines (Chapter 3);
- Anticipated civil charges of $250,000 or higher;
- Emergency Orders; and
- Actions that present novel issues, significant public interest, or upon request by the Regional Office.

Responsible Party Agreement and Signature

After preparing a draft consent order in accordance with the Enforcement Recommendation Plan (where required), DEQ staff send the draft consent order to the Responsible Party for review and comment. Staff consider the Responsible Party's comments and, where appropriate, incorporate

them into the draft consent order. When the Responsible Party makes substantive comments, staff may hold a meeting or use other means to resolve differences. DEQ and the Responsible Party must agree to all of the terms of the consent order before it is sent for signature. In instances where there are significant changes to the penalty, injunctive relief, or findings of fact, Regional Office staff should collaborate with Central Office. The Responsible Party executes the consent order and returns the document to DEQ.

Public Notice and Comment

After the Responsible Party signs the consent order and consent order amendment, DEQ provides at least 30 days' public notice and comment on proposed consent orders. The table below sets out public notice and comment requirements (DEQ pays for public notice). Though public notice may not specifically be required by law, DEQ policy is to provide an opportunity for public comment on all enforcement actions for 30 days on the Agency webpage.

Media Program	*Va. Register*	Local newspaper of general circ.	DEQ Webpage	Notice to local gov't § 62.1-44.15:4(E) § 10.1-1310.1
Air	No	No	Yes	Yes
VPDES (9 VAC 25-31-910(B)(3))	Yes	Yes	Yes	Yes
Virginia Pollution Abatement (9 VAC 25-32-280(B)(3))	Yes	Yes	Yes	Yes
Virginia Water Protection	No	No	Yes	Yes
Underground Storage Tanks	No	No	Yes	Yes
Oil and Aboveground Storage Tanks	No	No	Yes	Yes
Ground Water Management Act	No	No	Yes	No
Animal Feeding Operations and Poultry (VPDES or VPA) (9 VAC 25-31-910(B)(3)) or (9 VAC 25-32-280(B)(3))	Yes	Yes	Yes	Yes
Solid Waste (9 VAC 20-81-70(D))	No	No	Yes	No
Hazardous Waste (9 VAC 20-60-70(F))	No	Yes	Yes	No

Enforcement staff should use the public notice template provided by Central Office for the Virginia Register of Regulations and newspapers. Enforcement staff must place the public notice directly into the Virginia Register for publication. Publication deadlines and schedules are provided in each issue of the Virginia Register and are available online. Public notices need to be submitted to the appropriate Regional Office or Central Office Virginia Register web contributor as soon as practicable, but at least two days prior to the Virginia Register material submittal deadline. For newspaper public notice, a directory of Virginia Newspapers may be obtained from the Virginia Press Association. The newspaper dates and Virginia Register schedule may not have the same starting date. In this situation, the newspaper should run the notice in advance, but as close as possible to, the Virginia Register publication date. The public comment period start

and end date in the newspaper and Virginia Register should be identical and the start date will be the date of publication in the Register.
Enforcement staff must request an affidavit or confirmation that the public notice ran in the newspaper and enter the affidavit/confirmation in ECM upon receipt. At the same time as Register and/or newspaper notice, Regional Office staff send a copy of the public notice and proposed Waste and Water orders to the appropriate Regional Office or Central Office web contributor to post on the DEQ website. Notification to local government must also be completed prior to publication.[27] The email to the local government should include a request for confirmation of receipt and enforcement staff should include the confirmation in the record.

If public comments are received, they should be summarized with the agency response. If the consent order requires substantial changes to address public comment, the Central Office Division of Enforcement and the Office of Regulatory Affairs should be consulted about whether a second comment period is necessary. The comment-response document is prepared before the consent order is signed by the Agency. Staff is should send copies of the comment-response document to the Responsible Party and to anyone who commented during the public notice period (or posted to the DEQ Enforcement website with a notice to those who participated in the comment process of its location). Public comments and responses must be entered into ECM as part of the file of record for the case and be approved by Regional Director or Director of Enforcement.

Execution by DEQ

After considering public comment on proposed consent orders, the Director of DEQ or his designee executes the consent order. The consent order becomes effective upon DEQ signature. Enforcement staff immediately send a complete executed copy to the Responsible Party for implementation. The executed consent order is then added to ECM in order to comply with the record retention policy.

Copies (or definitive data to locate the order in ECM) are immediately sent:

- For Air orders, to the Office of Air Compliance Coordination (if designated a High Priority Violation);
- If the consent order requires monetary payments to DEQ, to the Office of Financial Management;
- Water Compliance Auditors should be copied on all water orders;
- If the consent order affects the Responsible Party's financial assurance, to the Office of Financial Assurance; and

[27] "Upon determining that there has been a violation of a regulation promulgated under this chapter and such violation poses an imminent threat to the health, safety or welfare of the public, the Executive Director shall immediately notify the chief administrative officer of any potentially affected local government." Va. Code § 62.1-44.15:4(A).

- To the Central Office Web Author for posting to the public webpage, a short summary of the violations, and a copy of the Enforcement Recommendation Plan.

Collecting Civil Charges

If the Consent Order includes a civil charge, send a copy of the Responsible Party signed Consent Order to Office of Financial Management in the event the Responsible Party sends the civil charge prior to public notice completion, so the Office of Financial Management will know how to direct the civil charge deposit.[28] DEQ specifies in all consent orders that the payment check include the Responsible Party's Federal Employer Identification Number (unless the FEIN is also a Social Security Number) and a notation that it is for payment of a civil charge pursuant to the consent order. The consent order states that the DEQ civil charge payment is to be made out to the Treasurer of Virginia and sent to:

Receipts Control
Virginia Department of Environmental Quality
PO Box 1104
Richmond, VA 23218

The consent order states which fund the civil charges are to be deposited. The Commonwealth Accounting Policies and Procedures (CAPP) Manual governs the management of accounts payable and receivable for state agencies. When a consent order is executed, the civil charge becomes an account receivable and is the responsibility of the Office of Financial Management to process. The Office of Financial Management uses its copy of the executed consent order to initiate CAPP tracking procedures. The Office of Financial Management copies the enforcement specialist on all correspondence requesting payment and keeps the enforcement specialist informed when the civil charge is paid.

If the civil charge or fee is not paid on time, DEQ follows the Virginia Debt Collection Act, Va. Code § 2.2-4800 et seq. The Office of Financial Management is responsible for administering debt collection procedures in accordance with the Virginia Debt Collection Act. If there is a payment plan, the entire civil charge becomes due once a payment is missed, as stated in the consent order. If civil charges are not paid, consent orders may be recorded, enforced and satisfied as orders or decrees of a circuit court upon certification of the consent order by the Director of DEQ or his designee. Va. Code § 2.2-4023. Central Office Enforcement Managers undertake recording DEQ consent orders upon request.

Amended and Superseding Consent Orders

After a consent order is executed, subsequent events may require modifying or supplementing its terms, either through an amended or a superseding consent order. An amended consent order modifies or supplements the existing consent order, but leaves the rest of the consent order

[28] The Office of Financial Management (OFM) will place the penalty in escrow until the Consent Order is effective. The executed consent order will be required to be conveyed to OFM, for final payment processing.

intact. A superseding consent order replaces the previous consent order in its entirety and terminates it. Whether one is amending or superseding an existing consent order, enforcement staff must prepare a new or amended Enforcement Recommendation Plan.

Whether to amend or supersede a consent order depends on the extent of the changes required to the consent order's terms. Amended consent orders are used for less extensive changes. Amendments are often employed for the following reasons:

- To modify, supplement, or supersede a schedule of compliance in an existing consent order (e.g., to extend deadlines or integrate new requirements);
- To resolve violations of the existing consent order or independent violations found while the consent order is in effect; and
- To pay civil charges for such violations.[29]

Because amendments are read together with the existing consent order, amended consent orders omit sections that would be redundant, usually "Section B: Definitions" and "Section E: Administrative Provisions." In the amendment, Section B is renamed "Basis for Amendment." If further definitions are necessary, staff may reinsert a Definitions section and renumber the sections in the rest of the amendment. Both the amended and existing consent order must be read carefully to ensure that their terms do not conflict. The original consent order must be effective and remain in place in order to issue a consent order amendment.

Superseding consent orders are used to replace the existing consent order entirely. For example, when a new NOV is issued to a Responsible Party with an existing consent order, the superseding consent order may address the new violations and any uncompleted requirements from the previous one. Because superseding consent orders stand on their own, the format is the same as for any consent order. Superseding consent orders are modified in "Section A: Purpose" and "Section D: Agreement and Order" to state that consent orders supersede and terminate the existing consent order; superseding language is linked in the model consent orders to the appropriate consent order sections.

Amended and superseding consent orders require public notice and approval as any other consent orders.

Central Office and Regional Office Collaboration

In most enforcement actions, Regional Office staff investigate, develop, and implement enforcement actions and may collaborate with Central Office. The Regional Office Enforcement Manager is responsible for ensuring that regional enforcement actions are consistent with DEQ policy and Agency practice. Central Office collaboration is required for the following:[30]

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[29] Amended and superseding orders must not be used to reduce or abate a civil charge after an order has been executed based on inability to pay. Inability to pay must be claimed before a Responsible Party agrees to a civil charge.

[30] When Central Office is the lead on an enforcement action, Central Office enforcement staff should collaborate with the Regional Office on these items.

- ERPs, civil charge worksheets, and SEP Analysis Forms (and substantive amendments) when the proposed civil charge is over $15,000 or is designated HPV or SNC;
- Draft consent order amendments, superseding consent orders, and Executive Compliance Agreements;
- Case closure memoranda that involve violations of a consent order, enforcement actions that present unique or sensitive issues, or enforcement actions without a full return to compliance to confirm that no enforcement action will practicably lead to further compliance or payment of an appropriate civil charge.

Monitoring Compliance with Consent Orders, Special Orders, and Letters of Agreement

Monitoring compliance with final orders and agreements is essential for assuring that the Responsible Party returns the facility to compliance with applicable environmental requirements. For enforcement tools by consent enforcement, staff that negotiated the enforcement action is responsible for monitoring compliance with its terms, unless other staff has been designated in writing. This is ordinarily the DEQ contact identified in the consent order. For administrative actions resolved without consent, the Central Office Adjudications Coordinator monitors the final action for compliance and is responsible for ensuring the record is in ECM and data entry is completed in CEDS. Judicial decrees are assigned for monitoring on a case-by-case basis. Typically, the staff assigned to receive any submissions from the Responsible Party is responsible for monitoring compliance and the appropriate database needs to be updated in a timely manner.

Executive Compliance Agreements

DEQ enforces against state agencies as against all other Responsible Parties. Instead of consent orders however, DEQ issues executive compliance agreements to state agencies. DEQ follows the procedures for consent orders except that DEQ cannot assess civil charges or enforce Executive Compliance Agreements in court. Executive compliance agreements are signed by the Director of the noncompliant agency and, via Central Office enforcement, the Director of DEQ. Executive compliance agreements are not divided into sections, and, except for the appendix, the paragraphs are usually not numbered. Since executive compliance agreements are counterparts to consent orders, they should recite a finding of one or more violations. The corrective action is the same as that in a consent order. If the model does not address a particular situation, Regional Office staff should contact the appropriate Central Office Enforcement Manager. Like consent orders, executive compliance agreements should be sent to the Central Office Web Author for posting to the final orders page.

Enforcement Procedures without Consent

Adversarial Administrative Actions

The Administrative Process Act provides for informal fact-finding proceedings and formal hearings for addressing alleged violations when the Responsible Party will not resolve a case by

consent. If the Regional Office wants to refer a case in this manner, the Regional Office must contact the Central Office Enforcement Adjudication Coordinator. Chapter 6 contains procedures for adversarial administrative actions.

Special Procedures for Delivery Prohibition and Sanitary Sewer Overflows

Delivery Prohibition

The Federal Energy Policy Act of 2005 (EPACT) makes it unlawful for anyone to deliver petroleum into or accept delivery of petroleum product or other regulated substance into certain noncompliant underground storage tanks. EPACT also requires states to promulgate regulations and to develop processes and procedures to implement the delivery prohibition requirement. Part IX of the Underground Storage Tank Technical Standards (9 VAC 25-580-370) has been promulgated to comply with EPACT and U.S. EPA guidance. Under either class of violations, staff provide notice to the owner/operator and conduct an Informal Fact Finding Proceeding to determine whether an underground storage tank is noncompliant and subject to delivery prohibition. Delivery prohibition procedures can be found on the Virginia DEQ website.[31] In appropriate enforcement actions, delivery prohibition can be combined with an Informal Fact Finding Proceeding in accordance with Va. Code § 10.1-1186(9) which may result in a civil charge.

Sanitary Sewer Overflows

In 2007, the General Assembly enacted Senate Bill 798 ("SB 798"), which added subdivision (8f) to Va. Code § 62.1-44.15:[32]

> *(8f) Before issuing a special order under subdivision (8a) or by consent under (8d), with or without an assessment of a civil penalty, to an owner of a sewerage system requiring corrective action to prevent or minimize overflows of sewage from such system, the Board shall provide public notice of and reasonable opportunity to comment on the proposed order. Any such order under subdivision (8d) may impose civil penalties in amounts up to the maximum amount authorized in § 309(g) of the Clean Water Act. Any person who comments on the proposed order shall be given notice of any hearing to be held on the terms of the order. In any hearing held, such person shall have a reasonable opportunity to be heard and to present evidence. If no hearing is held before issuance of an order under subdivision (8d), any person who commented on the proposed order may file a petition, within 30 days after the issuance of such order, requesting the Board to set aside such order and provide a formal hearing thereon. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Board shall immediately set aside the order, provide a formal*

[31] https://www.deq.virginia.gov/land-waste/petroleum-tanks/storage-tanks/underground-storage-tanks/delivery-prohibition

[32] Following legislative enactment and signature by the Governor, SB 798 became 2007 Acts c. 144.

hearing, and make such petitioner a party. If the Board denies the petition, the Board shall provide notice to the petitioner and make available to the public the reasons for such denial, and the petitioner shall have the right to judicial review of such decision under § 62.1-44.29 if he meets the requirements thereof.

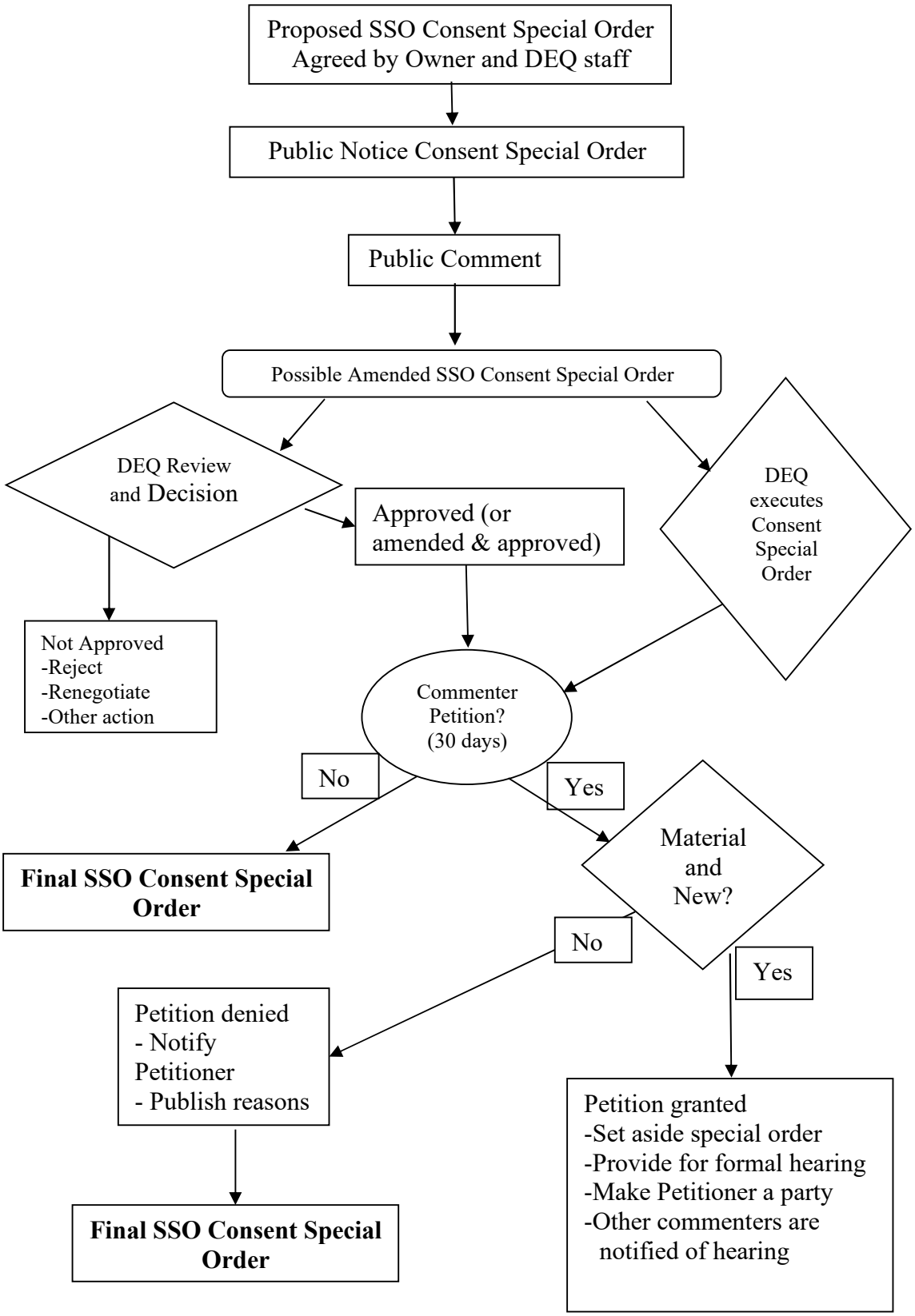
This subdivision specifies different procedures for issuing sanitary sewer overflow (SSO) special orders under subdivision (8a) and SSO hearing consent special orders under subdivision (8d). Chapter 6 provides more information on the process for SSO hearing special orders under subdivision (8a). A flow chart of the process under (8d) is included at the end of this section.[33] Subdivision (8f) does not address the issuance of emergency special orders under subdivision (8b) or the issuance of special orders under Va. Code § 10.1-1186(9).

Subdivision (8f) does not fundamentally alter the existing process prior to issuance for SSO consent special orders.[34] Subdivision (8f) sets out new rights for persons who comment on a proposed SSO consent special order after the consent special order is issued. Any person who commented on the proposed consent special order may file a petition, within 30 days after the issuance of the consent special order, requesting that the Department set aside the SSO consent special order and provide a formal hearing on it.[35]. Chapter 6 provides more detail on the Director's consideration of the petition and the process for notices and hearings following a successful petition.

Regional Office enforcement staff should consult with the Central Office Water Enforcement Manager when drafting and executing SSO consent special orders.

[33] The flow chart does not include all steps or options, and it does not replace adherence to the Virginia Administrative Process Act, Va. Code § 62.1-44.15 or the text of this guidance.
[34] Before SB 798, public notice and comment were required by regulation. 9 VAC 25-31-910(B)(3); *see* Va. Code § 62.1-44.15:4(E) (requirement to notify locality where the alleged offense has or is taking place, upon commencement of public notice of an enforcement action).
[35] Because of possible petitions and the time necessary to consider them, SSO consent special orders should direct payment of any civil charges by the party **within 60 days** of the date of the special order, rather than the customary 30 days

SSO Consent Special Order (8d) Illustrative Guide



Emergency Orders

Circumstances for Emergency Orders

DEQ is authorized by law to issue administrative emergency orders where circumstances require immediate action to abate imminent and substantial injury or damage.[36] The Office of the Attorney General must be consulted throughout the administrative process concerning an emergency order.

Emergency orders are the administrative equivalent of judicial temporary injunctions. They are effective upon service and are issued without the consent of the Responsible Party. DEQ must make "a reasonable attempt to give notice" (Air and Waste), or may give no formal notice (Water), prior to issuance. By law, however, there must be a prompt formal hearing after reasonable notice to the Responsible Party to affirm, modify, amend, or cancel the emergency order.[37] Delivery of a case decision after a formal hearing on an emergency order and time limits are governed by statute.[38]

Drafting Emergency Orders

The Central Office Enforcement Adjudication Coordinator drafts emergency orders in consultation with the Regional Office and Office of the Attorney General, and carries out the following steps when an emergency order[39] is being prepared:

- Determine whether the statutory criteria have been met for an emergency order, including any declarations or findings, and requirements to attempt prior notice;
- Prepare the emergency order, which must set forth:
- The purpose of the emergency order;
- The authority to issue the emergency order;
- A clear and concise statement of the facts constituting the emergency and any necessary declaration or finding;
- A clear and concise statement of what the Department is ordering the Responsible Party to do or refrain from doing; and
- A statement of the Responsible Party's right to a subsequent hearing.
- Obtain the services of a hearing officer; and
- Prepare a separate Notice of Hearing, if not included with the emergency order.

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[36] Va. Code §10.1-1309(B) (Air); §§ 10.1-1402(18) and (21), and -1455(G) (Waste); § 62.1-44.15(8b) (Water); and § 10.1-1197.9(C)(5) (Renewable Energy). In Air and Water, such orders are titled "Emergency Special Orders." Here they are referred to collectively as "emergency orders."

[37] The Air and Waste statutes specify that the hearing be held within 10 days. Under Water law, if the emergency order requires cessation of a discharge, the Department shall provide an opportunity for a hearing within 48 hours.

[38] See, Va. Code § 10.1-1309(C) (Air); § 62.1-44.12, -44.28 (Water); § 10.1-1455(C) (Waste).

[39] In most enforcement actions, an emergency order is appropriate when there is an imminent and substantial danger to human health and the environment.

Issuance, Hearing, and Notice to Local Government

Once the emergency order is signed by the person delegated that authority, DEQ must serve the executed emergency order on the Responsible Party by a means that is quick, certain, and verifiable, e.g., hand-delivery, sheriff service, express carrier, or process server. The hearing notice should be served simultaneously, either as a separate document or part of the emergency order. DEQ may transmit a copy of the emergency order by fax or electronic mail if receipt is confirmed. If this method is chosen, DEQ should also send a copy by U.S. Mail, with delivery confirmation. In the case of emergency orders issued under the State Water Control Law, the Central Office Adjudications Coordinator must notify the Office of Regulatory Affairs.[40] Circumstances that are serious enough to warrant consideration of an emergency order are also likely to require notice to the local government of the alleged violations. Va. Code §§ 10.1-1310.1 (Air), 10.1-1407.1 (Waste), and 62.1-44.15:4(A) (Water).

Court Actions

After evaluating all other options, the Director of DEQ may determine that court action is the most appropriate enforcement tool. Generally, DEQ considers civil litigation only after it has exhausted all reasonable administrative remedies, unless there is an emergency. Remedies in court actions include temporary and permanent injunctions and civil penalties. The Attorney General (personally or through his or her assistants) renders all legal services for the Boards and DEQ. Va. Code § 2.2-507(A).

A referral to the OAG may be appropriate where:

- There is a serious threat to human health or the environment;
- Enforcement staff has been unable to obtain compliance through DEQ's administrative enforcement tools;
- A consent order has been violated;
- There are ongoing violations; or
- The Responsible Party has a history of noncompliance.

Only the Director of DEQ is authorized to refer enforcement actions to the Office of the Attorney General. This authority has not been delegated. All referral packages, once finalized, are sent to the Director of DEQ for approval.

Central Office enforcement staff prepare referral packages in consultation with Regional Office and the Office of the Attorney General staff. The referral package contains an authorization-to-sue letter signed by the Director of DEQ, a memorandum in support of litigation (including recommendations for civil penalties and injunctive relief), and the enforcement action records. If the Office of the Attorney General files suit, Central Office and Regional Office staff assist in case preparation and provide litigation support. Central Office staff remains lead on referred

[40] This consultation must occur before issuance of an emergency order when the order includes cessation of a discharge that requires the hearing within 48 hours of issuance.

cases and shall be the point of contact for pending or active litigation. DEQ staff may also receive notice of a citizens' suit under federal law. These notices are handled as "Litigation Documents" under DEQ policy and a copy should be forwarded to the Director of Enforcement. DEQ has options in response to the notice, including: (1) petitioning to join the suit; (2) negotiating a separate court decree; and (3) taking no action.

United States Environmental Protection Agency Enforcement Actions

DEQ involvement in United States Environmental Protection Agency (EPA) actions can arise in several ways. If EPA is pursuing a court action against a Responsible Party with facilities in several states, DEQ may be invited to join, so that all interested parties are before the court. In such enforcement actions, DEQ may refer the matter to the Office of the Attorney General with a request to join the pending federal action.

When EPA undertakes its own inspections of Virginia facilities, it takes enforcement actions in its own name, whether administrative or judicial. DEQ does not join administrative actions, but may join court actions, after referral to the Office of the Attorney General. Finally, DEQ may refer enforcement actions initiated by DEQ staff to EPA; however, such referrals to EPA are not widely used.

Circumstances for Referral to EPA

DEQ considers the following criteria in deciding to refer a case to EPA for enforcement:

- Has explored and attempted, where appropriate, all reasonable administrative options and such efforts have not resulted in an acceptable conclusion (i.e., return to compliance, etc.);
- DEQ resources to pursue the case relative to the nature and/or complexity of the case;
- The interstate aspects of the case warrant an action by EPA;
- The Responsible Party is out-of-state and beyond the reach of DEQ; and/or
- Federal remedies are more appropriate to address the alleged violations.

Process for EPA Referrals

The Director of DEQ makes all final decisions to refer a case to EPA based upon the Regional Director and Director of Enforcement's recommendation. DEQ should also receive input from EPA and the U.S. Department of Justice on whether the referral would be appropriate.

If a case is referred, Central Office staff, in collaboration with the Regional Office, prepare and send the referral package to the Director of DEQ for consideration. The referral package includes a letter from the Director of DEQ to EPA, a brief memorandum outlining the facts of the case, and relevant attachments. The attachments may include the whole enforcement action record or selected documents (*e.g.*, NOAVs, draft consent order, reports). DEQ staff should be prepared to provide additional information to EPA upon request. Central Office Enforcement is the point of contact with EPA, and Regional Staff may be asked for technical support and review at the direction of EPA. Once referred to EPA, all communications with the Responsible Party should be directed to the Central Office Enforcement Coordinator or to the EPA.

EPA Communications about Compliance/Enforcement Activities

The Director of DEQ has requested that, for EPA enforcement actions (including but not limited to information requests, notices/findings of violation, administrative orders, and referrals to the U.S. Department of Justice), EPA give advance notice to the Director of Enforcement and the appropriate Division Director and keep communications open with them as the action progresses. The Director of DEQ has also asked that these same persons be notified if EPA is scheduling significant inspections, planning targeted inspection initiatives, and/or multimedia inspections. The Director of Enforcement and the Division Directors are responsible for sharing EPA's information with appropriate DEQ staff and coordinating with EPA. If Regional Office enforcement staff are contacted by EPA about a case or action that has not been previously coordinated, the Regional Office enforcement staff should immediately notify the Director of Enforcement and the appropriate Division Director.

Case Closure

DEQ may close an enforcement case when: (1) an appropriate enforcement action is complete and the Responsible Party has returned the facility to compliance; or (2) no enforcement action will practicably lead to further compliance or payment of an appropriate civil charge. Staff must complete the Enforcement Case Closure Memorandum when a case is being closed without a full return to compliance.

Return-to-Compliance Closure and Termination Letters

An enforcement case qualifies for return-to-compliance closure when all the terms of any appropriate enforcement instrument are completed (including any payments), and the Responsible Party has returned the facility to compliance on the issues for which it was referred. Staff should also ascertain whether there were subsequent alleged violations. Where compliance status can change quickly (e.g., DMR violations), staff should confirm that the return to compliance is durable.

Informal return to compliance closure is not appropriate for enforcement actions involving High Priority Violations (HPVs) or Significant Noncompliance (SNC), unless DEQ has fully evaluated all available enforcement options. Administrative closures for enforcement actions involving HPVs or SNCs require careful coordination. Central Office Enforcement Coordinators may also consult with the EPA before a final decision not to pursue these types of enforcement actions.

To close an enforcement action, enforcement staff complete the closure memorandum for the appropriate management approval. A termination letter may be drafted for submittal to Responsible Party in lieu of a case closure memo when all terms of the consent order have been complied with. Central Office coordination should occur when the enforcement action involves SNCs or HPVs.

After the closure memorandum/termination letter is approved, enforcement staff place it into ECM, and link it to the Enforcement Action number and appropriate permit or core facility. Enforcement staff should also update the relevant databases as soon as possible.

Administrative Case Closures and Dereferral

In limited circumstances, DEQ may also close an enforcement case administratively without a full resolution and return-to-compliance. An administrative closure may be appropriate when an enforcement action will not practicably lead to further compliance or payment of an appropriate civil charge. Enforcement staff must carefully evaluate all enforcement tools prior to proposing an administrative closure. Enforcement staff should document that they have obtained as much progress toward full compliance as possible – the enforcement action should at least abate any continuing unpermitted or illegal activities. Reasons for administrative closure/dereferral include, but are not limited to:

- The Responsible Party has ceased continuing, non-compliant activities, and no enforcement action will lead to further compliance or payment of an appropriate civil charge;
- The facility has shut down permanently, and DEQ is unable to pursue enforcement;
- There are no liable, viable or identifiable Responsible Parties to take an enforcement action against;
- DEQ has taken or considered all administrative enforcement actions, and none has or will result in compliance, and a referral for judicial enforcement is not appropriate;
- Upon further investigation, there is insufficient evidence to pursue the violation(s) in an enforcement action.

In closing an enforcement case administratively, enforcement staff prepare a closure memorandum in the same manner as for return-to-compliance closure. The memorandum should document efforts to obtain full compliance. Collaboration with the Central Office Enforcement Coordinator is required to close a case administratively. If the Central Office Enforcement Coordinator does not concur on the case closure, Central Office should state the basis for their objection, propose a path to resolution, or offer to assume responsibility for the case. Since no enforcement action is being taken, there is generally no requirement to notify the Responsible Party. However, if the case is being closed for insufficient evidence and substantial negotiations have occurred, the Responsible Party should be notified that DEQ is not pursuing the matter at this time. Administrative closure does not limit DEQ's authority to reopen a case should circumstances change or new information become available. Enforcement staff should update the relevant databases upon approval.

Administrative closure is not appropriate for enforcement actions involving High Priority Violations (HPVs) or Significant Noncompliance (SNC), unless DEQ has fully evaluated all available enforcement options. Administrative closures for enforcement actions involving HPVs or SNCs require careful coordination. The Central Office Enforcement Coordinator may also consult with the EPA before a final decision not to pursue these types of enforcement actions.

Chapter Three – Appropriate, Consistent, and Timely Enforcement

This chapter describes the enforcement procedures to help ensure an appropriate, consistent, and timely response to alleged noncompliance. The Department of Environmental Quality (DEQ) has a statewide presence with enforcement staff in the Richmond central office and in six regional offices. The Division of Enforcement collaborates with federal, state and local officials in a comprehensive strategy to thoroughly respond to alleged violations of environmental statutes, regulations, and permit requirements in a manner consistent with the Agency's mission, values, and goals.

Through the use of DEQ's administrative authority, the enforcement staff selects the most appropriate enforcement tool for each action. Each enforcement action begins with an evaluation of the least adversarial method appropriate to the alleged violation. An appropriate enforcement action addresses each alleged violation and the enforcement response is proportionate to the alleged violation. An enforcement response that is appropriate to the alleged violation deters similar noncompliance by the Responsible Party and throughout the regulated community.

A consistent enforcement program means that members of the regulated community should expect similar responses to comparable alleged violations, given similar impacts on human health and the environment, regardless of where in the Commonwealth the violation occurs. DEQ recognizes that each enforcement action is fact-specific, and it is unlikely that two enforcement actions will be entirely similar.[1] While consistency in DEQ's approach to alleged violations is an important factor in an enforcement program, it neither means a strict adherence to past decisions that may no longer be appropriate nor does it guarantee a resolution that is exactly the same as a prior enforcement action.

DEQ chooses to resolve alleged noncompliance in most cases through an administrative process with the consent of the responsible party that will result in a judicially enforceable document referred to as a consent order. The DEQ strives to address and resolve all enforcement actions in a timely fashion, considering the nature of the alleged violations and the availability of enforcement resources. The Enforcement Response Timeline sets forth benchmarks for processing enforcement actions across all programs, unless the enforcement action involves a High Priority Violation (HPV) or an issue of Significant Noncompliance (SNC).[2] DEQ will endeavor to process all enforcement actions in accordance with the Enforcement Response Timeline; however, certain enforcement actions may take longer to resolve due to the complexity of the issues involved. Emergency situations or enforcement actions presenting an imminent and substantial threat to human health or the environment should be processed on an expedited basis.

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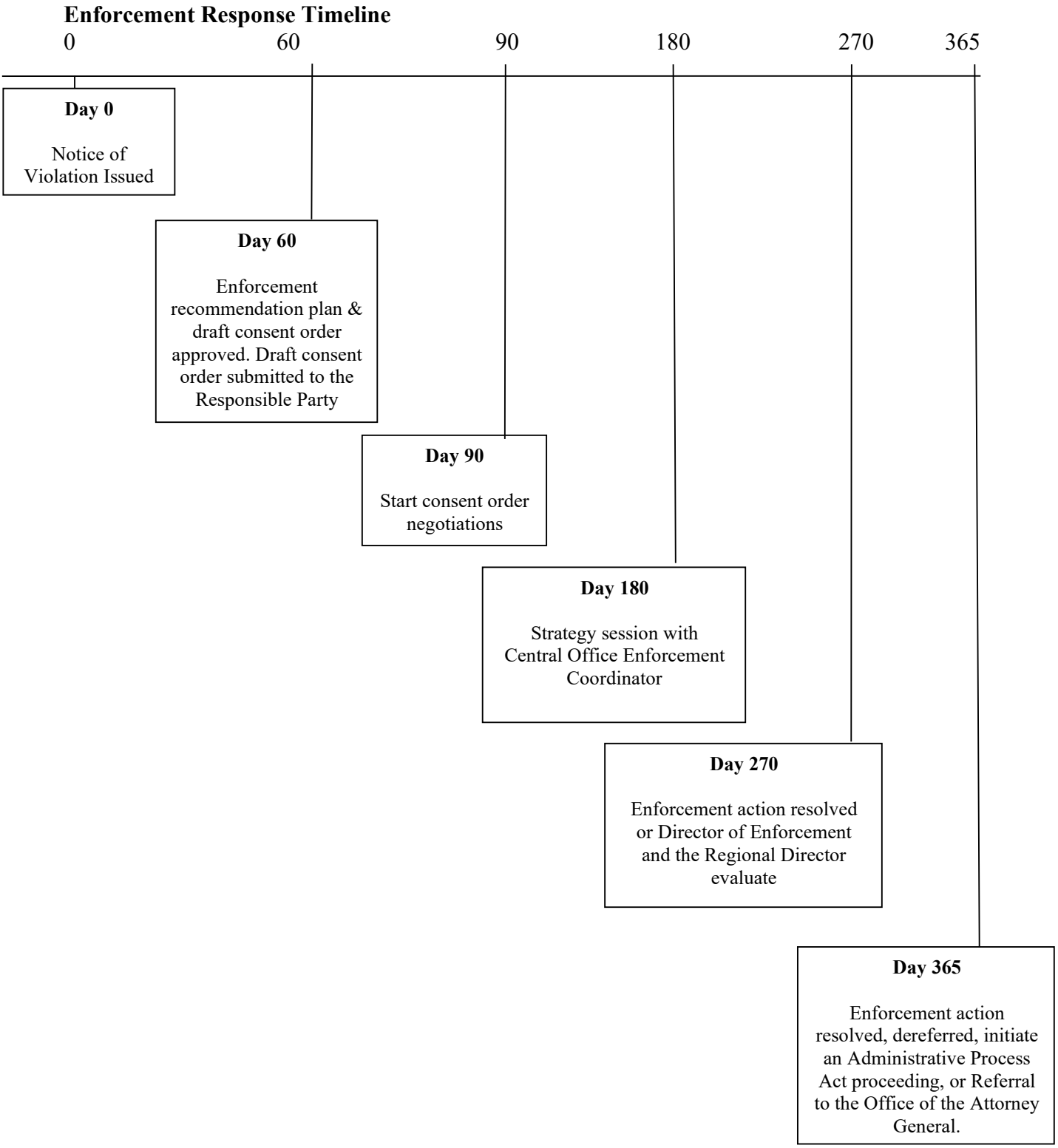
[1] Staff should reference various tools, e.g.,Compliance Auditing System, or consult with appropriate program staff for assistance in determining the priority level for an enforcement action.

[2] DEQ follows the policies of the United States Environmental Protection Agency to ensure timely and appropriate responses to alleged violations of environmental laws in those cases involving an issue of Significant Noncompliance in the Resource Conservation and Recovery Act and Clean Water Act, and a High Priority Violation in the Clean Air Act. Each program has its own specific criteria for making this determination.


Enforcement Response Timeline
0
60
90
180
270
365
Day 0
Notice of Violation Issued
Day 60
Enforcement recommendation plan & draft consent order approved. Draft consent order submitted to the Responsible Party
Day 90
Start consent order negotiations
Day 180
Strategy session with Central Office Enforcement Coordinator
Day 270
Enforcement action resolved or Director of Enforcement and the Regional Director evaluate
Day 365
Enforcement action resolved, dereferred, initiate an Administrative Process Act proceeding, or Referral to the Office of the Attorney General.

Day 0

Day zero represents the date the Notice of Violation was issued and when the alleged violations were referred to enforcement staff for resolution.

Day 60

Day 60 represents the time allotted for enforcement staff to prepare and collaborate in the development of the Enforcement Recommendation Plan and a draft consent order, and submit the draft consent order to the Responsible Party for review and comment.

Day 90

It is expected that after giving the Responsible Party adequate time to review the draft consent order, negotiations should begin no later than day 90 (30 days after the draft consent order was issued). In the event negotiations are not actively underway, enforcement staff should remind the Responsible Party of other administrative options to resolve any impasse or to resolve the enforcement action (see Chapters 2 and 6).

Day 180

At day 180, Regional Office enforcement staff should schedule a strategy session with the Central Office Coordinator to provide an update of the negotiations and discuss a plan/schedule for moving the enforcement action towards resolution.

Day 270

DEQ's goal is to resolve all enforcement actions within 270 days of referral. If the enforcement action has not been resolved by consent within 270 days of referral, the Director of Enforcement and the Regional Director should evaluate whether the enforcement action warrant the start of an Administrative Process Act proceeding, seeking assistance from EPA or another federal agency, preparing a referral to the Office of the Attorney General, or closing/termination of the enforcement action.

Day 365

If an enforcement action has not been resolved by day 365, the Director of Enforcement should consult with the Director of Regulatory Affairs to develop a plan for case resolution.

Enforcement Action Prioritization

DEQ staff initially prioritize enforcement actions chronologically on a first in, first out basis; however, there are a number of reasons enforcement staff will adjust their workload to prioritize a newer enforcement action above existing enforcement actions that have been in the queue longer. Due to limited staffing resources and time available to meet the goals of the Enforcement Response Timeline, enforcement staff should prioritize their work load based on the severity of the violations, the extent of any potential or actual harm to human health and the environment, substantial public/political interest, and HPV or SNC designation.[3]

It is expected that enforcement staff will prioritize enforcement actions in which there is imminent or potential serious harm to human health and the environment.

Lower priority cases usually present little or no risk of potential or actual harm to human health or the environment or are minor deviations from regulatory requirements.

Medium priority cases usually present some risk of potential or actual harm to human health or the environment or are moderate deviations from regulatory requirements.

Higher priority cases usually present a substantial risk of potential or actual harm to human health or the environment or are significant deviations from regulatory requirements.[4]

Enforcement Action Priority Matrix

Harm to Human Health & Environment				
	Serious	*High*	*High*	*High*
	Moderate	*Medium*	*Medium*	*High*
	Marginal	*Low*	*Medium*	*Medium*
		Marginal	**Moderate**	**Serious**
		Deviation from the Regulatory Program		

[3] For additional information on how to determine the severity of the violation or the extent of any potential or actual harm to the environment, and examples, please refer to Chapter Four of the Enforcement Manual.
[4] Enforcement actions that involve a High Priority Violation in the Air Program or are considered in Significant Noncompliance in the Hazardous Waste Program and Water Program are always classified as high priority cases and should be processed according to the EPA Timely & Appropriate policy.

Chapter Four – Civil Charges and Civil Penalties

Introduction[1]

This chapter sets out the specific methods and criteria used by DEQ to calculate civil charges and civil penalties[2] in administrative enforcement actions, including: (1) orders issued by consent; (2) special orders issued after an informal fact-finding proceeding; and (3) special orders issued after a formal hearing.[3] This chapter does not address civil charges and civil penalties assessed in the Air Check Virginia Program, which is addressed by separate guidance.

In order to provide fair and equitable treatment of regulated communities, civil charges and civil penalties should be evaluated consistently across the Commonwealth based on specific procedures and calculation methodology. The civil charge or civil penalty calculations in this guidance include an amount reflecting the gravity of the violation (the "gravity component") and the economic benefit of noncompliance.

The Code of Virginia requires the development of guidelines and procedures that contain specific criteria for calculating the appropriate civil charge for each violation based on the following factors: [4]

- The severity of the violation(s); [5]
- The extent of any potential or actual environmental harm;
- The compliance history of the facility or person;
- Any economic benefit realized from the noncompliance; and
- The ability to pay the civil charge.

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[1] Guidance documents set forth presumptive operating procedures. *See* Va. Code §§ 2.2-4001 and 2.2-4101. Guidance documents do not establish or affect legal rights or obligations, do not establish a binding norm, and are not determinative of the issues addressed. Decisions in individual cases will be made by applying the laws, regulations, and policies of the Commonwealth to case-specific facts.

[2] The Va. Code does not define the terms "civil charges" or "civil penalties." Generally, civil charges are assessed with the consent of the responsible party while civil penalties are assessed in adversarial administrative or judicial actions. The terms "civil charge" and "civil penalty" are hereinafter referred to collectively as "civil charge" for brevity and to make use of the most appropriate term.

[3] In accordance with Va. Code § 10.1-1186(9) an informal fact finding proceeding held in accordance with Va. Code § 2.2-4019 may result in the issuance of a special order. "Special Order means an administrative order issued to any party that has a stated duration of not more than twelve months and that may include a civil penalty of not more than $10,000." *See*, Va. Code § 10.1-1182. A formal hearing can require a Responsible Party to pay civil penalties of up to $32,500 for each violation, not to exceed $100,000 per special order. *See*, VA Code § 62.1-44.15 (8a).

[4] Va. Code §§ 10.1-1316(D) (Air), 10.1-1455(L) (Waste), and 62.1-44.15(8a), (8e) and (8g) (Water). *See* Va. Code § 10.1-1197.9(C)(4) (Renewable Energy). Separate statutory factors are set out for violations of Article 11 of the State Water Control Law. Va. Code § 62.1-44.34:20(D).

[5] In this chapter, the use of the term "violation" prior to a case decision by DEQ means an "alleged violation." DEQ makes case decisions in accordance with the Administrative Process Act, Va. Code § 2.2-4000, et seq. (APA).

EPA also includes an evaluation of culpability and/or willfulness in the assessment of a civil charge. As part of Virginia's delegation of authority to implement federal programs, this factor is also included as part of the civil charge analysis.[6]

Consent Orders with Civil Charges

Unless a violation results in a substantial violation warranting a departure from these procedures, DEQ assesses civil charges using the appropriate Civil Charge Worksheet (Worksheet). In calculating the civil charge, staff first identifies the appropriate "Potential for Harm" classification and then works through the various categories on the Worksheet to calculate a Gravity Subtotal. The Worksheet total may also be adjusted for appropriate reasons by providing a reasoned analysis on the Civil Charge Adjustment Form. Both the Worksheet and the Adjustment Form are part of the Enforcement Recommendation and Plan (ERP).
Civil charges are generally appropriate when one or more of the following criteria are met (the list is not exhaustive):

- Failure to adequately respond to compliance assistance efforts;
- Violation of a consent order or consent special order without mitigating circumstances;
- Violations that are avoidable or due to negligence;
- Violations of a fundamental requirement of the regulatory program (e.g., statutory or regulatory requirements, permit conditions);
- Noncompliance that is continuing or likely to recur absent a civil charge to serve as deterrence;
- Knowing or willful violations;[7]
- Violations resulting in actual harm to human health or the environment; or
- Violations that are HPV or SNC.[8]

Potential for Harm Classification

Using staff's professional judgement, staff will place violations into one of three "Potential for Harm" classifications, including "Serious," "Moderate," or "Marginal", that are listed near the top of each Worksheet. Staff classify the violations, in part, based on: (1) the severity of the violation, and (2) the extent of any potential or actual harm.

Severity of the violation: This consideration examines deviation from the regulatory requirement and whether the violation(s) or pattern of violations at issue are fundamental to the

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[6] US EPA. Policy of Civil Penalties. "EPA General Enforcement Policy #GM-21". Effective February 16, 1984. https://www.epa.gov/sites/default/files/documents/epapolicy-civilpenalties021684.pdf
[7] Evidence of a deliberate act may be grounds for referral for criminal investigation.
[8] For VPDES programs, consent orders without civil charges are typically not available for major facilities. For non-major SNCs, a no penalty consent order may be available if the facility's non-compliance is addressed timely and there is a durable return to compliance.

integrity of the regulatory program and DEQ's ability to monitor and protect human health and the environment.

Potential or actual Harm: Harm evaluations consider the potential harm as well as the actual effect the violation has on human health or the environment.[9]

Serious Classification: A violation is classified as Serious if (1) the severity of the violation presents a *substantial deviation* from the regulatory requirement or actual harm to the integrity of the regulatory program and/or (2) has or may have a *substantial adverse effect* to human health or the environment.

Moderate Classification: A violation is classified moderate if (1) the severity of the violation presents *some deviation* from the regulatory requirement or actual harm to the integrity of the regulatory program and/or (2) has or may have *some adverse effect* to human health or the environment.

Marginal Classification: A violation is classified as Marginal if (1) the severity of the violation presents *little or no* deviation from the regulatory requirement or actual harm to the integrity of the regulatory program and/or (2) has or may have *little to no adverse effect* to human health or the environment.

For each violation, staff must provide a reasoned analysis in the enforcement recommendation plan for why a potential for harm classification was selected by documenting how the responsible party deviated from the regulatory requirement and/or how the integrity of the regulatory program was affected and/or documenting the actual or potential harm to the environment.

Statutory Factors

Compliance History Category[10]

Staff evaluates the Responsible Party's history of noncompliance to determine if an increase to a civil charge is warranted. This factor is not used to reduce a civil charge when a Responsible Party has a history of compliance. When a Responsible Party has previously violated an environmental standard at the same or different source or facility, it is usually clear evidence that the Responsible Party was not deterred by DEQ's previous enforcement response. In calculating the adjustment factor for compliance history, staff considers:[11]

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[9]For example, the potential or actual harm to the environment is related to the potential to emit or discharge and/or the toxicity and volume of a pollutant.

[10] This criterion relates to the statutory factor of compliance history.

[11]Because a Remedy Consent Order action is founded on noncompliance with the Remedy Consent Order itself, the Compliance History factor is usually limited to prior Remedy Consent Order non-compliance, but is not limited to 36 months, since Remedy Consent Orders can be effective over many years.

- Administrative or judicial orders/decrees in any other media program within 36 months of issuance of an initial Notice of Violation (NOV) that is also the subject of the current enforcement action (5% of the current gravity-based civil charge/civil penalty or $5,000, whichever is less); and
- Administrative or judicial orders/decrees in the same media program within 36 months of issuance of an initial NOV that is also the subject of the current enforcement action (0.5 factor);
- An administrative or judicial order/decree with an effective date outside of the 36 months counts towards this multiplier if it is still in effective during the 36 month window. If there has been more than one enforcement action in the past 36 months, staff consider whether it is appropriate to depart from the civil charge/civil penalty worksheet, as described in the Introduction.

The evidence to establish culpability cannot be identical to that used to support an adjustment based on compliance history. If the evidence is identical, an adjustment is made for compliance history rather than culpability.

The following steps are taken to calculate a compliance history aggravating factor civil charge:

- Review the compliance history for the responsible party to determine if there have been any enforcement actions within the previous 36 months.
- Determine the appropriate factor to adjust the civil charge. Assuming that the current enforcement action was within the previous 36 months in the same media program, the compliance history factor would be 0.5 (or 50%) (x) gravity subtotal. If there is an enforcement action within the previous 36 months in another media program, the compliance history factor would be the lesser of 0.05 (x) gravity subtotal, or $5,000.

Degree of Culpability

DEQ staff assesses a Responsible Party's culpability based on the facts and circumstances of the enforcement action and may add an aggravating factor to the amounts for one, a subset, or all violations, depending on the culpability assessment. Enforcement staff rate the Responsible Party's culpability as low (0%), moderate (25%), serious (50%), or high (100%) based on the one or more of the factors listed below. An ERP should document consideration of relevant factors thoroughly. It is not anticipated that culpability will increase the civil charge in all cases. The evidence to establish culpability cannot be identical to that used to support the compliance history aggravating factor. If the evidence is identical, an adjustment is made for compliance history rather than culpability. In determining the degree of culpability, one or more of the following should be considered:

- The degree to which the Responsible Party knew or should have known of the legal requirement that was violated;
- The degree of control the Responsible Party had over the events constituting the violation;
- The foreseeability of the events constituting the violation;

- The Responsible Party knew or should have known of the hazards associated with the conduct;
- the Responsible Party took reasonable precautions against the events constituting the violation;
- Whether there is evidence of unjustified delay in preventing, mitigating or remedying the violation;
- The Responsible Party failed to comply with a consent order, special order, judicial order, or federal consent decree;
- There have been NOVs in the same media program during the past 36 months preceding the initial violation that is subject of the current enforcement action. However, staff do not consider NOVs that were withdrawn or not pursued because of insufficient evidence or strategic considerations;
- Commonality of ownership, management, and personnel with other Responsible Parties or facilities that have been subject of enforcement actions; and
- The level of sophistication within the industry in dealing with compliance issues or the accessibility of appropriate control technology. This should be balanced against the technology forcing nature of the statute, where applicable.

The depth of knowledge, experience, and control the Responsible Party had over the events leading to the violation is representative of the appropriate level of culpability. Lack of knowledge of a legal requirement is not a basis to reduce a civil charge.

Economic Benefit

Calculation and recovery of economic benefit is included in a civil charge to ensure the enforcement action removes any illegal competitive advantage and places the Responsible Party in the same financial position as they would have been if they complied on time.[12] A civil charge should remove any (i.e., greater than *de minimis*) economic benefit of noncompliance in addition to the gravity component.[13] An economic benefit is gained when the Responsible Party avoids or delays costs required to comply with a legal requirement or any profits generated from an illegal competitive advantage, and is evaluated on a case-by-case basis. Staff should use professional judgment when making the preliminary determination that an economic benefit exists. When there is evidence of an economic benefit based on delayed or avoided costs, or profits from an illegal competitive advantage, staff should estimate the value of the economic benefit and include this amount in the proposed civil charge.[14] Staff should consult Central Office Enforcement if there are questions about how to calculate and/or assess economic benefit.

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[12] Illegal competitive advantage occurs when the party's noncompliant actions allow it to attain a level of revenues that would not have been obtainable otherwise, *e.g.*, selling a product using water resources in excess of permitted amounts, or draining/filling and selling/developing wetlands without appropriate permits.

[13] An economic benefit may be considered de minimis if the amount would be considered trivial to the overall civil charge or civil penalty and the collection of which would not be a significant deterrence of future noncompliance.

[14] Estimation of economic benefit in the case of failure to comply with Total Nitrogen or Total Phosphorus loading limitations of the *General Permit for Total Nitrogen and Total Phosphorus Discharges and Nutrient Trading in the Chesapeake Watershed* is not necessary. Nor is it necessary to use EPA's BEN model to calculate economic benefit for this class of violations. Economic benefit should be calculated using the cost of purchasing the necessary amount of end-of –year (Class B) nutrient credits from the Nutrient Credit Exchange Association and/or (if sufficient credits

If the economic benefit is estimated to exceed $10,000, penalty and financial models produced by EPA should be used to calculate the economic benefit.[15] EPA's models compute the economic benefits of noncompliance with legal requirements and are a method for calculating economic benefit from delayed and avoided expenditures. The models use several data variables, most of which contain default values. The required variables include information about capital and non-capital costs, annual operation and maintenance costs, and the dates for the period of noncompliance. The economic benefit should be calculated from the first date of noncompliance but generally DEQ does not go back more than five years. A Responsible Party may provide actual financial data that could affect the economic benefit calculation. When the Responsible Party will not or cannot provide financial data in a timely manner, staff should make estimates based on available resources, including staff's professional judgment.[16] Finally, penalty and financial models other than those used by EPA may be used to calculate economic benefit of noncompliance, where staff concludes that an alternative method provides more meaningful results.

A necessary first step when making a preliminary determination of an economic benefit is understanding the costs delayed or avoided through noncompliance. Delayed costs can include capital investments in pollution control equipment, remediation of environmental damages (e.g., removing unpermitted fill material and restoring wetlands), or one-time expenditures required to comply with environmental regulations (e.g., establishing a reporting system, or purchasing land on which to site a wastewater treatment facility, or the purchase of compensatory mitigation credits). Avoided costs typically include operation and maintenance costs and/or other annually recurring costs (e.g., off-site disposal of fluids from injection wells), but can occasionally include capital investments or one-time expenditures. Generally, enforcement staff can look at what actions the Responsible Party does (or will do) to achieve compliance when trying to determine what the Responsible Party should have installed or done to prevent the violations at issue in the enforcement action.

Examples of avoided costs include, but are not limited to:

- Sampling and analytical costs for groundwater and gas monitoring;

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would not have been available through the Exchange), compliance credits from the Water Quality Improvement Fund for the calendar year in which the violation(s) occurred. Central office DE staff should be contacted for assistance in determining the per-unit cost of the appropriate credits for relevant calendar year.

[15]EPA. Penalty and Financial Models. Five models currently are available: BEN (calculates a violator's economic benefit of noncompliance from delaying or avoiding pollution control expenditures), ABEL (evaluates a corporation's or partnership's ability to afford compliance costs, cleanup costs or civil penalties, INDIPAY (Evaluates an individual's ability to afford compliance costs, cleanup costs or civil penalties), MUNIPAY (evaluates a municipality's or regional utility's ability to afford compliance costs, cleanup costs or civil penalties), PROJECT (Calculates the real cost to a Responsible Party of a proposed supplemental environmental project). .

[16] Staff may use the following in exercising their judgment: For delayed compliance, 6% per year of the delayed one-time capital costs for the period from the date the violation began until the date compliance was or is expected to be achieved; for avoided costs, the expenses avoided until the date compliance is achieved, plus 6% per year. *See* Va. Code § 6.2-301. Should Va. Code § 6.2-301 be amended, this figure should change accordingly.

- Disposing of hazardous or universal wastes at a sanitary landfill as opposed to at a permitted disposal facility. The avoided cost would be the difference in the cost of disposal at the landfill compared to disposal at a permitted hazardous waste disposal facility;
- Disconnecting or failing to properly operate and maintain existing pollution control equipment; failure to employ a sufficient number of staff; failure to adequately train staff; failure to establish or follow precautionary methods required by regulations or permits; removal of pollution equipment resulting in process, operational, or maintenance savings; disconnecting or failing to properly operate and maintain required monitoring equipment; and operation and maintenance of equipment that the party failed to install;
- Monitoring and reporting (including costs of the sampling and proper laboratory analysis);
- Permit fees, permit maintenance fees, or annual emissions fees; and
- Operation and maintenance expenses (*e.g.*, labor, power, chemicals) and other annual expenses.

Examples of delayed costs include, but are not limited to:[17]

- Capital equipment improvement or repairs (including engineering design, purchase, installation, and replacement);
- One-time acquisitions (such as equipment or real estate purchases);
- Failure to install equipment needed to meet emission control standards;
- Failure to effect process changes needed to reduce pollution; failure to test where the test still must be performed; and failure to install required monitoring equipment;
- Capital equipment improvement or repairs (including engineering design, purchase, installation, and replacement);
- Costs associated with providing required compensatory mitigation for surface water/wetland impacts (such as creation/restoration of wetlands, purchase or mitigation bank credits, *etc.*); and
- Costs associated with buying nutrient credits to comply with the discharge loading requirements of the General Permit for Total Nitrogen and Total Phosphorus Discharges and Nutrient Trading in the Chesapeake Watershed in Virginia, 9 VAC 25-820-10, et seq.
- Failure to remove hazardous waste 90 days after generation if the waste is ultimately disposed of.

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[17]In VPDES cases, especially municipal VPDES cases, it can be difficult to determine a clear "start date" for calculating the delayed costs of noncompliance. It is not unusual for Responsible Parties to need significant time to evaluate biological processes and/or infrastructure needs before settlement terms can be finalized. Issues like government appropriations, land availability, public participation and other facts not wholly within the control of a permittee can reasonably delay compliance. Finally, it is not unusual that savings that might have been realized from delayed costs are overtaken and surpassed by the increased construction costs resulting from delayed construction. Therefore, the calculation of the delayed costs of noncompliance should be commenced at such time as a VPDES Responsible Party fails or ceases to make a timely, diligent, and good faith effort to comply, while doing all it can to assure high quality treatment.

- Failure to conduct a geophysical investigation.

While the EPA BEN model may be appropriate for avoided and delayed costs, the BEN model often fails to capture adequately the illegal competitive advantage that may arise from violations. It may be necessary to use other standard accounting practices to determine the level of revenues that would have been unattainable had the Responsible Party abided by the law. For example, if a Responsible Party improperly filled wetlands and sold the property as sites for homes, the profit from the sale may be addressed as an element of the economic benefit of noncompliance. Such profits are not accounted for under the BEN model calculations. Here as elsewhere, the economic benefit should also include any costs avoided in failing to obtain a permit (e.g., consultant fees, delayed mitigation costs, and erosion and sedimentation controls), permit fees and tax or revenue benefits.

Once the economic benefit is calculated, DEQ is open to discussing the economic benefit with the Responsible Party and reviewing any documentation the Responsible Party may have that demonstrates a different economic benefit.

Ability to Pay

Ability to pay is one of the five statutory factors. In general, DEQ can reduce a civil charge where a Responsible Party demonstrates an inability to pay. At the same time, it is important that the regulated community not perceive the violation of environmental requirements as cost savings for financially-troubled businesses, and DEQ will, in appropriate circumstances, continue to seek civil charges where a business has failed to allocate environmental compliance costs to their business operations. It is also unlikely that DEQ would reduce a civil charge where a Responsible Party refuses to correct a serious potential for harm, a party has a history of noncompliance, or the violations are particularly egregious. A Responsible Party must claim and provide sufficient documentation of an inability to pay before a consent order or consent special order has been executed. A civil charge cannot be reduced based on a claim of inability to pay once a case decision has been issued. Should a Responsible Party fail to make timely payment of a civil charge, DEQ's Office of Financial Management may negotiate delinquent accounts in accordance with the Commonwealth Accounting Policies and Procedures Manual.

The burden to demonstrate an inability to pay rests on the Responsible Party. In order to evaluate a Responsible Party's ability to pay, the Responsible Party must provide sufficient information to the Office of Financial Responsibility to calculate a potential ability to pay using EPA models that include ABEL, INDIPAY, or MUNIPAY. Failure of the Responsible Party to provide sufficient information to run these models may result in a determination that the Responsible Party has the ability to pay the total civil charge, a portion of the total assessed civil charge, or is able to make payments. In the event a Responsible Party claims an inability to pay, staff are encouraged to consult with the Office of Financial Responsibility early in the discussion, and to advise the Responsible Party that qualification requires a records disclosure and a close evaluation of their financial condition.

The Office of Financial Responsibility provides an evaluation to enforcement staff concerning a Responsible Party's ability to pay. The information may also be used to determine if a Responsible Party would be prevented from carrying out essential corrective action measures in

the event a civil charge is not reduced. Where an inability to pay has been demonstrated, staff should consider the following options:

- Installment payment plan (at least quarterly payments for up to three years);
- Delayed payment schedule; and
- Reduction, up to the full amount of the civil charge, excluding economic benefit and/or the illegal competitive advantage, based on ability to pay modeling.

In its consent orders, DEQ does not suspend civil charges, and cannot charge interest as part of a payment plan. Regardless of a determination of an inability to pay a civil charge, a Responsible Party is required to comply with applicable laws, regulations, orders, permit conditions, and any corrective action to resolve the enforcement action. DEQ's determination about an ability to pay a civil charge does not forgo the goal to collect any economic benefit or illegal competitive advantage realized from the noncompliance.[18]

Adjustments in the Enforcement Recommendation Plan

Civil Charge Reductions up to 30%

DEQ may adjust the gravity component of a civil charge – excluding the economic benefit calculation – downward by up to 30% based on several factors that are clearly documented in the Enforcement Recommendation Plan or Civil Charge Worksheet.[19]

Cooperativeness/Quick Settlement: DEQ may adjust a civil charge where a Responsible Party is cooperative in resolving the case in a timely and appropriate manner and makes a good faith effort to settle the violations quickly.

Promptness of Injunctive Response/Good Faith Effort to Comply: Good faith efforts to comply with regulatory requirements or permit conditions include prompt reporting of noncompliance, prompt initiation of corrective action, prompt correction of environmental problems, and cooperation during the investigation. Responsible Parties who agree to expedite corrective action schedules may also qualify. Enforcement staff should consider institutional or legal limitations on corrective actions. For example, a municipality may be unable to institute corrective action immediately because of a budget approval process or administrative procedures.

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[18] The General Assembly stated in 1997 Acts c. 924, paragraph L.4: "It is the intent of the General Assembly that the [DEQ] recover the economic benefit of noncompliance in the negotiation and assessment of civil charges and penalties in every case in which there is an economic benefit from noncompliance, and the economic benefit can be reasonably calculated."

[19] Va. Code § 10.1-1316(B) requires courts, in assessing judicial civil penalties, to consider "in addition to such other factors as [they] may deem appropriate, the size of the owner's business, the severity of the economic impact of the penalty on the business, and the seriousness of the violation." Although not directly applicable to administrative actions, these considerations may be used to determine whether a downward adjustment is appropriate in the ERP, and if so, the amount of the adjustment.

Size and Sophistication of the Violator: When considering the size and sophistication of the Responsible Party, enforcement staff may presume, in the absence of information to the contrary, that entities such as small non-profit organizations and small municipalities do not possess the same level of sophistication as other regulated entities. The sophistication of the Responsible Party is also relevant in the case of a small business.

To provide a disincentive for any unreasonable delay, the civil charge reduction available to the Responsible Party should be reduced by 5% per month beginning 30 days after the draft consent order has been issued to the Responsible Party.

Days after issuing the draft consent order	Percentage of reduction that may be available
0 to 30 days	30%
31 to 60 days	25%
61 to 90 days	20%
91 to 120 days	15%
121 to 150 days	10%
151 to 180 days	5%
More than 180	0%

Civil Charge Reductions of More Than 30%

The gravity component may be reduced by more than 30% if appropriate circumstances exist. Enforcement staff must provide a reasoned analysis on the Civil Charge Adjustment Form and obtain concurrence from the Director of Enforcement when considering a reduction greater than 30%. The Director of Enforcement will evaluate the reduction for appropriateness and consistency. Circumstances that warrant a reduction of more than 30% (excluding economic benefit) are as follows:

- **Problems of proof:** Challenges with proving the elements of a violation may be due to inadequate information, conflicting evidence, witness availability or contributory activity by DEQ. In many cases, problems of proof are considered as part of the Litigation Potential, but may also be considered independently.
- **Actual or potential harm (or lack thereof) to human health or the environment:** The actual or potential harm to human health or environment should be considered in conjunction with other strategic considerations. A thorough and reasoned analysis should be provided for reducing a gravity component of the civil charge beyond 30% when considering the potential for harm. The evaluation should include a broad assessment of the potential or actual harm to human health or the environment in all media regardless of whether or not there is a legal requirement.
- **The precedential value of the case:** Resolution of certain cases may establish a valued endorsement of an agency program, regulatory or enforcement initiative. A reduction to the proposed civil charge or civil penalty may be appropriate to obtain such a precedent.
- **Probability of meaningful recovery of a civil charge:** In certain cases, information available to DEQ indicates that recovery of a meaningful civil charge is not possible, e.g., an inability to pay.

- **Litigation potential:** Through negotiations it may become apparent that the case is destined for litigation based solely on factors not relevant to environmental protection.

It may also be appropriate to increase a civil charge or civil penalty for continuing or uncorrected violations, previously undiscovered violations, or for economic benefits from continuing delays in achieving compliance and to provide additional incentives to resolve the action expeditiously. Enforcement Staff should provide a reasoned analysis in the ERP Addendum or Civil Charge/Civil Penalty Adjustment Form to support such an increase.

Consent Orders with a Maximum Penalty Allowed by Law

DEQ may depart from the recommended calculations in this guidance to seek civil charges up to the maximum sums permitted by law where the interests of equity, deterrence, and justice require. While uncommon, such departure is appropriate in egregious cases of noncompliance such as, but not limited to:

- Where the violation or its potential or actual environmental harm are especially egregious or severe;
- Where the violation has resulted in a declared emergency by federal, state, or local officials;
- Where the violation has placed another person in imminent and substantial danger of death, serious bodily injury, or significant harm;
- Where the violation is contrary to the specific terms of an administrative order or judicial decree;
- Where the violation or pattern of violations results in an imminent and substantial environmental harm; or
- Where the violation is the result of a pattern or practice that demonstrates the willful avoidance of regulatory requirements.

In cases where staff believes that the violation justifies seeking up to the maximum penalties authorized by law, staff must provide a reasoned analysis by applying the specific criteria described in the Virginia Code and in this chapter, demonstrating how the specific facts of the violation warrant the civil charge or civil penalty recommended.

Civil charges cannot exceed the statutory maximum, usually $32,500 per day for each violation. Certain statutes set out other maximum civil charges, especially for specific programs under the State Water Control Law.[20]

[20] Va. Code § 62.1-44.34:20(C) also establishes minimum civil charges for certain violations involving the discharge of oil. Va. Code § 62.1-44.15(8f) establishes maximum civil charges for sanitary sewer overflows (SSOs) in consent orders requiring SSO corrective action. If this guidance does not specifically reference a statute authorizing a civil charge, such charge may be calculated using the five statutory factors. Va. Code § 62.1-270 indicates a civil charge shall not exceed $25,000 for each violation of the Ground Water Management Act of 1992. Va. Code § 62.1-44.15(8g) establishes a civil charge shall not exceed $50,000 per violation for natural gas transmission pipelines greater than 36 inches inside diameter in special orders issued following a special procedure.

Consent Orders without Civil Charges

A civil charge is not appropriate in every enforcement action. The Virginia Code grants immunity from civil charges for certain voluntarily disclosed violations.[21] DEQ exercises its enforcement discretion to mitigate most or all of the gravity portion of a civil charge for violations that are discovered pursuant to an Environmental Assessment[22] and that are promptly self-reported and corrected.[23] Finally, the civil charge amount may be partially mitigated by a Supplemental Environmental Project.[24]

Initially, staff establish whether the violation warrants a civil charge.[25] Some enforcement actions may present facts and circumstances where no civil charge is appropriate.

The following criteria may qualify for a consent order without civil charges:

- The extent of the actual or potential harm results in little to no harm to the environment or the regulatory program;
- The Responsible Party is not in chronic noncompliance and has demonstrated a good-faith effort to comply;
- Municipal VPDES (major or minor) upgrade or expansion or collection system correction delayed due to the inability to secure funding;
- Interim limits needed pending connection to a municipal wastewater treatment system or a larger regional wastewater treatment system;
- Minor VPDES permittees, such as trailer courts operating lagoons or other antiquated systems, which will eventually be shut down or be connected to a municipal sewer system pursuant to a schedule of compliance.

The emphasis in all enforcement actions, but particularly in enforcement actions without civil charges, is on prompt and appropriate injunctive relief to return a Responsible Party to compliance with applicable laws, regulations, orders, and permit conditions.

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[21] Va. Code §§ 10.1-1199, -1233. *See,* Chapter 5.

[22] "Environmental assessment" means a voluntary evaluation of activities or facilities or of management systems related to such activities or facilities that is designed to identify noncompliance with environmental laws and regulations, promote compliance with environmental laws and regulations, or identify opportunities for improved efficiency or pollution prevention. An environmental assessment may be conducted by the owner or operator of a facility or an independent contractor at the request of the owner or operator.

[23] Voluntary disclosure and reporting do not include mandatory monitoring, sampling, or auditing procedures required by laws, regulations, permits, or enforcement actions. *See,* Chapter 5.

[24] Va. Code § 10.1-1186.2. *See* Chapter 5.

[25] No civil charge can be assessed if a statute grants the party immunity from civil charges, provided all requirements have been met. *See,* Va. Code §§ 10.1-1199, -1233. Civil charges may be mitigated by voluntary reporting and correction or by a SEP. *See,* Chapter 5.

Air Program

The State Air Pollution Control Law (Air Law) in Va. Code § 10.1-1316(c) provides for negotiated civil charges in consent orders for violations of the Air Law, regulations, orders, or permit conditions. A civil penalty cannot exceed $32,500 for each violation. Each day of violation constitutes a separate offense.

DEQ classifies air sources or facilites based on types and amounts of pollutants emitted as True Minor (TM), Synthetic Minor (SM), 80% Synthetic Minor (SM-80) or Major sources (includes Title V, Prevention of Significant Deterioration (PSD) and State Major). Sources classified as TMs do not have the potential to emit pollutants at major source levels. SM sources have a potential to emit pollution at major source levels, but have accepted federally enforceable limits to operations keeping emissions below the major source threshold. SM-80s are a subcategory of SM sources that have operational limits that place them within 80-99.9% of Major source threshold.

Major sources emit pollutants at levels above major source thresholds. These thresholds may differ by pollutant and geographic area; and a facility may be considered major for only some pollutants. Refer to the general tab in the CEDS Air module for the overall classification for a facility subject to enforcement and the specific source classification by pollutant contained in the table.

Potential for Harm Examples

DEQ staff assess the potential for harm for each violation based on the classifications below; these classifications are not used to determine whether a violation warrants formal enforcement. Departures from the examples listed below should be discussed with a Central Office Enforcement Coordinator and documented in the Enforcement Recommendation Plan.

Serious Classification

Examples include, but are not limited to:

- Emissions violations at a major source involving a pollutant for which that source is major;
- Violations which cause a documented potential for exceedance of a National Ambient Air Quality Standard (NAAQS);
- Not maintaining control equipment or failure to use control equipment, for a regulated pollutant for which the source is major, in a manner consistent with good air pollution control practices. Also applicable to SM sources where there is evidence that the failure may have caused emissions to exceed the applicable Major source threshold;
- Failure to conduct emissions tests, monitor, or maintain records necessary to demonstrate compliance with standards involving a pollutant for which the source is Major;

- For an SM source, failure to comply with standards critical to maintenance of that Minor status or failure to maintain records sufficient to document continued Minor status (applies to PSD, MACT, and Title V);
- Failure to obtain a permit prior to construction, modification, or operation of a Major source or SM-80. Also applies to a major modification at these sources.
- Failure to obtain a permit prior to construction, reconstruction, or modification that triggers the requirements of 9 VAC 5-80-1605, *et seq.* or 9 VAC 5-80-2000, *et seq.*;
- Violation of a National Emission Standard for Hazardous Air Pollutants (NESHAP) or MACT standards that indicate excess emissions or substantially interfere with DEQ's ability to determine emissions compliance;
- Violation of a substantive requirement in a consent order, consent special order, or judicial decree (typically not for late reports or minor record keeping deficiencies); and
- Failure to submit a timely Title V permit application (more than 60 days late), or to timely submit a compliance certification, Excess Emissions Report, or other substantive report required by a Title V permit (more than 60 days late).

Moderate Classification

Examples include, but are not limited to:

- Failure to obtain a permit prior to construction, modification or operation of an SM source.
- Emissions violations at an SM source that do not jeopardize the synthetic minor status of the source or violations at a major source involving pollutants for which the source is not considered major;
- Not maintaining control equipment or failure to use control equipment, for a pollutant, at an SM source, in a manner consistent with good air pollution control practices (unless there is evidence that the failure resulted in emissions that jeopardize the synthetic minor status of the source – in this case, the potential for harm is elevated to Serious);
- Failure to conduct emissions tests, monitor, or maintain records necessary to demonstrate compliance with standards involving a pollutant for which the source is SM (unless there is additional evidence to indicate that the source is not in compliance with the limits that establish SM status for that pollutant); and
- Opacity violations at a source that is subject to the PSD, MACT, or Title V Programs.

Marginal Classification

Examples include, but are not limited to:

- Failure to obtain a permit prior to construction, modification or operation of a TM source;
- Not maintaining control equipment or failure to use control equipment for a pollutant at a TM source, in a manner consistent with good air pollution control practices,

unless there is evidence that the failure resulted in emissions of a pollutant at a Major source level;
- Failure to conduct emissions tests, monitor or maintain records necessary to demonstrate compliance with standards involving a pollutant for which the source is a TM source;
- Most record keeping and reporting violations including non-substantive violations at Major, SM, and New Source Performance Standard (NSPS) sources (see Serious and Moderate categories for additional information on when violations at major or synthetic minor sources are not Marginal); and
- Opacity violations at a source that has been classified as either a TM or an SM.

Calculating the Civil Charge

The categories are the numbered items (Categories 1 through 10) that make up the rows of the Worksheet. These categories are used together to make up the portions of the total civil charge for a particular air violation. Each line item on the Air Worksheet does not necessarily constitute a separate violation. For example, the preliminary civil charge for a permit emissions limit violation may be made up of a charges on line 1c, 4a, 4c, and 5.

When using the Worksheet to address multiple violations discovered during the same compliance activity, staff calculates civil charges for each violation independently, with the exception of Category 7, and then combine them to provide the total proposed civil charge. Applicable portions of the Worksheet may be copied to accommodate multiple violations. Staff uses this procedure to determine the appropriate civil charge for each category listed and enter it on the Worksheet.

Statutory, Regulatory, or Permit Violation Category

This category is general in nature and is intended to establish a minimum civil charge for all violations of statutory, regulatory, or permit requirements. Generally speaking, every air case will include a civil charge in line 1 as the base charge for a violation - this charge is in addition to any which may apply under the other categories of the Worksheet for the same violation with the exception of Category 2. If the source is being assessed for violation of a substantive PSD, NESHAP, MACT, NSPS, or Title V requirement, the applicable charges in Category 1 are doubled due to the risk to public health and the environment. Substantive PSD, NESHAP, MACT, NSPS, or Title V requirements may include emissions limits, testing requirements, and reporting requirements.

- Failure to obtain required permit: This charge applies to construction, modification, or reconstruction without a new source permit and to the failure to obtain an operating permit.
- Operating without a permit: This charge applies to construction, modification, or reconstruction without a new source permit where the source has begun operation of the source affected by the permit applicability determination. This line item is assessed in addition to Subcategory 1a.

- Statute/regulation/permit violated (other than a. or b., above): This civil charge applies to violations of permit conditions and requirements of the Air Law or regulations that are not already addressed by Subcategories 1.a or 1.b or Category 3 for the same violation.

Order Violation Category

In Category 2, DEQ assesses civil charges for consent or other order violations. This charge is in addition to any civil charges calculated in the Worksheet except for Category 1.

Pollution Control Equipment Violation Category

In Category 3, DEQ assesses civil charges for the failure to install or properly operate and maintain air pollution control equipment. Category 3 civil charges are not limited to traditional end-of-the-pipe equipment. Category 3 also applies to monitoring equipment and to production equipment where that equipment has been identified as Best Available Control Technology (BACT) or Reasonable Available Control Technology (RACT) or Lowest Achievable Emission Rate (LAER), or as a pollution control device or method in a permit or regulatory program.

Failure to install required equipment:

This civil charge applies, but is not limited, to:

- Failure to install air pollution control equipment specifically required by permit, order, or regulation, or removal of such equipment;
- Failure to install equipment necessary to meet BACT, RACT, LAER, Best Achievable Retrofit Technology (BART), or similar mandatory control technology requirements (in situations of construction/ modification/reconstruction without a permit) as may be determined through the permit review process; or
- Failure to install pollution control equipment capable of meeting emissions limits established by permit, order, or regulations where installation of control equipment is required by a permit, regulation, consent or administrative order, consent decree, or court order.
- Failure to properly operate and maintain equipment: This civil charge applies where the source does not operate the equipment properly or is not operating or maintaining the equipment adequately. Staff should carefully consider the appropriateness of assessing a Category 3 charge if a charge is also being assessed under Category 4 of the Worksheet. A situation could exist where the pollution controls are maintained and operated properly but, nonetheless, an emission violation still occurs. In that situation, it is not appropriate to assess a civil charge for improperly operated pollution control equipment (Category 3). If emissions violation occurred even though pollution controls were maintained and operated properly, select a charge for the emissions violation under Category 4 instead.

Emissions, Reporting/Monitoring, and Toxics Violations Category

Emissions violations: In Category 4, DEQ assesses a charge for documented violations of emissions standards in addition to charges applied in Subcategory 1.c, 2, or 3. A Category 4 emissions charge applies to the percent over a standard established by state or federal statutes, regulations, permits, or orders (including throughput and production limits). If a charge is assessed in Category 4, then a charge is also assessed in Category 5.

- To calculate the appropriate charge for an emissions violation, staff enter the emissions limit or standard and the observed value in the Data column of the Worksheet. Then staff calculate the "% over limit" and insert the percentage in the Data column.26 Staff select the charge from the appropriate Potential for Harm column and transfer to the Amount column of the Worksheet.
- For example, assume a source has a permitted limit of 422 tons per year for volatile organic compounds (VOCs), calculated as the sum of a consecutive 12-month period. Records demonstrate that the facility had actual emissions of 519 tons of VOCs for a 12-month rolling period. Assume the violation is classified as "Serious." The charge for the emissions violation is calculated as follows:
- Subtract the permitted limit of 422 tons from the observed VOC emissions of 519 tons. Divide the difference by the permit limit of 422 and multiply by 100 to obtain the "% over limit," in this case, 23%. ((519-422)/422) x 100 = 23%
- Use the appropriate multiplier for the Potential for Harm. The civil charge for a Serious violation can be calculated by multiplying the percent over by $100. 23% x $100 = $2,300
- In this example, the Amount entered in Category 4.a. of the Worksheet would be $2,300.

As another example, assume a minor source has a permitted limit of 50 tons per year for VOCs, calculated as the sum of a consecutive 12-month period. Records demonstrate that the facility had actual emissions of 75 tons of VOCs for a 12-month rolling period. Assume the violation is classified as "Marginal." The civil charge for the emissions violation is calculated as follows:

- Subtract the permitted limit of 50 tons from the observed VOC emissions of 75 tons. Divide the difference by the permitted limit of 50 and multiply by 100 to obtain the "% over limit," in this case, 50%. ((75-50)/50) x 100 = 50%
- Use the appropriate multiplier for the Potential for Harm. The civil charge for a Marginal violation can be calculated by multiplying the percent over by $25. 50 x $25 = $1,250.
- In this example, the Amount entered in Category 4.a. of the Worksheet is $1,250.

Toxic pollutant violations: This civil charge is assessed for emissions and monitoring violations involving a toxic pollutant. A toxic air pollutant is defined in the 9 VAC 5-60-210 as "any air pollutant listed in § 112(b) of the federal Clean Air Act, as revised by 40 CFR 63.60, or any other air pollutant that the board determines, through adoption of regulation, to present a

[26] Opacity violations are calculated by the highest documented non-exempt "six-minute period" of the "one hour" (*e.g.*, VEE) or a "one-hour period" (*e.g.*, COMS), as may be applicable and as defined in 9 VAC 5-10-20.

significant risk to public health. This term excludes asbestos, fine mineral fibers, radio nuclides, and any glycol ether that does not have a [threshold limit value (TLV)]." Where a violation involves exceedance of a permit limit for a toxic pollutant, a charge should be assessed for both the emission limit exceedance and the toxic pollutant.

Sensitivity of the Environment Category: Category 5 focuses on the geographic location of the violation. Civil charges associated with this category are dependent on the nonattainment/ attainment status or the PSD area classification and the classification of the violation.[27] The sensitivity of the environment charge applies only to emission standards violations or to work practice or technology standards that serve as emission standards, or to violations of monitoring requirements. When a violation occurs in a nonattainment area, the nonattainment charge applies only for violations involving pollutants or pollutant precursors for which the area is designated nonattainment. The regulations contain a description of the nonattainment areas and the Class I PSD areas, and the remainder of the Commonwealth is currently classified as a Class II area.[28]

Length of Time Factor Category: The longer a violation continues uncorrected, the greater the potential for harm to air quality and the more severe the violation. The Worksheet addresses this consideration in the category labeled "Length of Time Factor." Where separate civil charges are not assessed for daily, documented violations, DEQ calculates the charge for this factor as follows: (a) multiply the number of days the violation occurred by 0.274 (i.e., 1/365) - this is the Percent Increase Factor; (b) divide this factor by 100 to obtain the decimal expression, which is then multiplied by the Preliminary Subtotal to obtain the additional civil charge.
The time span (expressed in days) used to calculate the civil charge begins, based on available evidence, on the day the violation began. The time span ends on the date the source corrects the deficiency addressed by the civil charge or the date the source agrees in principle to a set of corrective actions designed to achieve compliance with the regulatory requirement for which the charge was assessed. For violations where the length of time exceeds five years, as determined by this section, DEQ calculates the civil charge based on a length of time of five years (1,826 days). This limitation on length of time is not applicable to calculation of economic benefit.

- For construction without a permit, the time span begins with the start of construction and ends when the source either begins operation of the equipment or the source submits a permit application for the affected process or equipment or agrees in principle to a set of corrective actions.
- For operation without a permit, the time span begins with the start-up of the equipment and ends when the source submits a permit application for the affected process or equipment.
- For stack tests that occur prior to execution of an consent order, the time span begins with the date the test was required (or date of the failed stack test) and ends the date the test is completed and demonstrates compliance as documented by a stack test report.

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[27] If the air quality in a particular geographic region meets the national standard set by EPA, it is called an attainment area; areas that do not meet the national standard are considered nonattainment areas.

[28] 9 VAC 5-20-204 (nonattainment) and 9 VAC 5-20-205 (PSD).

The following is an example of how to calculate a "length of time" civil charge:

- Calculate the length of time in days that the noncompliance existed. For example, 200 days elapsed between the beginning day of the noncompliance and the date a stack test was completed showing compliance, or the date the source agreed in principle to a set of corrective actions necessary to return to a state of compliance.
- Multiply the number of days by 0.274. Take 200 and multiply it by 0.274 to get 54.8, which is rounded up to the nearest whole number to get 55%, or a factor of 0.55.
- Multiply the Preliminary Subtotal calculated on the Worksheet by the Length of Time Factor. Assume for this example that the Preliminary Subtotal is $1,300. $1,300 times 0.55 yields $715.
- Enter the calculated charge into the "Amount" column for Category 6 on the Worksheet.

Air Civil Charge Worksheet

Va. Code §§ 10.1-1316, -1309

Source/Responsible Party	Reg.#			NOV Date	
	NOV Observation #	**Potential for Harm**			
		Serious	**Moderate**	**Marginal**	***Amount***
1. Statutory/Regulatory/Permit Violation					
a. Failure to obtain required permit.		$ 7,938	$ 2,646	$ 1,323	
b. Operating without a permit		$ 5,292	$ 2,646	$ 1,323	
c. Statute/regulation/permit violated *(other than a or b above)*		$ 2,646	$ 1,323	$ 661	
(Multiply by 2 for violation of a substantive PSD, NESHAP, MACT, NSPS or TV requirement)					
2. Order Violation					
a. Consent or Other Order condition violated.		$ 5,292	$ 2,646	$ 1,323	
3. Pollution Control Equipment Violation					
a. Failure to install required equipment.		$ 13,229	$ 7,938	$ 2,646	
b. Failure to properly operate or maintain equipment.		$ 13,229	$ 7,938	$ 2,646	
4. Emissions, Monitoring, and Toxics Violations					
a. Violation of Emission Limit or Standard *(% over limit or standard)*		$100 (x) % over	$50 (x) % over	$25 (x) % over	
- Limit or Standard					
- Observed Value					
b. Toxic Pollutant Violations		$ 2,646	$ 1,323	$ 814	
5. Sensitivity of the Environment					
a. Nonattainment Area		$ 5,292	$ 2,646	$ 1,323	
b. Class I PSD area		$ 2,646	$ 1,323	$ 814	
c. Class II and III PSD area		$ 1,323	$ 509	$ 305	
Preliminary Civil Charge/Civil Penalty Subtotal					
	Data	Factor			
6. Length of Time Factor *(enter days)*		%			
7. Compliance History					
Order or decree in another media program within 36 mo. before initial NOV	Y N	If yes, add lesser of 0.05 (x) Preliminary Subtotal, or $5,000			
Order or decree in same media program within 36 mo. before initial NOV	Y N	0.5 (x) Preliminary Subtotal (for 1 order in 36 mo.)			
8. Degree of Culpability *(apply to violation(s)' Amount or to the Preliminary Civil Charge/Civil Penalty Subtotal)*	Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
9. Economic Benefit					
10. Ability to Pay *(based on information supplied by the source/party)*					( )
Total Civil Charge *(may not exceed $32,500 per day per violation)*					***$***

Animal Feeding Operations and Poultry Waste

Va. Code § 62.1-44.17:1 provides specific statutory authority for VPDES permits for confined animal feeding operations and General VPA Permit for Animal Feeding Operations (AFO) and outlines certain design and operational criteria for AFO owners and operators. Va. Code § 62.1-44.17:l(J) states that persons violating the provisions of § 62.1-44.17:1 may not be assessed civil charges that exceed $2,500 for any AFO covered by a VPA permit. For AFOs covered by a VPA permit, enforcement staff use the AFO Civil Charge/Civil Penalty Worksheet to assess appropriate civil charges on a per settlement action basis. Enforcement staff should use the VPDES worksheet in this chapter for AFOs covered by a VPDES permit.

In no event may the final recommended civil charge for AFO general permit violations exceed $2,500. However, it is clear from the language of the statute, which focuses on AFO design and normal operating conditions, and from the legislative history of that section of the State Water Control Law, that the General Assembly did not intend to limit penalty liability for onsite violations not addressed under § 62.1-44.17:1 (*e.g.*, violations of § 62.1-44.5 which prohibits unpermitted discharges to state waters). Those violations should be assessed separately using the appropriate civil charge/civil penalty worksheet.

Like the penalty limitations for permitted AFO facilities, § 62.1-44.17:1.1(F) limits civil charges for violations at operations covered by the VPA General Poultry Waste Management Permit to $2,500. A Poultry Waste Civil Charge/Civil Penalty Worksheet for such violations follows. Both the AFO and the Poultry Waste Worksheets may apply to operations where both activities take place.

In calculating the appropriate civil charge, staff assesses the gravity-based component of the civil charge by selecting the appropriate violation category and multiplying the individual civil charge noted by the number of occurrences of the violation. After calculating a civil charge for each violation category, staff adds the civil charges to arrive at a subtotal. The noncompliance period considered should generally be limited to six months. Aggravating factors, including threats to human health and safety and environmental damage caused by the violation are then considered. If an aggravating factor is present, staff multiplies the civil charge subtotal by the aggravating factor multiplier of 1.5 and adds it to the Subtotal to arrive at the civil charge.

Animal Feeding Operation Civil Charge Worksheet

Va. Code § 62.1-44.17:1(J)

Facility/Responsible Party	Reg./Id. #			NOV Date	
	NOV Observation #	**Potential For Harm** (Environmental Harm and Severity)			***Amount***
		Serious	**Moderate**	**Marginal**	
1. Violations and Frequency (per occurrence per inspection unless otherwise noted) *(Severity and Environmental Harm)*		**$ (x) occurrences**	**$ (x) occurrences**	**$ (x) occurrences**	
(a) Failure to monitor soils, waste or groundwater		1000 (x) ___	500 (x) ___	200 (x) ___	
(b) Failure to maintain records		1000 (x) ___	500 (x) ___	200 (x) ___	
(c) Improper documentation of liner, seasonal high water table, siting, design and construction		500 (x) ___	300 (x) ___	100 (x) ___	
(d) Improper operation and maintenance of waste storage facility		1000 (x) ___	500 (x) ___	200 (x) ___	
(e) Improper operation and maintenance of equipment (including but not limited to checking for leaks, calibrations, having manufacturer's manuals on site)		1000 (x) ___	500 (x) ___	200 (x) ___	
(f) NMP Violations		1000 (x) __	500 (x)___	200 (x) ___	
(g) Evidence of breached buffers or runoff		1000 (x) __	500 (x) ___	200 (x) ___	
(h) Operator training requirements not met		500 (x) __	300 (x) ___	100 (x) ___	
(i) Insufficient notice prior to animal placement or utilization of new waste storage facilities		500 (x) __	300 (x) ___	100 (x) ___	
(j) Improper closure of waste storage facility		1000 (x) __	500 (x) ___	200 (x) ___	
(k) Other violations		1000 (x) __	500 (x) ___	200 (x) ___	
Violations and Frequency Subtotal					
2. Adjustment Factors: If there is a threat to human health or safety, or environmental damage *multiply the Violations and Frequency Subtotal by 1.5*					
Compliance History					
Order or decree in another media program within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 * Violations and Frequency Subtotal, or $5,000		
Order or decree in same media program within 36 mo. before initial NOV	Y	N	If yes, add 0.5 * Violations and Frequency Subtotal (for 1 order in 36 mo.)		
Culpability *(apply to violation(s)' Amount or to the Violations and Frequency Subtotal)*	Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
Adjustment Factor Subtotal					
3. Economic Benefit of Noncompliance *(Economic Benefit)*					
4.Ability to Pay *(based on information supplied by the responsible party) (Ability* to Pay)					( )
Total Civil Charge *(not to exceed $2500 when covered by a VPA permit)*					**$**

Poultry Waste Civil Charge Worksheet

(for any confined animal feeding operation covered by a Virginia Pollution Abatement permit)

Va. Code § 62.1-44.17:1.1

Facility/Responsible Party	Reg./Id. #			NOV Date	
	NOV Observation #	**Potential For Harm** *(Environmental Harm and Severity)*			***Amount***
		Serious	**Moderate**	**Marginal**	
1. Violations and Frequency (per occurrence per inspection unless otherwise noted) *(Severity and Environmental Harm)*		**$ (x) occurrences**	**$ (x) occurrences**	**$ (x) occurrences**	
(a) Failure to monitor soils, waste or groundwater		1000 (x) ___	500 (x) ___	200 (x) ___	
(b) Failure to maintain records		1000 (x) ___	500 (x) ___	200 (x) ___	
(c) Transfer of more than 10 tons of poultry waste without providing the nutrient analysis or fact sheet to recipient		500 (x) ___	300 (x) ___	100 (x) ___	
(d) Improper disposal of mortalities		1000 (x) ___	500 (x) ___	200 (x) ___	
(e) Improper storage of poultry waste		1000 (x) ___	500 (x) ___	200 (x) ___	
(f) Improper operation and maintenance of waste storage facility		1000 (x) ___	500 (x) ___	200 (x) ___	
(g) Nutrient Management Plan (NMP) Violations		1000 (x) ___	500 (x) ___	200 (x) ___	
(h) Improper winter land application of poultry waste or land application to soils that are saturated		1000 (x) ____	500 (x) ___	200 (x) ___	
(i) Evidence of breached buffers or runoff		1000 (x) ___	500 (x) ___	200 (x) ___	
(j) Improper closure of poultry waste storage facility		1000 (x) ___	500 (x) ___	200 (x) ___	
(k) Operator training requirements not met		500 (x) ___	300 (x) ___	100 (x) ___	
(l) Other violations		1000 (x) ___	500 (x) ___	200 (x) ___	
	Violations and Frequency Subtotal				
2. Adjustment Factors: If there is a threat to human health or safety, or environmental damage *multiply the Subtotal by 1.5*					
Compliance History					
Order or decree in another media program within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or $5,000		
Order or decree in same media program within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)		
Culpability *(apply to violation(s)' Amount or to the Violations and Frequency Subtotal)*	Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
3. Adjustment Factor Subtotal					
4. Economic Benefit of Noncompliance *(Economic Benefit)*					
5.Ability to Pay *(based on information supplied by the responsible party) (Ability to Pay)*					( )
Total Civil Charge *(not to exceed $2,500 when covered by a VPA permit)*					**$**

Article 9 – Underground Storage Tank Program

The Underground Storage Tank (UST) Program is authorized under Article 9 of the State Water Control Law, Va. Code §§ 62-1-44.34:8 and 62.1-44.34:9. Article 9 typically addresses USTs for petroleum products, but also includes USTs for other "regulated substances," as defined by statute. Authority for negotiated civil charges for violations of Regulated UST Program laws, regulations, orders is found in the Water Law at Va. Code § 62.1-44.15(8d). The maximum civil charge is $32,500 per day for each violation.[29]

Potential for Harm Examples
In evaluating the Potential for Harm, issues to consider when assessing actual or potential harm to human health and the environment, include the volume of the product, characteristics of the product, population density where the release occurred and risk to that population (e.g., receptor population heavily reliant on drinking water wells and vapor intrusion), skill set/training/certification of employees, time of exposure, distance from a drinking water source, sensitivity of the environment, or any other criteria that may be appropriate. The criteria established in the Storage Tank Program Compliance Manual Volume 4: Compliance Process, specifically Appendix-C Underground Tank Delivery Prohibition Decision Matrix, provides additional guidance on determining the Potential for Harm.[30]

For example, violation of a regulatory requirement that qualifies for an expedited process for delivery prohibition would qualify as a serious Potential for Harm. A violation of a regulatory requirement that would qualify under the regular delivery prohibition process may qualify for either moderate or marginal after taking into consideration the issues listed in the preceding paragraph.

In evaluating the Potential for Harm for failures to report, investigate or cleanup a UST release, issues to consider include the extent of the release, population density where the release occurred, the presence and proximity of nearby human health or environmental receptors and any other criteria that may be appropriate. Some receptors of concern include supply water wells, surface water bodies, underground utilities (vapor impacts) and other vapor impacts to structures.

Line 1(a): Failure to Report a Release or Investigate and/or Report a Suspected Release
This category includes violations for failure to investigate, confirm and/or report a release or a suspected release. This would also include failure to immediately clean up a spill or overfill pursuant to 9 VAC 25-580-220.

Potential for Harm Example:

Failure to report a confirmed release or investigate/report suspected release.	Serious	Moderate	Marginal
Release impacted receptor OR release poses imminent threat to a receptor. Failure to investigate a suspected release (other than	X		

[29] Va. Code § 62.1-44.15 incorporates by reference the penalty amounts from Va. Code § 62.1-44.32.
[30] https://www.deq.virginia.gov/permits-regulations/laws-regulations/land-waste

a suspected release indicated by inconclusive monitoring results) at a facility in a groundwater use area or nearby to surface water body.			
Repeated failure to investigate suspected release indicated by monitoring results or failure to report confirmed release with no known receptors nearby.		X	
Failure to report suspected release that facility later investigated and determined no actual release. Failure to investigate a suspected release indicated by inconclusive monitoring results at a facility with no apparent nearby receptors.			X

Line 1(b): Corrective Action /Monitoring/Closure Report Not Submitted

This category would include violations for failure to submit any kind of report detailing what corrective actions have been performed at the site, including initial abatement, site characterization, corrective action plan implementation, monitoring and closure reports.

Potential for Harm example:

Corrective Action/Monitoring/Closure Report not submitted	Serious	Moderate	Marginal
Critical implementation/characterization reports where receptors are impacted or at imminent risk of impact OR critical reports late that identify potential receptors (e.g., site characterization report)	X		
Other reports late where receptors impacted or at imminent risk of impact.		X	
Late interim reports (e.g., quarterly monitoring reports) with no potential receptors under imminent threat of impact			X

Line 1(c): Failure to Abate, Characterize or Otherwise Remediate a Confirmed Release

This category includes cleanup-related items (9 VAC 25-580-240 to -270) such as failure to conduct initial abatement, site characterization or failure to remove free product.

Potential for Harm example:

Failure to abate, characterize or remediate a release	Serious	Moderate	Marginal
Failure to take ANY corrective actions to address a confirmed release that has impacted human health receptors OR critical activities necessary to address cleanup of impacted environmental receptors or receptors at imminent risk of impact. Failure to take actions necessary to identify potential receptors.	X		
Failure to perform routine activities (e.g., quarterly monitoring) where receptors at imminent risk of impact		X	

Late performing routine actions such as quarterly monitoring event at facility where no receptors at imminent risk of impact.			X

Line 1(d): No CAP or Failure to Execute a CAP

This category includes situations where the RP does not have an approved Corrective Action Plan (CAP) from DEQ or does not execute the CAP at all or properly.

Potential for Harm example:

No Corrective Action Plan or Failure to execute CAP	Serious	Moderate	Marginal
Failure to have an approved CAP or execute the CAP for a release that has impacted human health receptors (e.g., basements or other indoor spaces, water supply wells) or surface waters	X		
Failure to have an approved CAP or execute a CAP for a release that has impacted human health or surface receptors but RP is otherwise performing cleanup activities that address the contamination		X	
The corrective action is performed and would have been the approved work under the CAP but RP did not go through process to obtain a CAP. Work was done, however.			X

Potential for Harm Evaluation for Pollution Prevention Noncompliance

Potential for harm in cases of UST pollution prevention noncompliance is assessed both as potential harm caused by a release that may occur or be made worse as a result of noncompliance and the extent of deviation from regulatory requirements (i.e., harm to the regulatory program), and staff should use the general assessment criteria at the beginning of this chapter. For example, a facility located in a groundwater use area and in violation of corrosion protection requirements may have a higher potential for harm assessed than a facility with the same violation located within a city block on public water. However, a facility with no nearby receptors can still be assessed a "serious" potential for harm if the deviation is severe enough, e.g., no release detection is performed at all for the last year or failing to repair a corrosion protection system that has failed its 3-year test.

DEQ's UST risk based inspection strategy (RBIS) can assist in evaluating the potential for harm associated with pollution prevention noncompliance. Facilities are assigned risk levels (high to low) according to the following factors: the presence of nearby human health and/or environmental receptors, tank age and noncompliance with key UST requirements. Noncompliance at high-risk facilities will generally equate to higher potential for harm than noncompliance at a low risk facilities. However, depending upon the applicable criteria, there may not be much difference in potential for harm between high and medium risk facilities. A facility's risk level is a helpful tool but should be used in conjunction with other factors, i.e., an evaluation of the extent of deviation from the regulatory requirements, to assess potential for

harm. A facility's risk category can be found on the general tab of the Tank Facility screen in CEDS.

Line 1(e): Tank System Operated Improperly (per violation)

This includes failure to properly operate equipment and failure to conduct required testing to ensure the equipment is operating properly, e.g., the shutoff valve is not set to shut off flow into the tank at the required level or the alarm is not audible or visible to delivery driver. This includes all testing requirements, including failing to test following a repair and improper testing. This category would also include situations where the rectifier has been turned off, where release detection is not being performed every month or correctly, and where the owner does not meet all the requirements to use certain forms of release detection (e.g., the release detection method has expired or their equipment is faulty such as a measuring stick that is not capable of measuring 1/8 of an inch). It would also cover failure to comply with the temporary closure requirements (9 VAC 25-580-310 to -330).

Potential for Harm examples:

Tank system operated improperly (release detection)	Serious	Moderate	Marginal
No release detection for last 6-12 months OR no release detection for last 3 or more months (high risk facility)	X		
No release detection for last 3 months (medium or low risk facility)		X	
No release detection for 3 out of 12 months with subsequent passing results			X
Tank system operated improperly (corrosion protection)	Serious	Moderate	Marginal
CP system turned off or CP system failed test and not repaired (high or medium risk facility)	X		
CP system turned off or CP system failed test and not repaired (low risk facility) or failure to get 3 year CP test (high or medium risk facility)		X	
Failure to get 3 year test (low risk facility)			X

Line 1(f): Tank system Installed, Upgraded, Equipped, or Closed Improperly (per violation)

This category includes items that demonstrate the tank system is not equipped to perform required pollution prevention including Overfill (OF), Corrosion Prevention (CP), Release Detection (RD), Secondary Containment (SC), Spill Prevention (SP) and Compatibility. This includes items that were never installed (e.g.,no secondary containment) or installed improperly (e.g.,ball float installed on or after Jan. 1, 2018), or the equipment is so damaged or broken that it no longer functions. This also includes tanks and/or piping that are not compatible with the substance stored as well as items that were not upgraded properly (e.g.,no CP integrity assessment prior to upgrade). This would also include items related to improper tank closure such as failure to conduct site assessments, provide soil samples or begin corrective action when necessary.

Potential for Harm example:

Tank system installed, upgraded, equipped or closed improperly	Serious	Moderate	Marginal
Basic pollution prevention (P2) equipment (e.g., spill bucket, CP system, overfill prevention) not installed at all or P2 equipment such as CP system, release detection equipment or overfill equipment nonfunctional at high/medium risk facility	X		
P2 equipment such as CP system, release detection equipment or overfill equipment nonfunctional at low risk facility		X	
Minor functionality issues such as a hole in a spill bucket at low/medium risk facility; ball float installed after 1/1/18			X

Line 1(g): Failure to Demonstrate Financial Responsibility

This category includes situations where the owner has no financial responsibility mechanism or the current mechanism needs to be updated. The Potential for Harm evaluation for financial responsibility violations is based on the potential harm to DEQ's cleanup reimbursement fund. Owners with a higher throughput are responsible for paying a higher amount of cleanup costs before becoming eligible for reimbursement from Virginia's fund than owners with a lower throughput, and noncompliance with these requirements in the event of a UST release will have a higher financial impact on the Fund. An owner's financial responsibility regulatory amount is based on the amount of petroleum that flows through an owner's tanks annually. Each tank owner's financial responsibility obligation is tracked on the financial responsibility tab in CEDS.

Potential for Harm example:

Failure to Demonstrate Financial Responsibility	Serious	Moderate	Marginal
Tank owner has a higher petroleum throughput with an annual aggregate FR obligation of $200,000.	X		
Tank owner has moderate petroleum throughput with an annual aggregate more than $20,000 but less than $200,000		X	
Tank owner lower petroleum throughput owner with an annual aggregate FR obligation of $20,000			X

Line 1(h): Records not available

This category includes missing or incomplete annual and 3-year test records, monthly and annual release detection records, test records not provided after repairs, repair records, 60-day rectifier logs (inspections), operator training records, closure documents, walkthrough inspection records and some release monitoring and investigation reports that are not categorized elsewhere.

Potential for Harm example:

Records not available	Serious	Moderate	Marginal

Records not maintained at all (e.g., no equipment testing records, CP system rectifier logs, or release detection records)	X		
Records incomplete at high/medium risk facility (e.g., missing 4 out of 10 months RD records or a few days' worth of rectifier logs)		X	
Records incomplete at low risk facility			X

Line 1(i): Improper/No Registration

This category includes situations where the facility has never been registered or the registration is incorrect (e.g., the owner, substance stored, tank/piping material, piping type, RD type, SP, OF, tank closure, piping closure, or temporary closure information is incorrect). Potential for harm assessment for registration violations is generally assessed as the extent of deviation from regulatory requirements. An unregistered facility with a UST released should be assessed for a higher potential for harm.

Potential for Harm example:

Improper/No Registration	Serious	Moderate	Marginal
Facility not registered at all	X		
New tanks installed at existing facility not registered or new facility ownership not registered or tank permanent closure not registered		X	
Incomplete or incorrect forms/ release detection equipment changes not registered/Piping run closure not registered.			X

Line 1(j): Other violation

This category includes operator training issues that are not covered in the records violation section, such as operator training not completed; operators not designated; emergency response procedures not kept on site; and Class C refresher training not conducted. It would also cover failure to conduct monthly or annual operation and maintenance walkthrough inspections or conducting incomplete inspections, pursuant to 9VAC25-580-85.

Potential for Harm example:

Other violation	Serious	Moderate	Marginal
No walkthrough inspection performed at high risk facility.	X		
No designated or trained operators at high risk facility. No walkthrough inspections performed at low or medium risk facility. Incomplete walkthrough inspections at high risk facility.		X	
Incomplete walkthrough inspections or Class C operator not trained annually/emergency procedures not posted (low to medium risk facility)			X

Underground Storage Tank Civil Charge Worksheet

Va. Code § 62.1-44.15

Facility/Responsible Party	Reg./Id. #		NOV Date		
	NOV Observation #	**Potential for Harm** *(Environmental Harm and Severity)* **Serious**	**Moderate**	**Marginal**	***Amount***
1. Violations and Frequency* *(Severity and Environmental Harm)*					
a. Failure to Report a Release or Investigate and/or Report a Suspected Release		$13,229	$6,615	$1,323	
b. Corrective Action /Monitoring/Closure Report Not Submitted		$1,323 per phase	$712 per phase	$305 per phase	
c. Failure to, Abate, Characterize or Remediate a Release		$5,292	$2,646	$1,323	
d. No CAP or Failure to Execute a CAP		$2,646 per tank *	$1,323 per tank *	$712 per tank *	
e. Tank System Operated Improperly (per violation)		$1,323 per tank *	712 per tank *	$305 per tank *	
f. Tank system Installed, Upgraded, Equipped, or Closed Improperly (per violation)		$2,646	$1,323	$712	
g. Failure to Demonstrate Financial Responsibility		$1,323	$712	$305	
h. Records not Available		$1,323	$712	$305	
i. Improper/No Registration		$1,323 per tank *	$712 per tank *	$305 per tank *	
j. Other Violation Component		$1,323	$712	$305	
* per tank or, if compartments, per tank compartment					
2. Violations and Frequency Subtotal					
3. Degree of Culpability *(Severity and Compliance History) (apply to violation(s)' Amount or to the Violations and Frequency Subtotal)*	Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
4. History of Noncompliance *(Compliance History)*					
Order or decree in another media program within 36 mo. before initial NOV	Y N	If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or $5,000			
Order or decree in same media program within 36 mo. before initial NOV	Y N	If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)			
4. Subtotal					
5. Economic Benefit of Noncompliance *(Economic Benefit)*					
6. Ability to Pay *(based on information supplied by the responsible party) (Ability to Pay)*					( )
Total Civil Charge *(may not exceed $32,500 per day per violation)*					***$***

Article 11 – Oil Discharges and Aboveground Storage Tanks

Article 11 of the State Water Control Law[31] establishes a civil charge authority for the discharge of oil, for violations related to aboveground storage tanks (ASTs), and for violations of underground storage tanks not regulated under Article 9. Va. Code § 62.1-44.34:20(C) establishes civil charges and penalties for:

- For failing to obtain approval of an oil discharge contingency plan as required by § 62.1-44.34:15;
- For failing to maintain evidence of financial responsibility as required by § 62.1-44.34:16;
- For discharging or causing or permitting a discharge of oil into or upon state waters, or owning or operating any facility, vessel or vehicle from which such discharge originates in violation of § 62.1-44.34:18;
- For failing to cooperate in containment and cleanup of a discharge as required by § 62.1-44.34:18 or for failing to report a discharge as required by § 62.1-44.34:19; and
- For violating or causing or permitting to be violated any other provision of this article, or a regulation, administrative or judicial order, or term or condition of approval issued under this article.

Va. Code § 62.1-44.34:17 sets out exemptions for items 1 and 2, above.[32] Va. Code § 62.1-44.34:23 sets out exceptions to Article 11 generally.
Pursuant to Va. Code § 62.1-44.34:20(D), in determining the amount of any civil charge or penalty pursuant to violations of Article 11, consideration must be given to each of the following seven factors:

a. The willfulness of the violation;
b. Any history of noncompliance;
c. The actions of the person in reporting, containing and cleaning up any discharge or threat of discharge;
d. The damage or injury to state waters or the impairment of their beneficial use;[33]
e. The cost of containment and cleanup;
f. The nature and degree of injury to or interference with general health, welfare and property; and
g. The available technology for preventing, containing, reducing or eliminating the discharge.

Potential for Harm Examples

In evaluating the seven factors, issues to consider include the volume of the product, characteristics of the product, population density where the discharge/release occurred, skill

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to): (1) farm or residential tanks of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes (9 VAC 25-580-10) ("UST" definition); (2) tanks used for storing heating oil for consumption on the premises where stored (*Id.*); and (3) aboveground storage tanks with a capacity of 5,000 gallons or less containing heating oil for consumption on the premises where stored (Va. Code § 62.1-44.34:17(E)).

[33] Though Va. Code §62.1-44.15(8e) states that the procedures for calculating a civil charge shall include, "the extent of any potential or actual environmental harm", note that the specific penalty provision for violations of Article 11, Va. Code §62.1-44.34:20(D), does not use the term potential. .

set/training of employees, time of exposure, distance from a drinking water source, sensitivity of the environment, or any other criteria that may be appropriate.

Discharges to State Waters

When evaluating a civil charge or civil penalty under Va. Code § 62.1-44.34:20(C)(3) the following are the suggested increments for each of the seven factors:

- Marginal: 0, 10, 20
- Moderate: 30, 45, 60
- Serious: 70, 85, 100

Line 1(a): Nature/Degree of Injury to General Health, Welfare and Property -
The greater the nature and degree of injury to or interference with property or health, the higher the number. In evaluating the Potential for Harm, consider the amount of the pollutant, the characteristics of the pollutant, the sensitivity of the human population and the length of time of exposure.

- Serious: Substantial injury to or interference with general health through impacts such as, but not limited to, drinking water supply or extensive damage to public and/or private property;
- Moderate: Moderate injury to or interference with general health through impacts such as, but not limited to, drinking water supply or moderate damage to public and/or private property;
- Marginal: Minor injury to or interference with general health through impacts such as, but not limited to, drinking water supply or minor damage to public and/or private property;
- N/A: No apparent injury to or interference with general health; negligible damage to public and/or private property.

Line 1(b): Damage/Injury to State Waters or Impairment of Beneficial Use -
The greater the damage to state waters or impairment of their beneficial uses, the higher the number. In evaluating the Potential for Harm, consider the amount of the pollutant, the characteristics of the pollutant, the sensitivity of the state waters, and the length of time of exposure.

- Serious: Fish kill (consider the type and number of fish and the waters affected), significant threat to sensitive ecosystem, loss of beneficial use, or harm to wildlife34 (especially endangered species), or other impacts that can only be corrected after a substantial effort or period of time;
- Moderate: Moderate threat to State waters, adjoining shorelines, or vegetation (other than a sensitive ecosystem) that can be corrected after a period of time;

[34] Harm in this context should be defined broadly but generally includes any act which actually kills or injures fish or wildlife, and emphasizes that such acts may include significant habitat modification or degradation that significantly impairs essential behavioral patterns of fish or wildlife.

- Marginal: Spill created a visible sheen, film, sludge, or emulsion and damage was quickly corrected;
- N/A: No apparent damage to state waters or impairment of beneficial use.

Line 1(c): History of Noncompliance:
History of noncompliance should be analyzed as in all other programs.

Line 1(d): Actions in Reporting/Containing/Cleaning up the Discharge
Prompt action will result in a lower number. This should not be used in conjunction with civil charges or civil penalties assessed under Va. Code § 62.1-44.34:20(C)(4).

- Serious: Failed to timely report/contain or abate/cleanup;
- Moderate: Notification/response inadequate such that containment or cleanup was significantly affected;
- Marginal: Delayed notification/response with minor impact;
- N/A: Timely notification and best and most prompt response possible under the circumstances.

Line 1(e): Cost of Containment and Cleanup

The higher the cost, the lower this will be.

- Serious: The Commonwealth had to expend funds; actual cost to violator to contain and cleanup small relative to the size of the discharge;
- Moderate: The Commonwealth had to expend funds; actual cost to violator to contain and cleanup comparable to the size of the discharge;
- Marginal: The Commonwealth did not need to expend funds; actual cost to violator to contain and cleanup comparable relative to the size of the discharge;
- None: Actual cost to violator to contain and cleanup disproportionate to the size of the discharge.

Line 1(f): Culpability
Culpability should be analyzed as in all other programs.

Line 1(g): Available Technology to Prevent/Contain/Reduce/Eliminate Discharge
The more readily accessible and less expensive the technology to prevent, contain, reduce or eliminate the discharge, the higher this number.

- Serious: Technology and/or service available on site or readily accessible, but not utilized;
- Moderate: Technology not available on site, but relatively inexpensive and readily accessible on the commercial market;
- Marginal: Technology not available on site, but relatively expensive or not readily accessible on the commercial market;
- None: Technology available on site and utilized; technology not on site, but prohibitively expensive or not available on the commercial market.

Oil Discharges (State Waters) Civil Charge Worksheet *Va. Code § 62.1-44.34:20(C)(3)*				
Responsible Party/Facility	Reg./Id.#		NOV Date	
	Nature and degree of Harm			
	Serious	**Moderate**	**Marginal, NA or None**	***Amount***
C (3) for discharging or causing or permitting a discharge of oil into or upon state waters, or owning or operating any facility, vessel or vehicle from which such discharge originates in violation of § 62.1-44.34:18.				
1. Statutory Factors *Discuss each factor, circle the Potential for Harm and assign a dollar amount between $0 and $100 to each factor.*				
a. Nature/Degree of Injury to Health, Welfare and Property	70, 85, 100	30, 45, 60	0, 10, 20	$
b. Damage/Injury to State Waters or Impairment of Beneficial Use	70, 85, 100	30, 45, 60	0, 10, 20	$
c. History of Non-Compliance	70, 85, 100	30, 45, 60	0, 10, 20	$
d. Actions in Reporting/Containing/Cleaning Up the Discharge	70, 85, 100	30, 45, 60	0, 10, 20	$
e. Cost of Containment and Clean Up (Relative to Amount of Oil Spilled)	70, 85, 100	30, 45, 60	0, 10, 20	$
f. Culpability (Willfulness)	70, 85, 100	30, 45, 60	0, 10, 20	$
g. Available Technology to Prevent/Contain/Reduce/Eliminate Discharge	70, 85, 100	30, 45, 60	0, 10, 20	$
Gravity Subtotal				$
Gravity Subtotal Average *[Gravity Subtotal divided by seven (7)]*				$
Number of gallons of oil discharged				
Number of gallons discharged multiplied by the Gravity Subtotal Average				
Economic Benefit of Noncompliance				$
Ability to Pay *(based on information supplied by the party)*				( )
Total Civil Charge *(cannot exceed statutory maximum amounts)*				*$*

Oil Discharges (Lands or Storm Drain Systems) Civil Charge Worksheet ***Va. Code § 62.1-44.34:20(C)(5)***				
Responsible Party/Facility	Reg./Id.#		NOV Date	
	Nature and degree of Harm[35]			
	Serious	**Moderate**	**Marginal**	***Amount***
C (5) for discharging or causing or permitting a discharge of oil into or upon lands or storm drain systems in violation of § 62.1-44.34:18.				
1. Nature and Degree of the Violation				
a. Nature/Degree of Injury to Health, Welfare and Property	$4,132	$2,066	$1,038	$
b. Actions in Reporting/Containing/Cleaning Up the Discharge	$4,132	$2,066	$1,038	$
c. Cost of Containment and Clean Up (Relative to Amount of Oil Spilled)	$4,132	$2,066	$1,038	$
d. Available Technology to Prevent/Contain/Reduce/Eliminate Discharge	$4,132	$2,066	$1,038	$
2. Gravity Subtotal				$

3. Degree of Culpability *(Severity and Compliance History) (apply to violation(s)' Amount or to the Violations and Frequency Subtotal)*	Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	$

4. History of Noncompliance *(Compliance History)*				
Order or decree in another media program within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or $5,000	$
Order or decree in same media program within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)	$
5. Subtotal				$
6. Natural gas transmission pipeline greater than 36 inches inside diameter (special order under § 62.1-44.15(8g))	Y	**N**	If yes, add 0.5 * *subtotal 1.a*	$
7. Economic Benefit of Noncompliance *(Economic Benefit)*				$
8. Ability to Pay *(based on information supplied by the responsible party) (Ability to Pay)*				( )
Total Civil Charge *(may not exceed $32,500 per day per violation)*				***$***

[35] Note that VA Code 62.1-44.34:20(D) does not reference the potential for harm. This worksheet should not be used to assess a civil charge or civil penalty for damage or injury to state waters or the impairment of their beneficial use.
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Article 11 – Other Violations

For violations of C(1), C(2), and C(4), the noncompliance period considered should ordinarily be limited to six months, but may be longer if, for example, there has been a slow leak. Staff use best professional judgment on the gallons discharged if better estimates are not available.

Potential for harm Examples

When evaluating the potential for harm for violations of C(1), C(2), and C(4), consider the following examples:

- In assessing C(1), failing to submit and obtain approval of an oil discharge contingency plan (ODCP) would be at the higher end of the spectrum compared to an incomplete ODCP. In addition, failing to have an ODCP for a product with a high toxicity and requires a special type of emergency response would fall into the higher end of the spectrum compared to failing to have an ODCP when a less toxic product is involved.
- Assign a dollar amount of not less than $1,000 nor more than $50,000 for the initial violation, and $5,000 per day for each day of violation thereafter.
- In assessing C(2), for failing to maintain evidence of financial responsibility, a Responsible Party whose storage capacity is 25,000 gallons or less would be at the lower end of the spectrum compared to a Responsible Party whose storage capacity is over 1 million gallons. In assessing the potential for harm to the environment, an Responsible Party whose product requires a more expensive response cost would be at the higher end of the spectrum compared to an Responsible Party whose product requires a minimal response cost, which would be at the lower end of the spectrum.
- Assign a dollar amount of not less than $1,000 nor more than $100,000 for the initial violation, and $5,000 per day for each day of violation thereafter.
- In assessing Line C(4) for failing to cooperate in the containment and clean-up, or failing to report: For example, failing to report a discharge of a highly toxic product would be at the high end of the spectrum, whereas failing to report a discharge of a low toxicity product would be at the low end of the spectrum. In addition, a Responsible Party failing to provide information about the product (i.e., amount, type, characteristics) which would hinder the clean-up process would fall at the higher end of the spectrum, compared to a Responsible Party who provides necessary information about their product. Furthermore, failing to report a discharge for a week would fall into the high end of the spectrum, whereas failing to report a discharge for a few hours would fall into the low end of the spectrum.
- Assign a dollar amount of not less than $1,000 nor more than $50,000 for the initial violation, and $10,000 for each day of violation thereafter.

Article 11 – Other Violations Charge Worksheet

Va. Code § 62.1-44.34:20(C)(1,2,&4))

Facility/Responsible Party	Reg./Id. #			NOV Date	
	NOV Observation #	Nature and degree of Harm			
		Serious	**Moderate**	**Marginal**	***Amount***
1. Violations and Frequency					
a. Failure to obtain approval of an oil discharge contingency plan.		$8,500	$4,500	$1,000	$
		Each subsequent day of violation is subject to a penalty of $5,000 per day.			$
b. Failing to maintain evidence of financial responsibility.		$3,250	$2,000	$1,000	$
		Each subsequent day of violation is subject to a penalty of $5,000 per day.			$
c. Failing to cooperate in containment and clean-up of a discharge.		$8,500	$4,500	$1,000	$
		Each subsequent day of violation is subject to a penalty of $10,000 per day.			$
d. Failing to report a discharge		$8,500	$4,500	$1,000	$
		Each subsequent day of violation is subject to a penalty of $10,000 per day.			$
2.Violations and Frequency Total					
a. Nature/Degree of Injury to Health, Welfare and Property		$4,132	$2.066	$1,038	$
b. Actions in Reporting/Containing/Cleaning Up the Discharge		$4,132	$2.066	$1,038	$
c. Cost of Containment and Clean Up (Relative to Amount of Oil Spilled)		$4,132	$2.066	$1,038	$
d. Available Technology to Prevent/Contain/Reduce/Eliminate Discharge		$4,132	$2.066	$1,038	$
Gravity Subtotal					$
3. Degree of Culpability *(Severity and Compliance History) (apply to violation(s)' Amount or to the Violations and Frequency Subtotal)*	Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	$
4. History of Noncompliance *(Compliance History)*					
Order or decree in another media program within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or $5,000		$
Order or decree in same media program within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)		$
Subtotal					$
(4) Natural gas transmission pipeline greater than 36 inches inside diameter (special order under § 62.1-44.15(8g))	Y	**N**	If yes, add 0.5 * *subtotal 1.a*		
5. Economic Benefit of Noncompliance *(Economic Benefit)*					$
6. Ability to Pay *(based on information supplied by the responsible party) (Ability to Pay)*					( )
Total Civil Charge					***$***

Aboveground Storage Tanks Charge Worksheet

Va. Code § 62.1-44.34:20(C)(5) – For violating or causing or permitting to be violated any other provision of Article 11, *including most AST violations (*9VAC25-91-10 *et seq*.). *Each day of violation of each requirement constitutes a separate offense.* Discharges of oil to state waters from an AST should be assessed using the Article 11 Worksheet for violations of *Va. Code § 62.1-44.34:20(C)(3)*.

Facility/Responsible Party	Reg./Id. #			NOV Date	
	NOV Observation #	Nature and Degree of Harm			***Amount***
		Serious	**Moderate**	**Marginal**	
1. Violations and Frequency					
a. Corrective Action /Monitoring/Closure Report Not Submitted		$1,323 per phase	$712 per phase	$305 per phase	
b. AST, pipeline, or facility: Installed, Upgraded, Equipped, or Closed Improperly (per violation)		$2,646 per tank	$1,323 per tank	$712 per tank	
c. AST, pipeline, or facility Operated Improperly (per violation*)*		$1,323 per tank	$712 per tank	$305 per tank	
d. Failure to implement any applicable oil spill contingency plan or Failure to Execute an approved CAP		$2,646	$1,323	$712	
e. Records not Available		$1,323	$712	$305	
f. No Registration or inventory of ASTs		$1,323 per tank	$ 712 per tank	$305 per tank	
g. Other Violation Component		$1,323	$712	$305	
2.Violations and Frequency Total					
a. Nature/Degree of Injury to Health, Welfare and Property		$4,132	$2,066	$1,038	$
b. Actions in Reporting/Containing/Cleaning Up the Discharge		$4,132	$2,066	$1,038	$
c. Cost of Containment and Clean Up (Relative to Amount of Oil Spilled)		$4,132	$2,066	$1,038	$
d. Available Technology to Prevent/Contain/Reduce/Eliminate Discharge		$4,132	$2,066	$1,038	$
Gravity Subtotal					$

3. Degree of Culpability *(Severity and Compliance History) (apply to violation(s)' Amount or to the Violations and Frequency Subtotal)*	Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	$

4. History of Noncompliance *(Compliance History)*				
Order or decree in another media program within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or $5,000	$
Order or decree in same media program within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)	$
Subtotal				$
(4) Natural gas transmission pipeline greater than 36 inches inside diameter (special order under § 62.1-44.15(8g))	Y	**N**	If yes, add 0.5 * *subtotal*	$
5. Economic Benefit of Noncompliance *(Economic Benefit)*				$
6. Ability to Pay *(based on information supplied by the responsible party) (Ability to Pay)*				( )
Total Civil Charge *(may not exceed $32,500 per day per violation)*				***$***

Chesapeake Bay Preservation Act Local Program Reviews

Chesapeake Bay Preservation Act

Staff should calculate an appropriate civil charge or penalty using the Civil Charge Worksheet at the end of this section. In calculating the appropriate civil charge, staff assesses the gravity-based component of the civil charge by selecting the appropriate violation category and potential for harm category and multiplying the individual charge noted by the number of occurrences of the violation. Although not required by statute for local program violations[36], the Degree of Culpability, History of Noncompliance, Economic Benefit, and Ability to Pay are considered for consistency with other programs and the categories are calculated as they are for other programs (see Chapter 4, pages 7-13). However, the time period that should be considered for the History of Noncompliance is generally five years which corresponds with the typical frequency of program reviews. When considering this factor, staff should consider whether DEQ issued the Responsible Party a consent order or took unilateral action during the previous program compliance review cycle. The history of noncompliance aggravating factor should not be applied if a corrective action agreement was implemented and no subsequent enforcement action was taken by DEQ during the previous cycle. The civil charge cannot exceed $5,000 per day with the maximum amount not to exceed $20,000 per violation.[37] After the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, the civil charge cannot exceed $5,000 per violation with the maximum amount not to exceed $50,000 per order.[38]

Violations and Frequency: The violations generally fall into one of the following categories and the frequency is per violation.

1. **Ordinances**
   Line 1(a)(1) should be assessed if the ordinance is missing required items such as the plan and plat notation requirements, performance criteria, etc. In general, this should be assessed as a whole, and a separate violation should not be assessed for each missing item.

2. **Comprehensive Plans**
   Line 1(a)(2) should be assessed if the comprehensive plan is not up to date or is missing elements. In general, this should be assessed as a whole, and a separate violation should not be assessed for each missing element.

3. **Performance Criteria Implementation/Enforcement (other than those listed separately on worksheet)**
   Line 1(a)(3) should be assessed for issues with Performance Criteria implementation and enforcement other than those items listed separately on the worksheet. If the criteria are

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[36] See Va. Code § 62.1-44.15(8).
[37] Va. Code § 62.1-44.15:71.
[38] Beginning thirty days after the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, *see* (19) of 62.1-44.15.

not incorporated into the comprehensive plans, or ordinances as appropriate then it should be assessed on line 1(a)(1) or 1(a)(2), not line 1(a)(3). In general, deficiencies with each criteria can be assessed as an individual violation.

4. **Site-Specific CBPA Determinations**
   Line 1(a)(4) should be assessed for failure to follow the process for ensuring site-specific delineation of the RPA/on-site determinations of water bodies. This line should also be assessed for issues related to mapping, Resource Protection Areas (RPA), Resource Management Areas (RMA), Intensely Developed Areas and site specific refinement of CBPA boundaries.

5. **Plan of development review process**
   Line 1(a)(5) should be assessed for issues with the plan of development review process including the failure to follow a POD process for all development that exceeds 2,500 square feet or deficiencies in the process that are not captured in another listed category. In general, this should be assessed as a whole and a separate violation should not be assessed for each deficiency in the process.

6. **Water Quality Impact Assessment (WQIA)**
   Line 1(a)(6) should be assessed for the failure to require a WQIA when appropriate or failure to require a complete WQIA. In general, this should be assessed as a whole and a separate violation should not be assessed for each missing WQIA or flaw in the WQIA process.

7. **Waivers and Exceptions**
   Line 1(a)(7) should be assessed for deficiencies with waivers and exceptions. Examples include failure to make the required findings prior to granting exceptions and failure to have a process in place. Deficiencies associated with waivers and deficiencies associated with exceptions should be assessed separately.

8. **Septic tank pump out/Enforcement**
   Line 1(a)(8) should be assessed for issues with the septic tank pump out requirements including failure to have a process in place to require pump out and failure to have enforcement provisions or take follow up enforcement action for noncompliance with pump out requirements.

9. **Reporting/Submissions**
   Line 1(a)(9) should be assessed for the failure to submit annual reports or other required reports/updates.

10. **Agriculture/Silvicultural Assessment**
    Line 1(a)(10) should be assessed for the failure to require an agriculture/silvicultural assessment when appropriate or failure to require a complete agriculture/silvicultural assessment. In general, this should be assessed as a whole, and a separate violation

should not be required for each missing assessment or flaw in the process.

11. Other

Line 1(a)(11) should be assessed for items that do not have a corresponding category above.

Potential for Harm Examples

In addition to the potential for harm guidance contained in the Introduction of Chapter 4 of DEQ's Enforcement Guidance, this section provides some examples of additional factors to consider when choosing a potential for harm classification.

- The amount of development in Chesapeake Bay Preservation Act areas within the locality
- The amount of RPA located within the locality
- Actual impacts to the RPA or potential impacts to the RPA
- The extent of deviation from the requirement- for example, was the issue noted throughout many of the sites reviewed or was it an occasional error? Are there multiple elements missing from the comprehensive plan or ordinance?

CBPA Program Review Civil Charge Worksheet

Va. Code § 62.1-44.15; Va. Code § 62.1-44.15:71

Locality/Responsible Party	EA No.	NOV No.		NOV Date
	NOV Observation #	**Potential for Harm**		
		Serious	**Moderate**	**Marginal**	***Amount***
1. Gravity-based Component					
a. Violations and Frequency (per violation unless otherwise noted)		$ (x) occurrences	$ (x) occurrences	$ (x) occurrences	
(1) Ordinances		3,000 (x) ___	2,000 (x) ___	1,500 (x) ___	
(2) Comprehensive Plans		2,000 (x) ___	1,000 (x) ___	700 (x) ___	
(3) Performance Criteria Implementation/Enforcement (other than those items listed below)		3,000 (x) ___	2,000 (x) ___	1,500 (x) ___	
(4) Site-Specific CBPA Determinations		2,500 (x) ___	1,500 (x) ___	1,000 (x) ___	
(5) Plan of Development Review Process		2,500 (x) ___	1,500 (x) ___	1,000 (x) ___	
(6) WQIA		2,500 (x) ___	1,500 (x) ___	1,000 (x) ___	
(7) Waivers/Exceptions		3,000 (x) ___	2,000 (x) ___	1,500 (x) ___	
(8) Septic Pump Out/Enforcement		2,000 (x) ___	1,000 (x) ___	700 (x) ___	
(9) Reporting/Submissions		2,000 (x) ___	1,000 (x) ___	700 (x) ___	
(10) Agriculture/Silvicultural Assessment		2,000 (x) ___	1,000 (x) ___	700 (x) ___	
(11) Other		2,000 (x) ___	1,000 (x) ___	700 (x) ___	
Subtotal 1.a – Violations and Frequency - Preliminary Subtotal					
b. Aggravating Factors					
(2) Compliance History					
Order or decree in another media program within 60 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) subtotal line 1.a, or $5,000		
Order or decree in same media program within 60 mo. before initial NOV	Y	N	If yes, add 0.5 (x) subtotal line 1.a (for 1 order in 36 mo.)		
(3) Degree of Culpability *(applied to specific line amount(s) or subtotal line 1.a)*	Low = (x) 0		Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
Subtotal 1 b. – Aggravating Factors					
Subtotal - Gravity Based Component Subtotal *(Add Subtotal #1.a and Subtotal #1.b)*					
2. Economic Benefit of Noncompliance					
3. Ability to Pay *(based on information supplied by the locality)*					( )
Total Civil Charge *(may not exceed $5,000 per day with the maximum amount not to exceed $20,000 per violation. Once new regulations go into effect, may not exceed $5,000 per violation with the maximum not to exceed $50,000 per order.)*					***$***

Construction Stormwater

The Construction Stormwater Program is a separate VPDES program authorized under the Stormwater Management Act, Article 2.3 of the State Water Control Law, Va. Code §§ 62.1-44.15:24-44.15:50.[39] This guidance addresses civil charges for DEQ enforcement actions for violations of state requirements. Negotiated civil charges are authorized by Va. Code §§ 62.1-44.15:25(6) and 62.1-44.15:48(D)(2) for violations of the Stormwater Management Act, construction stormwater permit, Virginia Stormwater Management Program (VSMP) Regulations, or order.[40] The maximum civil charge is $32,500 per day for each violation.[41]

Staff should calculate an appropriate civil charge or using the worksheet at the end of this section. In calculating the appropriate civil charge, staff assess the gravity-based component of the civil charge by selecting the appropriate violation category and potential for harm category and multiplying the individual civil charge noted by the number of occurrences of the violation. Each calendar month of violation is treated as a separate occurrence unless otherwise noted. The Degree of Culpability, History of Noncompliance, Economic Benefit, and Ability to Pay categories are calculated as they are for other Water programs.

Following the initial NOV, the Responsible Party may have ongoing and new violations. Enforcement staff should assess additional occurrences on the worksheet for violations that were included in the initial NOV and are identified in subsequent inspection reports or NOVs as ongoing violations or not adequately addressed by the Responsible Party. Enforcement staff should discuss new violations with compliance staff to determine if the new violations are serious enough to assess a civil charge. Examples where new violations could be included in the enforcement action with a corresponding civil charge include repeated observances of non-compliance and non-compliance that results in environmental impacts.

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[39] HB 1250/SB 673 (2016) consolidates the stormwater and erosion and sediment control programs into the Virginia Erosion and Stormwater Management Act, Article 2.3 of the State Water Control Law. Beginning thirty days after the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, some authorities will change or be located in different sections of the Code. Code citations referenced in these procedures are those effective prior to that date.

[40] Note that these procedures are only applicable to land disturbing activities subject to regulation under the Stormwater Management Act. Sites with land disturbances between 10,000 square feet and an acre, not part of a larger common plan of development or sale, are subject to different penalty authorities under the Erosion and Sediment Control Law (ESCL). The Construction Stormwater Civil Charge/Civil Penalty Worksheet should not be used for violations at such sites. For violations of the ESCL, Regulations, and orders of the Board, the ESCL limits penalties to $1,000 per violation, up to $10,000 for a series of specified violations arising from the same operative set of facts. Va. Code §§ 62.1-44.15:54, 62.1-44.15:63. For violations of court orders, the ESCL authorizes penalties up to $2,000 per violation. Va. Code § 62.1-44.15:63. Beginning thirty days after the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, these penalty authorities will be amended by HB 1250/SB 673 (2016). Note that for land disturbing activities subject to regulation under the Stormwater Management Act, erosion and sediment (E&S) control deficiencies typically constitute violations under both the Stormwater Management Act and the ESCL. DEQ addresses such deficiencies with its greater penalty authority under the Stormwater Management Act, and staff should calculate the appropriate civil charge or civil penalty using the Worksheet at the end of this section.

[41] Va. Code §§ 62.1-44.15:25(6) and 62.1-44.15:48(D)(2) incorporate by reference the civil charge amount from Va. Code § 62.1-44.15:48(A).

Violations of Construction Stormwater requirements often accompany violations of Virginia Water Protection Permit Program (VWPP) requirements (unauthorized impacts to wetlands and/or streams, or surface water). When VWPP violations result from unauthorized discharges of stormwater from land-disturbing activities, the VWPP Civil Charge Worksheet should be used to calculate the appropriate civil charge for the VWPP violations, and the Construction Stormwater Civil Charge Worksheet should be used to calculate the appropriate civil charge for the Construction Stormwater Violations.

Potential for Harm Examples

Potential for Harm for Unpermitted Discharge to State Waters or Discharge to State Waters Not in Compliance with a Permit

DEQ staff follow the guidance applicable to other Water Programs in assessing the potential for harm for unpermitted discharge to state waters or discharge to state waters not in compliance with a permit (line 1(a)(2)). Examples of Serious violations for line 1(a)(2) include, but are not limited to: fish kills, loss of beneficial uses, and destruction of aquatic habitat.

Potential for Harm for all other Violations

In assessing the potential for harm for all violations other than unpermitted discharge to state waters or discharge to state waters not in compliance with a permit (line 1(a)(2)) and other record or reporting violations (line 1(a)(12)), DEQ staff should first consider the size of the land disturbing activity as follows:

- A Serious ranking generally should be used for large construction activities that result in land disturbance of greater than or equal to ten acres of total land area.
- A Moderate ranking generally should be used for construction activities that result in land disturbance of greater than or equal to five acres and less than ten acres of total land area.
- A Marginal ranking generally should be used for construction activities that result in land disturbance of less than five acres.

When determining the potential for harm, enforcement staff should consider the amount of land disturbance at the time of the inspections or month where an occurrence is assessed, not the total proposed land disturbance for the project. For example, if an inspection for the month of May indicates that 6 acres of land have been disturbed at the time of inspection, and the site is permitted for 12 acres of land disturbance, occurrences for the month of May would start off as moderate, not serious, pending consideration of additional factors.

Staff may adjust these potential for harm thresholds based on case-specific factors if they provide additional justification. Factors that may impact the potential for harm ranking include, but are not limited to: proximity of the land disturbance to the receiving water; surrounding land use and cover types; site conditions such as permeability, erodibility, and slope; property degradation;

impacts to aquatic and wildlife habitat; fish kills and other harm to wildlife;[42] unique aspects or critical habitats; location in a Chesapeake Bay Preservation Area, Resource Protection Area, or Resource Management Area; presence of endangered species; water quality; any applicable Total Maximum Daily Loads; impacts to beneficial uses; pollutant content of stormwater; proximity to critical area; and extent of the deviation from the statutory, regulatory, and/or permit requirement. In assessing potential for harm for failure to install or to properly install post-construction stormwater management Best Management Practices (BMPs, line 1(a)(8)) and failure to install or to properly install or maintain Erosion and Sedimentation (E&S) controls or other pollution prevention measures (line 1(a)(9)), additional factors that may impact the potential for harm ranking include the number of deficient BMPs, controls, or measures; drainage area of deficient BMPs or controls; and severity of deficiencies.

Calculating the Civil Charge

Line 1(a)(1) Failure to Obtain Permit Coverage

Line 1(a)(1) should be used where the Responsible Party fails to obtain permit coverage prior to engaging in land disturbing activities. The frequency is per month, beginning with the first date of land disturbance and enforcement staff should make reasonable efforts to determine the start date of land disturbing activities. If sufficient information is not available to determine the start date, then enforcement staff should use the date that land disturbance is first observed during an inspection or other defensible date. The end date for determining the number of occurrences is the date the Responsible Party receives permit coverage; however, if the Responsible Party ceases land disturbing activity (except for activity required for corrective action), undertakes efforts to comply with regulatory requirements, and makes a good faith effort to obtain permit coverage, then enforcement staff may use discretion and cease assessing occurrences earlier. Enforcement staff must document the reasoning for the timeframe assessed in the ERP.

Line 1(a)(2) Unpermitted Discharge to State Waters or Discharge to State Waters not in Compliance with Permit

Line 1(a)(2) should be used where there is a discharge of stormwater from land-disturbing activities, which reaches state waters, either (1) from a site without required construction stormwater permit coverage, or (2) from a site with permit coverage where required treatment, controls, and pollution prevention measures are wholly or almost entirely lacking or deficient, such that stormwater discharged from the site has essentially bypassed treatment or control, or (3) from a site with permit coverage where stormwater discharge due to a violation of permit conditions results in a significant demonstrated environmental impact (e.g., a fish kill). This line should not be used when stormwater discharge results in a measurable volume of sediment accumulation on the bed of the receiving wetland, stream or other surface water (in which case use line 1(i) on the Virginia Water Protection Program Civil Charge Worksheet for unauthorized impacts to wetlands and/or streams). The Virginia Water Protection Program Civil Charge

[42] Harm in this context should be defined broadly but generally includes any act which actually kills or injures fish or wildlife, and emphasizes that such acts may include significant habitat modification or degradation that significantly impairs essential behavioral patterns of fish or wildlife.

Worksheet should not be used when an unauthorized stormwater discharge results in turbidity of the receiving surface water without a measurable amount of sediment accumulation in the bed of the receiving water.

Lines 1(a)(3), (4) and (7) Failure to Develop a SWPPP, Incomplete SWPPP, and Failure to Have an Approved E&S Control Plan or Agreement in Lieu of a E& S Control Plan

In addressing Stormwater Pollution Prevention Plan (SWPPP) violations, failure to have an approved E&S Control Plan or agreement in lieu is addressed separately from the other SWPPP components as follows:

- If a Responsible Party does not have an approved E&S control plan or agreement in lieu for a site, and no other components of a SWPPP have been developed both lines 1(a)(7) (failure to have an approved E&S control plan) and 1(a)(3) (failure to develop a SWPPP) should be used.
- If a Responsible Party does not have approved E&S control plan or agreement in lieu for a site, and it has some, but not all, of the other components of a SWPPP (e.g., it has an approved stormwater management (SWM) plan, but not a pollution prevention plan) both lines 1(a)(7) (failure to have an approved E&S control plan) and 1(a)(4) (Incomplete SWPPP) should be used.
- If a site has an approved E&S control plan, but does not have any other components of the SWPPP, line 1(a)(3) (failure to develop a SWPPP) should be used.
- If a site has an approved E&S control plan and has some, but not all, of the other components of a SWPPP (e.g., it has an approved SWM plan, but not a pollution prevention plan, site plan, or notice of coverage letter), line 1(a)(4) (Incomplete SWPPP) should be used.

In applying line 1(a)(4) (Incomplete SWPPP), the SWPPP should be considered as a whole, rather than assessing a separate occurrence for each SWPPP component that is missing. When assessing occurrences for failure to have an approved ESC or SWM plan, the frequency is per month beginning with the first date land disturbance occurs without an approved plan. If sufficient information is not available to determine the start date, then enforcement staff should use the date that land disturbance is first observed during an inspection or other defensible date. The end date for determining the number of occurrences is the date the Responsible Party receives plan approval; however, if the Responsible Party ceases land disturbing activity (except for activity required for corrective action) and makes a good faith effort to obtain plan approval, then enforcement staff may use discretion and cease assessing occurrences earlier.

Line 1(a)(5) Failure to Maintain SWPPP on site

Line 1(a)(5) should be used when a Site has a SWPPP but it is not on site and notice of the SWPPP's location is not posted. This line should not be used in conjunction with line 1(a)(3) (failure to develop a SWPPP). If the SWPPP is not on site because no SWPPP has been developed, line 1(a)(3) should be used, and not line 1(a)(5). Line 1(a)(5) should be used if there is no SWPPP onsite, and case facts suggest a SWPPP was developed. This line may also be used if a component of the SWPPP, such as the approved ESC plan, has been developed but is not on site at the time of inspection.

Lines 1(a)(8) and (9) Failure to Install or to Properly Install Post-Construction Stormwater Management BMPs, and Failure to Install or to Properly Install or Maintain E&S Controls or Other Pollution Prevention Measures

In determining the number of occurrences for Line 1(a)(8) and Line 1(a)(9), deficiencies with post-construction management BMPs, E&S controls, and pollution prevention measures should each be assessed cumulatively for the entire site (rather than assessing a separate occurrence for each BMP, control, or measure). For Line 1(a)(9), a separate occurrence should be assessed for each month of noncompliance. Enforcement staff may assess monthly occurrences for ongoing non-compliance between inspections, even if inspectors do not document the non-compliance each month, if site circumstances and documentation supports the assessment. For example, stabilization matting is not installed in January or during a follow-up inspection in April. If the matting is installed in May and there is no documentation in the SWPPP that stabilization was applied in the interim, then occurrences could be assessed for January, February, March, and April. Similarly, if no E&S controls are installed prior to land disturbance, and the controls are not installed between inspections, then enforcement could assess occurrences for the interim months. Deficiencies with E&S controls and deficiencies with pollution prevention measures should be assessed separately.

Line 1(a)(11) Failure to Conduct or Record Inspections, or Incomplete Inspections

In determining the number of occurrences for Line 1(a)(11), enforcement staff should assess a separate occurrence for each month with a missing or incomplete inspection. Enforcement staff should consult the inspector and inspection reports to determine the number of missed inspections. Factors to consider when evaluating the potential for harm include the number of missed or incomplete inspections during that month, the conditions of the site, and the size of the site.

Construction Stormwater Civil Charge Worksheet

Va. Code §§ 62.1-44.15:20 through -44.15:50

Facility/Responsible Party	EA No.		Per./Reg. No.	NOV Date	
	NOV Observation #	**Potential for Harm** *(Environmental Harm and Severity)*			
		Serious	**Moderate**	**Marginal**	***Amount***
1. Gravity-based Component					
a. Violations and Frequency (per month unless noted)		$ (x) occurrences			
(1) Failure to obtain permit coverage when required prior to commencing land disturbing activities		5,292 (x) __	2,646 (x) ___	916 (x) ___	
(2) Unpermitted discharge to state waters or discharge to state waters not in compliance with a permit (per day or per event)		13,229 (x) _	6,615 (x) ___	1,323 (x) ___	
(3) Failure to develop a stormwater pollution prevention plan (SWPPP)		5,292 (x) __	2,646 (x) ___	916 (x) ___	
(4) Incomplete SWPPP other than E&S control plan requirements (e.g., lack of approved stormwater management (SWM) plan (or agreement in lieu of SWM plan) or pollution prevention plan)		2,646 (x) __	1,323 (x) ___	661 (x) ___	
(5) Failure to maintain SWPPP on site (per event)		1,323 (x) __	712 (x) ___	305 (x) ___	
(6) Failure to have approved annual standards and specifications when required		5,292 (x) __	2,646 (x) ___	916 (x) ___	
(7) Failure to have an approved E&S control plan or agreement in lieu of a plan		3,967 (x) __	1,934 (x) ___	712 (x) ___	
(8) Failure to install or to properly install post-construction stormwater management BMPs (per site)		9,362 (x) __	4,681 (x) ___	916 (x) ___	
(9) Failure to install or to properly install or maintain E&SC controls or other pollution prevention measures		5,292 (x) __	2,646 (x) ___	916 (x) ___	
(10) Failure to comply with approved annual standards and specifications		5,292 (x) __	2,646 (x) ___	916 (x) ___	
(11) Failure to conduct or record inspections, or incomplete inspections		2,646 (x) __	1,323 (x) ___	661 (x) ___	
(12) Other record or reporting violations		1,323 (x) __	661 (x) ___	265 (x) ___	
(13) Failure to implement permit and/or SWPPP requirements or to comply with SWM plan, E&S control plan, or other requirement, not otherwise listed		2,646 (x) __	1,323 (x) ___	712 (x) ___	
(14) Failure to submit notice of permit termination		5,292 (x) __	2,646 (x) ___	916 (x) ___	
(15) Failure to report unpermitted discharge to state waters		13,229 (x) _	6,615 (x) ___	1300 (x) ___	
Subtotal 1.a – Violations and Frequency					
b. Aggravating Factors					
(1) Compliance History					
Order or decree in another media program within 36 months before initial NOV	Y N	If yes, add lesser of 0.05 * *subtotal line 1.a*, or $5,000			
Order or decree in same media program within 36 months before initial NOV	Y N	If yes, add 0.5 * *subtotal 1.a*			
(2) Degree of Culpability *(applied to specific line amount(s) or subtotal line 1.a)*	Low = (x)*0	Moderate = (x)*0.25	Serious = (x)*0.5	High = (x)*1.0	
(3) Natural gas transmission pipeline greater than 36 inches inside diameter (special order under § 62.1-44.15(8g))	Y N	If yes, add 0.5 * *subtotal 1.a*			
Subtotal 1 b. – Aggravating Factors					
Subtotal - Gravity Based Component Subtotal *(Add Subtotal #1.a and Subtotal #1.b)*					
2. Economic Benefit of Noncompliance					
3. Ability to Pay *(based on information supplied by the facility)*					( )
Total Civil Charge (may not exceed $32,500 per day per violation)					***$***

Erosion and Sediment Control Program

Staff should calculate an appropriate civil charge using the worksheet at the end of this section. In calculating the appropriate civil charge, staff assess the gravity-based component of the charge by selecting the appropriate violation category and potential for harm category and multiplying the individual civil charge noted by the number of occurrences of the violation. When using the Worksheet to address multiple violations discovered during the same compliance review, each violation is a separate occurrence.

Although not required by statute for local program violations[43], the Degree of Culpability, History of Noncompliance, Economic Benefit, and Ability to Pay categories are calculated as they are for other Programs (see Chapter 4). However, the time period that should be considered for the History of Noncompliance is five years which corresponds with the typical frequency of program reviews. When considering this factor, staff should consider whether DEQ issued the Responsible Party a consent order or took unilateral action during the previous review cycle. The history of noncompliance multiplier should not be applied if a corrective action agreement was implemented and no subsequent action was taken by DEQ during the previous cycle. The civil charge cannot exceed $5,000 per day with the maximum amount not to exceed $20,000 per violation.[44] After the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, the civil charge cannot exceed $5,000 per violation with the maximum amount not to exceed $50,000 per order.[45]

Violations and Frequency: The violations generally fall into one of the following categories and the frequency is per violation.

1. **Ordinance**
   Line 1(a)(1) should be assessed if the ordinance is missing required components or the components are not current and correct. Generally, the ordinance is assessed as a whole instead of assessing an occurrence for each missing or deficient component.

2. **Administration**
   Line 1(a)(2) should be assessed for issues with certified personnel and/or any items under program administration other than the ordinance and submissions. Examples include land disturbance without an approved plan or VSMP permit coverage; failure to maintain a copy of approved plans and records of inspections and enforcement actions; and failure to require provision of the name of an individual holding a certificate of competence.

3. **Plan Review**
   Line 1(a)(3) should be assessed for plan review deficiencies. Examples of violations that would be assessed on this line include failure to provide written notice of plan

[43] See Va. Code § 62.1-44.15(8).
[44] Va. Code § 62.1-44.15:71.
[45] Beginning thirty days after the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, *see* (19) of 62.1-44.15.

disapproval stating the reasons for disapproval within 45 days; approved plans that do not comply with state minimum standards and when an appropriate variance is not granted; other variance issues.

4. **Inspections**
   Line 1(a)(4) should be assessed for inspection deficiencies. Examples of violations that would be assessed on this line include issues with inspection frequency/timing; ESC measures not maintained and are not documented in inspection reports; issues with inspection documentation and notification; completion deadlines are not specified for corrective actions.

5. **Enforcement**
   Line 1(a)(5) should be assessed for issues with enforcement. Examples of items that are assessed on this line are the failure to issue a notice to comply; enforcement actions do not contain corrective actions and deadlines; and advanced enforcement such as a stop work order is not initiated when warranted.

6. **Submissions**
   Line 1(a)(6) should be assessed for failure to submit land-disturbing activity reports or other required reports/updates. Generally, each type of report is treated as a separate occurrence.

7. **Other**
   Line 1(a)(7) should be assessed for violations that do not have a corresponding category above.

Potential for Harm Examples

In addition to the potential for harm guidance contained in the Introduction of Chapter 4 of DEQ's Enforcement Guidance, this section provides some examples of additional factors to consider when choosing a potential for harm classification:

- The amount of development within the locality
- Actual impacts to nearby water bodies or off site impacts from development
- The extent of deviation from the requirement- for example, was the issue noted throughout many of the sites reviewed or was it an occasional error?
- The length of time of the violation

ESC Program Review Civil Charge Worksheet

Va. Code § 62.1-44.15; Va. Code § 62.1-44.15:54

Locality/Responsible Party	EA No.		NOV No.		NOV Date	
	NOV Observation #		**Potential for Harm**			***Amount***
			Serious	**Moderate**	**Marginal**	
1. Gravity-based Component						
a. Violations and Frequency (per violation unless otherwise noted)			$ (x) occurrences	$ (x) occurrences	$ (x) occurrences	
(1) Ordinance			3,000 (x) ___	2,000 (x) ___	1,500 (x) ___	
(2) Administration			2,500 (x) ___	1,500 (x) ___	1,000 (x) ___	
(3) Plan Review			2,500 (x) ___	1,500 (x) ___	1,000 (x) ___	
(4) Inspections			2,500 (x) ___	1,500 (x) ___	1,000 (x) ___	
(5) Enforcement			2,500 (x) ___	1,500 (x) ___	1,000 (x) ___	
(6) Submissions			1,500 (x) ___	750 (x) ___	500 (x) ___	
(7) Other			1,500 (x) ___	750 (x) ___	500 (x) ___	
Subtotal 1.a – Violations and Frequency - Preliminary Subtotal						
b. Aggravating Factors						
(2) Compliance History						
Order or decree in another media program within 60 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) subtotal line 1.a, or $5,000			
Order or decree in same media program within 60 mo. before initial NOV	Y	N	If yes, add 0.5 (x) subtotal line 1.a (for 1 order in 36 mo.)			
(3) Degree of Culpability *(applied to specific line amount(s) or subtotal line 1.a)*	Low = (x) 0		Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
Subtotal 1 b. – Aggravating Factors						
Subtotal - Gravity Based Component Subtotal *(Add Subtotal #1.a and Subtotal #1.b)*						
2. Economic Benefit of Noncompliance						
3. Ability to Pay *(based on information supplied by the locality)*						( )
Total Civil Charge *(may not exceed $5,000 per day with the maximum amount not to exceed $20,000 per violation. Once new regulations go into effect, may not exceed $5,000 per violation with the maximum not to exceed $50,000 per order.)*						***$***

Groundwater Withdrawal Program

Pursuant to VA Code § 62.1-270(A), "Any person who violates any provision of this chapter, or who fails, neglects or refuses to comply with any order pertaining to ground water, or order of a court, issued as herein provided, shall be subject to a civil penalty not to exceed $25,000 for each violation within the discretion of the court. Each day of violation of each requirement shall constitute a separate offense."

For the purposes of calculating an occurrence for an unpermitted withdrawal, each new calendar month begins at zero gallons and once a withdrawal reaches 300,000 gallons a permit is required. Once a person withdraws more than 300,000 gallons of water, each additional day of water withdrawn will count as a separate occurrence in that calendar month. For permitted withdrawals, once the monthly, annual, or permit term limit has been exceeded, each additional day of withdrawal should be considered a separate occurrence. Certain permitted withdrawals may violate one or more of the three permitted withdrawal limits from a single withdrawal of ground water.

Potential for Harm Examples

Volume of Withdrawals

Serious, Moderate, and Marginal rankings are based on the annual water withdrawals of the withdrawal system and adjusted based on any specific environmental harm assessment. In the case of unpermitted withdrawals, best professional judgment should be used to estimate the annual withdrawal amount where withdrawals were not metered or readings may be suspect.

Environmental Harms

Serious Classification

Withdrawal systems permitted to withdraw 1 billion gallons or more annually;
Exceeding annual permitted withdrawal limit greater than 25%;
Unauthorized withdrawal or withdrawal exceedances at or near areas where there are water levels estimated to be below critical surface levels;
Failure to implement a Water Conservation Management Plan or mandatory conservation measures during a declared drought emergency; or
Multiple well pump intakes set below the top of the aquifer;
Failure to install or maintain monitoring equipment.

Moderate Classification

Withdrawal systems permitted to withdraw less than 1 billion gallons but more than 10 million gallons annually;

Exceeding monthly and/or annual permitted water withdrawal limits between 10% and 25%; or
Failing to implement a water conservation and management plan.

Marginal Classification

In the absence of specific environmental harm or areas more sensitive to excess withdrawal, a Marginal ranking is to be used for withdrawal systems permitted to withdraw 10 million gallons or less annually.

Exceeding monthly and/or annual limits by less than 10%.
Staff may adjust the potential for harm thresholds based on case-specific factors such as but not limited to: proximity to other groundwater withdrawals, evidence of land subsidence, incidents/reports of well interference, coastal areas with high risk of saltwater intrusion/increased chloride zones, and populated areas dependent on groundwater.

Calculating the Civil Charge

Line 1(c) through 1(e): When assessing a civil charge or civil penalty for these line items, chose the line item that corresponds with the longest reporting period only. In the event that one or more of these line items is violated, staff should evaluate the potential for harm to determine whether its potential for harm should be increased. When monitoring equipment has not been installed, staff should use best professional judgement when calculating the estimated volume of water withdrawn.

Groundwater Withdrawal Civil Charge Worksheet Va. Code § 62.1-270(A)					
Facility/Responsible Party	**NOV Observation #**	Reg./Id. #		NOV Date	
		Potential for Harm (Potential for Harm and Severity)			
		Serious	**Moderate**	**Marginal**	***Amount***
1. Violations and Frequency *(Severity and Environmental Harm)*		$ (x) occurrences	$ (x) occurrences	$ (x) occurrences	
h. Unpermitted withdrawal		12,721 (x) ___	6,360 (x) ____	3,180 (x) ____	
i. Failure to mitigate		12,721 (x) ___	6,360 (x) ____	3,180 (x) ___	
j. Permit Term withdrawal limits (per day*)*		6,828 (x)____	3,419 (x)___	1,710 (x) ____	
k. Monthly withdrawal limits (per month)		3,419 (x) ____	1,710 (x) ____	855(x) ____	
l. Annual withdrawal limits		6,828 (x)____	3,419 (x)___	1,710 (x) ____	
m. Failure to implement a Water Conservation Management Plan		5,293 (x) ___	2,646 (x) ___	1,323 (x) ___	
n. Failure to submit, complete Record or reporting; (per reporting period)		3,155 (x) ___	1,577 (x) ___	855 (x) ___	
o. Failure to install and/or maintain equipment or other operational deficiencies		3,419 (x) ____	1,710 (x) ____	855 (x) ____	
p. Other, Violation of Permit, Special Exceptions or Special Conditions NOT listed above		3,419(x) ____	1,710 (x) ____	855 (x) ____	
Violations and Frequency Subtotal					
2. Adjustment Factors *(applied to Violations and Frequency Subtotal)*					
Compliance History (Compliance History)					
Order or decree in another media program within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or $5,000		
Order or decree in same media program within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)		
Degree of Culpability *(Severity and Environmental Harm) (apply to violation(s)' Amount or to the Violations and Frequency Subtotal)*	Low = (x) 0		Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0
Adjustment Subtotal					
3. Economic Benefit of Noncompliance *(Economic Benefit)*					
4.Ability to Pay *(based on information supplied by the responsible party) (Ability to Pay)*					( )
Total Civil Charge *(may not exceed $25,000 per day per violation)*					***$***

Land Protection and Revitalization Programs

The Virginia Waste Management Act at Va. Code § 10.1-1455(F) provides for civil charges in a consent order for violations of the Act, any regulation, order, or any permit condition. The maximum civil charge is $32,500 for each violation, with each day being a separate violation. For this section, the Land Protection and Revitalization Programs include the Solid Waste, Hazardous Waste, and Revitalization Programs. Remediation Consent Orders (RCOs) under the Remediation Program are based on the authority of Va. Code § 10.1-1402(19) through (21) which allows DEQ take actions to contain or clean-up sites where substances have been improperly managed. The DEQ has authority to enforce RCOs as with any other order.

Potential for Harm Examples: Solid Waste

Each violation and associated line item of the civil charge worksheet must be evaluated as discussed in the Chapter 4 Introduction regarding the Potential for Harm Classifications. The table below may be used as a preliminary assessment tool in evaluating the potential for harm. However, it is important to note that on a case specific basis, a reasoned analysis of the Secondary Factors may warrant a different potential for harm classification. Furthermore, some line items of the civil charge worksheet have additional guidance or examples to assist with the potential for harm evaluation. Where there is no specific guidance on the analysis for an individual line item, the ten secondary factors should be used to provide a reasoned analysis for the potential for harm.

Preliminary Factors to consider in evaluating potential for harm:

Type of Facility	**Serious**	**Moderate**	**Marginal**
A violation resulting from a facility operating without a solid waste permit	X		
A violation resulting from a facility operating without a permit by rule.		X	
A violation resulting from an unpermitted facility that would typically be exempt from permitting, as described in 9 VAC 20-81-95, but failed to comply with the requirements of the exemption.			X

Secondary Factors to use in evaluating potential for harm:

- Quantity and type of waste;
- Existence, size, and proximity of receptor populations (e.g., local residents, fish and wildlife, including threatened or endangered species) and sensitive environmental media (e.g., surface waters, wetlands and aquifers);
- Likelihood or fact of transport by way of environmental media (e.g., air, surface water, and groundwater);

- Evidence of release (e.g., soil, air, surface water or groundwater contamination);
- Multimedia impacts (e.g., no other media impacted v. impacts to air/water/wetlands/etc.);
- Evidence of waste mismanagement (e.g., dumping, burial, improper storage, containment, or response to spills);
- Adequacy of provisions for detecting and preventing a release (e.g., monitoring equipment and inspection procedures, freeboard measurements);
- Repeat nature of violation (e.g., 1st occurrence v. 2nd occurrence v. 3rd occurrence, etc.);
- Pattern, nature, and frequency of violation;
- Environmental justice impacts;[46]
- Alignment or consideration of Severity Levels, identified in Land Protection and Revitalization Guidance Memo No. LPR-SW-02-2010.[47]

Additional Guidance for specific civil charge worksheet line items:

1(a)(2) Leachate Discharges/Seeps

Observation	**Serious**	**Moderate**	**Marginal**
Discharge of leachate to surface water, wetlands or a drinking water source	X		
Leachate seep, spill, or overflow results in leachate outside the landfill's disposal unit boundary and into a sediment basin but without discharging to surface water, wetlands, or drinking water source		X	
Leachate seep, spill, or overflow results in leachate outside the landfill's disposal unit boundary but not into a sediment basin or discharging to surface water, wetlands or drinking water source			X

[46]Environmental Justice means "the fair treatment and meaningful involvement of every person, regardless of race, color, national origin, income, faith, or disability, regarding the development, implementation, or enforcement of any environmental law, regulation, or policy". Fair Treatment means "means the equitable consideration of all people whereby no group of people bears a disproportionate share of any negative environmental consequence resulting from an industrial, governmental, or commercial operation, program, or policy". See, Virginia Environmental Justice Act, Va. Code § 2.2-234.

[47] https://townhall.virginia.gov/l/ViewGDoc.cfm?gdid=4391

1(a)(3) Landfill Slope Failure

Observation	Serious	Moderate	Marginal
Landfill slope failure and waste is deposited outside the disposal unit boundary	X		
Waste is deposited within the disposal unit boundary but on an unlined area		X	
Waste is deposited within the disposal unit boundary on a lined area			X

1(a)(10) Improper Management of Waste

Observation		Serious	Moderate	Marginal
Improper management of regulated medical waste, asbestos, waste tires, or PCBs; improper disposal		X		
Speculative accumulation; improper storage of mulch, stockpiles, scrap metal, etc.; unauthorized waste accumulation and storage areas			X	
Minor deviations from permit requirements				X

1(a)(11) Facility Operation

Observation	Serious	Moderate	Marginal
Operating without a licensed waste management facility operator; operation deficiencies leading to environmental impacts; open burning	X		
Leachate head exceeding 30 cm on bottom liner as a result of design flaws and/or operational deficiencies (excluding sumps and manifold trenches; failure to maintain sufficient landfill daily, intermediate, or final cover; overfill		X	
Exceedance of PBR processing limitations (minor), or other operational deficiencies			X

If the following is observed, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification:

1(a)(17) Record Keeping/Reporting

Observation	Serious	Moderate	Marginal
Failure to report noncompliance or unusual condition within 24 hours/5 days (or alternate timeframe in permit)	X		
Failure to comply with recordkeeping requirement (e.g., Operations Manual, Self-Inspections, Unauthorized Waste Records, Certification/inspection, or other); failure to submit required plan or report to DEQ (e.g., Disclosure Statement, SWIA Report, groundwater or gas monitoring report, or other); failure to respond to a request for information		X	
Other recordkeeping or reporting deficiencies			X

Solid Waste Civil Charge Worksheet

Va. Code § 10.1-1455

Facility/Responsible Party:	EA No.:	Permit No.:	NOV Date:		
	NOV Observation No(s).	Potential for Harm			
		Serious	Moderate	Marginal	*Amount*
1. Gravity-based Component					
a. Violations and Frequency *(x) = number of occurrences*		$ (x)	$ (x)	$ (x)	
(1) Operation of solid waste management facility without a permit		13,229 (x)	6,615 (x)	3,307 (x)	
(2) Leachate Discharges/Seeps		13,229 (x)	6,615 (x)	3,307 (x)	
(3) Landfill slope failure		13,229 (x)	6,615 (x)	3,307 (x)	
(4) Failure to extinguish a landfill fire		13,229 (x)	6,615 (x)	3,307 (x)	
(5) Failure to implement landfill gas remediation		13,229 (x)	6,615 (x)	3,307 (x)	
(6) Failure to implement groundwater corrective action remedy		13,229 (x)	6,615 (x)	3,307 (x)	
(7) Failure to adhere to closure plan or closure timeframe		13,229 (x)	6,615 (x)	3,307 (x)	
(8) Disposal of solid waste beyond permitted landfill disposal unit boundary or vertical design capacity		13,229 (x)	6,615 (x)	3,307 (x)	
(9) Unauthorized open burning of solid waste		13,229 (x)	6,615 (x)	3,307 (x)	
(10) Improper management of waste		13,229 (x)	6,615 (x)	3,307 (x)	
(11) Facility Operations		6,615 (x)	3,250 (x)	1,307 (x)	
(12) Failure to conduct groundwater monitoring or landfill gas monitoring		6,615 (x)	3,250 (x)	1,654 (x)	
(13) Failure to comply with financial assurance requirements		6,615 (x)	3,250 (x)	1,654 (x)	
(14) Failure to properly conduct post-closure care maintenance		6,615 (x)	3,250 (x)	1,654 (x)	
(15) Failure to comply with site-specific permit condition		6,615 (x)	3,250 (x)	1,654 (x)	
(16) Other		6,615 (x)	3,250 (x)	1,654 (x)	
(17) Record keeping/Reporting		3,250 (x)	1,654 (x)	826 (x)	
(18) Housekeeping, or maintenance issues (litter, odor, vector, dust, run-on/run-off control, well maintenance, road maintenance, or other)		3,250 (x)	1,654 (x)	826 (x)	
Subtotal 1.a – Violations and Frequency					

2. Degree of Culpability					
Culpability subtotal *(apply to violation(s)' Amount or to the sum of 1.a.)*	Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
3. Compliance History					
Order or decree in another media program within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) sum of 1 and 2, or $5,000		
Order or decree in same media program within 36 mo. before initial NOV	Y	N	If yes, add 0.25 (x) sum of 1 and 2 (for 1 order in 36 mo.)		
4. Economic Benefit of Noncompliance					
5. Ability to Pay *(based on information supplied by the owner/operator)*					**( )**
Total Civil Charge *(may not exceed $32,500 per day per violation)*					

Potential for Harm Examples: Hazardous Waste

Each violation and associated line item of the civil charge worksheet must be evaluated as discussed in the Chapter 4 Introduction regarding the Potential for Harm Classifications. The table below may be used as a preliminary assessment tool in evaluating the potential for harm. However, it is important to note that on a case specific basis, a reasoned analysis of the Additional Factors may warrant a different potential for harm classification. Furthermore, some line items of the civil charge worksheet have additional guidance or examples to assist with the potential for harm evaluation.

Preliminary Factors to Consider:

Type of Generator	Serious	Moderate	Marginal
Large Quantity Generator (LQG)[48]	X		
Small Quantity Generator (SQG)[49]		X	
Very Small Quantity Generator (VSQG)[50]			X

Secondary Factors to Consider:

See, "Secondary Factors to Consider" in the "Potential for Harm Examples: Solid Waste," above.

Additional Guidance for specific civil charge worksheet line items

1(a)(6) Failure to comply with Satellite Accumulation Area/ Central Accumulation Area/

Universal Waste Requirements

If the following is observed, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification:

- For Satellite Accumulation Areas (SAA):
- Greater than 55 gallons of hazardous waste;
- Greater than one quart of liquid acute hazardous waste;
- Greater than 1 kg of solid acute hazardous waste;
- Other SAA deficiencies;
- For Central Accumulation Areas (CAA);
- An LQG that accumulates hazardous waste for more than 90 days;

[48] 40 CFR § § § 262.13, 262.15, and 262.17
[49] 40 CFR § § § 262.13, 262.15, and 262.16
[50] 40 CFR § § 262.13 and 262.14

- An SQG that accumulates hazardous waste for more than 180 days;
- An SQG that accumulates greater than 6,000 kg of hazardous waste;
- A VSQG that accumulates hazardous waste for more than 180 days;
- A VSQG that accumulates greater than 1,000 kg of hazardous waste;
- Other CAA deficiencies;
- For Universal Waste (UW);
- Accumulation of UW for greater than one year, this will be assessed as a separate violation;
- Other UW deficiencies.

1(a)(7) Failure to Properly Manage Waste

If the following is observed, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification:

- Failure to properly label containers containing hazardous waste;
- Failure to mark "Hazardous Waste" or other words that distinctively identify the contents of the container;
- Failure to properly mark the start date of waste accumulation;
- Failure to maintain structural integrity of hazardous waste and UW containers;
- Other hazardous waste management deficiencies.

1(a)(8) Failure to Comply with Contingency Plan/ Emergency Plan Requirements

If the following is observed, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification:

- Failure of an LQG to develop and/or update an existing contingency plan that meets the requirements of the regulation (the failure to have a plan may be assessed as a more egregious violation than the failure to update the contingency plan, based on the Additional factors);
- Other contingency plan deficiencies;
- Emergency Plan deficiencies for LQGs:
- Failure to make arrangements with local authorities;
- Failure to provide documentation verifying the attempts of making such arrangements;
- Failure to designate an emergency coordinator;
- Other emergency plan deficiencies;
- Emergency Plan deficiencies for SQGs:
- Failure to comply with emergency procedure requirements (e.g., facility postings).

1(a)(13) Failure to Submit and Maintain Documentation

If the following is observed, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification:

- An LQG's failure to submit biennial report(s);
- Failure to file an exception report when a signed copy of the manifest was not received within a specified period of time;
- Failure to maintain copies of manifests and other required paperwork, inspections, BRs etc. for 3 years;
- A signed copy of a manifest has not been received within 45 days for an LQG and 60 days for an SQG;
- Other submittal or documentation deficiencies.

Hazardous Waste Civil Charge Worksheet

Va. Code § 10.1-1455

Facility/Responsible Party:	**EA No.:**		**Permit No.:**	**NOV Date:**
	NOV Observation No(s).	**Potential for Harm**		
		Serious	**Moderate**	**Marginal**	***Amount***
1. Gravity-based Component					
a. Violations and Frequency *(x) = number of occurrences*		$ (x)	$ (x)	$ (x)	
(1) Failure to Accurately Identify Waste as Hazardous Waste		13,229 (x)	6,615 (x)	3,307 (x)	
(2) Failure to Properly Determine Hazardous Waste Generator Status/ Failure to Obtain an EPA Identification Number		13,229 (x)	6,615 (x)	3,307 (x)	
(3) Failure to Notify and/or Re-notify DEQ of Hazardous Waste Generator Status		13,229 (x)	6,615 (x)	3,307 (x)	
(4) Failure to Comply with Conditions of a Permit/ Failure to Obtain a Permit		13,229 (x)	6,615 (x)	3,307 (x)	
(5) Failure to Properly Dispose of Waste		13,229 (x)	6,615 (x)	3,307 (x)	
(6) Failure to comply with Satellite Accumulation Area/ Central Accumulation Area/ Universal Waste Requirements		13,229 (x)	6,615 (x)	3,307 (x)	
(7) Failure to Properly Manage Waste		13,229 (x)	6,615 (x)	3,307 (x)	
(8) Failure to Comply with Contingency Plan/ Emergency Plan Requirements		13,229 (x)	6,615 (x)	3,307 (x)	
(9) Training		6,615 (x)	3307 (x)	1,654 (x)	
(10) Failure to Comply with Land Disposal Restrictions Requirements		6,615 (x)	3,307 (x)	1,654 (x)	
(11) Failure to comply with Part 265 Subparts AA, BB, and CC Air Emissions Requirements		6,615 (x)	3,307 (x)	1,654 (x)	
(12) Other		6,615 (x)	3,307 (x)	1,654 (x)	
(13) Failure to Submit and Maintain Documentation		3,307 (x)	1,654 (x)	826 (x)	
Subtotal 1.a – Violations and Frequency					

2. Degree of Culpability					
Culpability subtotal *(apply to violation(s)' Amount or to the sum of 1.a.)*	Low = (x) 0		Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0
3. Compliance History					
Order or decree in another media program within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) sum of 1 and 2, or $5,000		
Order or decree in same media program within 36 mo. before initial NOV	Y	N	If yes, add 0.25 (x) sum of 1 and 2 (for 1 order in 36 mo.)		
4. Economic Benefit of Noncompliance					
5. Ability to Pay *(based on information supplied by the owner/operator)*					**( )**
Total Civil Charge *(may not exceed $32,500 per day per violation)*					

Remediation Consent Order Civil Charge Worksheet

Va. Code § 10.1-1455

Facility/Responsible Party:	ORP Identification No.:	Permit No.:	RCO Effective Date:	
	NOV Observation No(s).	Potential for Harm		
		Serious	Moderate	Marginal	*Amount*
1. Gravity-based Component					
a. Violations and Frequency *(x) = number of days of continuing, discrete violations*		$ (x)	$ (x)	$ (x)	
(1) Failure to comply with Schedule of Compliance or Statement of Work.		13,229 (x)	6,615 (x)	3,307 (x)	
(2) Failure to implement Final Selected Remedy.		13,229 (x)	6,615 (x)	3,307 (x)	
(3) Failure to Notify DEQ of change of Ownership.		13,229 (x)	6,615 (x)	3,307 (x)	
(4) Failure to properly conduct Operation and Maintenance of Remedy.		13,229 (x)	6,615 (x)	3,307 (x)	
(5) Failure to implement Institutional Controls		13,229 (x)	6,615 (x)	3,307 (x)	
(6) Failure to comply with terms of Cost Reimbursement Agreement		13,229 (x)	6,615 (x)	3,307 (x)	
(7) Failure to notify DEQ within specified timeframes outlined in the RCO.		6,615 (x)	3,307 (x)	1,654 (x)	
(8) Failure to comply with financial assurance requirements of the RCO.		6,615 (x)	3,307 (x)	1,654 (x)	
(9) Other		6,615 (x)	3,307 (x)	1,625 (x)	
(10) Failure to Record Final Certificate.		3,307 (x)	1,654 (x)	826 (x)	
(11) Failure to provide notice of the RCO to contractors and Agents (14 days after effective date of RCO).		3,307 (x)	1,654 (x)	826 (x)	
(12) Failure to provide access to the Site for DEQ		3,307 (x)	1,654 (x)	826 (x)	
(13) Failure to retain Records for 10 years as required by RCO.		3,307 (x)	1,654 (x)	826 (x)	
Subtotal 1.a – Violations and Frequency					

Potential for Harm Examples: Remediation Consent Order

A Remediation Consent Order (RCO) is a consent order with a comprehensive risk-based remedial strategy and schedule tailored to a specific site. A traditional consent order with a civil charge and/or schedule of compliance will only occur for an RCO if a notice of violation is issued to the Responsible Party to the RCO for failure to comply with the provisions of the RCO. Each line item in section 1(a) of the civil charge worksheet will be classified as outlined in Chapter 4 Potential for Harm Classifications. As there is no hierarchy of facilities participating in the program (e.g., LQG/SQG/VSQG, SWP, PBR), a violation of an RCO may be classified as having a serious, moderate, or marginal potential for harm, based on the Secondary Factors identified in the "Potential for Harm Examples: Solid Waste," above.

2. Degree of Culpability					
Culpability subtotal *(apply to violation(s)' Amount or to the sum of 1.a.)*	Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
3. Compliance History					
Order or decree in another media program within 36 mo. before initial NOV	**Y**	N	If yes, add lesser of 0.05 (x) sum of 1 and 2, or $5,000		
Order or decree in same media program within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) sum of 1 and 2 (for 1 order in 36 mo.)		
4. Economic Benefit of Noncompliance					

5. Ability to Pay *(based on information supplied by the owner/operator)*	**( )**
Total Civil Charge *(may not exceed $32,500 per day per violation)*	

Natural Gas Transmission Pipelines Greater Than 36 Inches Inside Diameter

Va. Code § 62.1-44.15(8g) provides statutory authority for the Department to assess higher civil charges for natural gas transmission pipelines greater than 36 inches inside diameter and outlines procedures for the issuance of a special order. Va. Code § 62.1-44.15(8g) states that persons constructing or operating a natural gas transmission pipelines greater than 36 inches inside diameter who violates the provisions of § 62.1-44.2 et seq. may be assessed civil charges up to $50,000 per violation, not to exceed $500,000 per special order. These higher civil charges can only be applied after a Formal Hearing (see criteria below), and do not apply to consent orders. For pipeline consent orders staff should disregard this section and apply the standard penalty guidance in this chapter.

While Va. Code § 62.1-44.15(8g) provides for higher civil charges for any violations of the State Water Control Law, the most common violations will be violations of the Virginia Water Resources and Wetlands Protection Program, Article 2.2 of the State Water Control Law, Va. Code §§ 62.1-44.15:20 through -44.15:23.1; the Stormwater Management Act, Article 2.3, Va. Code §§ 62.1-44.15:24 through -44.15:50; and the Erosion and Sediment Control Law, Article 2.3, Va. Code §§ 62.1-44.15:51 through -44.15:66.

In order to qualify for higher penalties, the criteria in Va. Code § 62.1-44.15(8g) must be met:

- DEQ has issued at least two written notices of alleged violation for violations involving the same pipeline;
- Such violations have not been resolved by a demonstration that there was no violation or by a consent order; and
- There is a finding that such violation occurred after a formal hearing was conducted (a) before a hearing officer appointed by the Supreme Court, (b) in accordance with §2.2-4020, and (c) with at least 30 days' notice to such person of the time, place, and purpose thereof.

When the criteria for issuance of a special order with higher penalties are met, staff should use the program civil charge worksheets in this guidance that correspond to the type of violations.[51] In calculating the appropriate civil charge, staff should follow the guidance accompanying the worksheets to assess the gravity-based component (see special instructions below for construction stormwater and VWPP). Once the gravity-based component is calculated, an aggravating factor multiplier of 50% should be added to the gravity based component of the worksheet. The Degree of Culpability, History of Noncompliance, Economic Benefit, and

[51] Va. Code § 62.1-44.15(8g) states: "The actual amount of any penalty assessed shall be based upon the severity of the violation, the extent of any potential or actual environmental harm, the compliance history of the person, any economic benefit realized from the noncompliance, and the ability of the person to pay the penalty."

Ability to Pay categories are calculated as they are for other Water Programs. Staff must provide the Responsible Party the civil charge worksheet prior to the hearing.[52]

VWPP Violations

Civil charges and civil penalties for VWPP violations are assessed per occurrence. An occurrence is defined as a separate, identifiable, discrete act that results in a discharge of a pollutant to state waters. Separate civil charges are assessed: (1) for impacts to streams and (2) for impacts to wetlands and other surface waters, based on the potential for harm to the environment and the extent of deviation from regulatory program. Wetland type is not considered when determining the number of occurrences, unless the different wetland types were subject to separate discharges of pollutants. Also, an individual stream reach is not considered when determining the number of occurrences, unless there have been separate discharges affecting the same or differing portions of the stream(s).

In assessing the potential for harm, DEQ staff should first consider the relative level of impacts reflected by the permitting thresholds. For example, discharges or impacts that would require an individual permit are considered serious, impacts that would have required a full general permit requiring compensation are considered moderate, and impacts that would have required reporting-only are considered marginal.

If staff believe that these thresholds should be adjusted staff should provide additional justification by considering the following factors: classification of a wetland type (e.g., PFO, PSS, PEM);[53] surrounding land use and cover types; nutrient, sediment, and pollutant trapping ability; flood control and flood storage capacity, and flood flow synchronization; erosion control and shoreline stabilization; groundwater recharge and discharge; aquatic and wildlife habitat; unique aspects or critical habitats; water quality; and recreation, education, aesthetics, or other beneficial uses.

Stormwater Violations

When calculating a civil charge using the Construction Stormwater civil charge worksheet, the frequency for assessing violations is per violation, not per month or per site. Each BMP, ESC measure, or pollution prevention measure that is deficient would be assessed as a separate violation. In assessing potential for harm, staff should not apply the land disturbance thresholds in the construction stormwater civil charge guidance section since most natural gas pipelines of this size will exceed the serious threshold. Instead, staff should consider the other factors listed in the guidance that may impact potential for harm, including but not limited to proximity to a receiving water or sensitive feature, erodibility and slope, Total Maximum Daily Loads

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[52] Va. Code § 62.1-44.15(8g) states: "The Board shall provide the person with the calculation for the proposed penalty prior to any hearing conducted for the issuance of an order that assesses penalties pursuant to this subdivision."

[53] Under the U.S. Fish and Wildlife Service Wetland Classification System, wetlands are of two basic types: coastal (also known as tidal or estuarine wetlands) and inland, also known as non-tidal, freshwater, or palustrine wetlands which have three classes: palustrine emergent (PEM), palustrine scrub-shrub, (PSS), and palustrine forested (PFO).

(TMDLs), and drainage area of deficient BMPs. In addition to those factors, staff may also consider the length of time of the violation when evaluating potential for harm.

Line 1(a)(2) of the construction stormwater civil charge worksheet should be used when there is a discharge which reaches state waters where (1) required treatment, controls, and pollution prevention measures are wholly or almost entirely lacking or deficient, such that stormwater discharged from the site has essentially bypassed treatment or control, or (2) a stormwater discharge results in a significant demonstrated environmental impact (e.g., a fish kill). This line should not be used when stormwater discharge results in a measurable volume of sediment accumulation on the bed of the receiving water (in which case use line 1(i) on the VA Water Protection Permit Program Civil Charge Worksheet for unauthorized impacts to wetlands and/or streams).

When determining the number of occurrences on line 1(a)(8) and line 1(a)(9) of the construction stormwater worksheet, deficiencies with post construction management BMPs, E&S controls, and pollution prevention measures should not be assessed cumulatively for the entire site or pipeline project (assess a separate occurrence for each BMP, control, or measure).
Virginia Pollutant Discharge Elimination System and Pollution Abatement Program

Virginia Pollutant Discharge Elimination System and Virginia Pollution Abatement

The State Water Control Law at Va. Code § 62.1-44.15(8d) provides for the payment of civil charges in consent orders for past violations. This statutory section is the basis for negotiated civil charges in the Virginia Pollutant Discharge Elimination System (VPDES) Program, and Virginia Pollution Abatement (VPA) Permit Program. With the exception of consent orders to prevent or minimize sanitary sewer overflows (SSOs),[54] the maximum civil charge is $32,500 for each violation, with each day being a separate violation.[55]

Potential for Harm Examples

This section provides some examples of violations for each potential for harm classification. These examples are not determinative of whether or not a violation warrants formal enforcement. The evaluation of other examples of a specific potential for harm should be done in collaboration with the Central Office and documented in the Enforcement Recommendation Plan.

[54] Va. Code § 62.1-44.15(8f) establishes maximum civil charges for SSO violations in consent orders requiring SSO corrective action. Any such order may impose civil penalties in amounts up to the maximum amount authorized in § 309(g) of the Clean Water Act. These limits are subject to change and the Code of Federal Regulations should be consulted.
[55] The maximum amounts for consent civil charges are incorporated by reference from Va. Code § 62.1-44.32(a).

- Serious Classification: Examples include, but are not limited to: fish kills, violations resulting in loss of beneficial uses, chronic refusal to apply for a permit or perform a Toxics Management Plan (TMP).
- Moderate Classification: Examples include, but are not limited to: failure to observe Best Management Practices (BMPs) in VPDES permits, chronic late submission of monitoring reports or permit application, or failure to follow an operation and maintenance (O&M) manual.
- Marginal Classification: Examples include, but are not limited to: an improperly completed Discharge Monitoring Report (DMR) in any case where the DMR does not report permit violations that would be classified as Serious or Moderate; minor exceedance of land application rates with no impact to ground or surface water.

The following potential for harm factors may be considered when evaluating potential for harm: facility/site conditions, size of facility/site, length of time, number of outfalls, receiving water characteristics and the nature of the discharges from the outfalls. Potential for harm factors identified in this guidance are among the most common encountered in enforcement actions; however, they should not be considered exhaustive and additional investigation may be required.

These additional factors may also be considered, as appropriate:

Line on Worksheet	**Potential for Harm Factors**
Line 1(a)(1)	Extent of deviation from the effluent limits, the nature of parameter exceeded, storm event, flood conditions, mixing zones, receiving water impairments, receiving water size, frequency of exceedances, and impacts to the environment (see section below for additional explanation)
Line 1(a)(2)	Number of areas exposed to pollutants, impact of discharges from site
Line 1(a)(3)	Whether previous monitoring indicates an issue at the site, whether performing monitoring earlier would have led to controls being installed sooner, whether there is a waste load allocation for the site, the number of performance/documentation deficiencies For violations that are assessed per SWPPP review, the number of monitoring events/examinations that were not performed or number of deficiencies with performance should be considered when assessing potential for harm. Generally, for missed monitoring, 1 = marginal; 2-3 = moderate; and 4+ = serious
Line 1(a)(4)	Length of time of discharge, discharge composition, amount discharged, size of the storm event, instream concentration of the SSO relative to the stream flow, stream class designation, frequency of bypasses/overflows to receiving water, receiving water impairments, downstream uses (withdrawals, drinking water intake locations), and loss of other downstream beneficial uses (recreational, agriculture). See additional information below for SSOs.
Line 1(a)(5)	Length of delay, the number of deficiencies with the submission,

Line 1(a)(6)	Length of time without permit coverage, actions taken while there was no coverage
Line 1(a)(7)	Length of time prior to report, whether corrective action would have occurred sooner
Line 1(a)(8)	Length of time without maintenance/installation of BMPs; length of time in taking corrective action once notified (e.g., Inspection Reporting), nature of triggering event, number of measures not implemented
Line 1(a)(9)	The number of missed inspections, the number and severity of performance/documentation deficiencies For violations that are assessed per SWPPP review, the number of inspections/examinations that were not performed/documented may be considered when assessing potential for harm. Generally, for missed inspections, 1 missed inspection = marginal; 2-3 missed = moderate; and 4+ is serious
Line 1(a)(10)	Length of time without a SWPPP/O&M Manual
Line 1(a)(11)	The length of time since permittee monitoring revealed an exceedance of benchmark value, the magnitude of the exceedance, the number of monitoring periods with an exceedance and no corrective action, the nature of the modifications that permittee has/will take, the length of time since the department notified the permittee that the facility is a source of a specified pollutant of concern for which a TMDL allocation has been approved, length of time measures not incorporated into SWPPP/O&M Manual
Line 1(a)(12)	Amount of biosolids spilled, amount of biosolids that reach state waters, number of deficiencies with securing biosolids, magnitude of driver error
Line 1(a)(13)	Magnitude of increase in nutrient and sediment load, nature of expansion

Line 1(a)(1) Effluent Limits

When evaluating the potential for harm for effluent limit exceedances, enforcement staff should first determine if the parameter is a Group I or Group II pollutant. For purposes of this guidance, Group I includes ammonia, biochemical oxygen demand, chemical oxygen demand, total oxygen demand, dissolved oxygen, total organic carbon, total suspended solids, total dissolved solids, inorganic phosphorous compounds, inorganic nitrogen compounds, oil and grease, calcium, chloride, fluoride, magnesium, sodium, potassium, sulfur, sulfate, total alkalinity, total hardness, aluminum, cobalt, iron, vanadium and temperature. Bacteria (e.g., fecal coliform and E. *coli*) and pH are calculated using logarithmic scales and are assessed separately using the table at the bottom. All other pollutants are classified as Group II (ex. total residual chlorine, cyanide, metals not listed in Group I).

Using the table below, the enforcement representative assigns the corresponding potential for harm to the violation. The potential for harm may be adjusted based on other case-specific

relevant factors such as the size of the storm event, flood conditions, mixing zones, receiving water impairments, receiving water size, frequency of exceedances, impacts to the environment, and regulatory harm.

Effluent Limitation Potential for Harm Chart				
Percentage by which effluent limit exceeded			**Potential for Harm**	
Monthly	7-day	Daily	Group I	Group II
1-20	1-30	1 – 50	Marginal	Marginal
21-40	31-60	51 – 100	Marginal	Moderate
41-100	61-150	101- 200	Moderate	Moderate
101-300	151-450	201-600	Moderate	Serious
301 - >	451 - >	601- >	Serious	Serious
Percent Exceedance of Bacteria Limit		Standard Units above or below pH		Potential for Harm
0-100		0-1.0		Marginal
101-500		1.0-3.0		Moderate
500 +		3.0 +		Serious

Line 1(a)(4) Spills/Unpermitted Discharges

In assessing the potential for harm for wet weather sanitary sewer overflows/bypasses to state waters, DEQ staff should first consider the size of the discharge as follows:

For small waterbodies (creeks, runs, tributaries, etc.)

- A Serious ranking generally should be used for large discharges that result in discharges of greater than or equal to 250,000 gallons.
- A Moderate ranking generally should be used for discharges that result in overflows of greater than or equal to 50,000 gallons and less than 250,000 gallons.
- A Marginal ranking generally should be used for smaller discharges that result in overflows up to 50,000 gallons.

For large waterbodies (rivers)

- A Serious ranking generally should be used for large discharges that result in discharges of greater than or equal to 500,000 gallons.
- A Moderate ranking generally should be used for discharges that result in overflows of greater than or equal to 100,000 gallons and less than 500,000 gallons.

- A Marginal ranking generally should be used for smaller discharges that result in overflows up to 100,000 gallons.

The potential for harm may then be adjusted after considering additional factors, where the information is available, such as the size of the storm event (for wet weather bypass/overflow), instream concentration of the SSO relative to the stream flow, stream class designation, frequency of bypasses/overflows to receiving water, receiving water impairments, downstream uses (e.g., withdrawals, drinking water intake locations), and loss or impact to other downstream beneficial uses (e.g., recreational, agriculture).

Calculating the Civil Charge.

Gravity Based Component

Staff identifies all of the violations being addressed in the gravity-based component section of the Worksheet and calculates the civil charge separately for each violation. The gravity-based component covers two areas: (a) violations and frequency; and (b) aggravating factors as multipliers. Staff should mark the data column for each type of violation and apply the appropriate multiplier in the Worksheet, depending on the number of occurrences and whether the violation is classified as Serious, Moderate, or Marginal potential for harm. The charge is then entered into the "Amount" column of the Worksheet. After calculating charges for each violation category, staff add the charges to arrive at a subtotal. Aggravating factors are then considered and added as appropriate.

Compliance program point windows should be considered when determining the noncompliance period. For example, for VPDES programs with a six month rolling point window, the noncompliance period should generally include the six months prior to the date of the referral NOV and any non-compliance following the NOV. Enforcement staff may cease assessing civil charges for ongoing violations that require upgrades or time to resolve if the Responsible Party is cooperating with enforcement staff to resolve the noncompliance and agree to an enforceable schedule.

Violations and Frequency

The violations generally fall into one of the following categories and the frequency is per month, unless otherwise noted:

Line on Worksheet	**Examples of Violations**	**Frequency**
1(a)(1) Effluent Limits	Exceedance of effluent limit	Per effluent limit, per month, or longer, specified interval
1(a)(2) Operational Deficiencies	Employee training	Per SWPPP review/inspection
	Good housekeeping	Per inspection
1(a)(3) Monitoring	Visual monitoring/examinations	Per SWPPP review

	Benchmark monitoring, impaired waters monitoring, Chesapeake Bay TMDL monitoring	Per parameter and highest frequency that is not performed. Each DMR is evaluated separately
	Effluent Limit monitoring	Per parameter and highest frequency that is not performed. Each DMR is evaluated separately
1(a)(4) Spills/Unpermitted Discharges	Discharges not composed entirely of stormwater and not authorized by Permit	Per day or per event
1(a)(5) Submissions	Annual report for Chesapeake Bay TMDL action plan	Per report
	Facility stormwater load calculations	Per calculation
	Chesapeake Bay TMDL action plan	Per action plan
	Exceedance report	Per report
	Reports not signed properly/no authorization	Per SWPPP review or per report
	Late DMR	Per report
1(a)(6) No Permit	Failure to obtain coverage/submit a new registration statement to continue coverage	Per month
1(a)(7) Failure to Report	Failure to report an unpermitted discharge	Per event or per month
1(a)(8) Control Measures/BMPs not implemented or maintained	Failure to take corrective action/implement measures in response to an inspection or exceedance	Per corrective action or per inspection
	Failure to implement measures required by the Permit to eliminate or minimize exposure.	Per inspection
	Failure to correct deficiencies in the implementation of the SWPPP	Per inspection that identifies deficiencies
	Failure to repair/maintain control measures	Per inspection
	Failure to observe all control measures at least annually when a stormwater discharge is occurring to ensure that they are functioning correctly	Per SWPPP review
	Routine inspections	Per SWPPP review

1(a)(9) Perform/Record Inspections	Annual evaluation of stormwater outfalls	Per year/annual evaluation
1(a)(10) No SWPPP/O&M Manual	Failure to develop a SWPPP/O&M manual	Per SWPPP/O&M review
1(a)(11) Incomplete O&M Manual/Incomplete SWPPP/SWPPP not on site	Incomplete O&M manual	Per SWPPP/O&M review[56]
	Failure to modify SWPPP in response to exceedance of benchmark values	
	Failure to complete revisions to the SWPPP within 60 days	
	Failure to properly document control measure modifications or additions in response to deficiencies	
	Failure to keep records in SWPPP/on site	
	Failure to incorporate measures/controls into SWPPP to comply with TMDL requirements	
	Failure to have a complete and updated SWPPP with all of the contents required by the Permit.	
	Failure to update SWPPP to reflect addition/removal of outfall(s)	
1(a)(12) Biosolids transport violation	Vehicle wreck or spill as a result of failure to properly secure or driver error while biosolids are transferred from plant to land application site or routine storage location	Per vehicle or per event
1(a)(13) Other	Failure to meet the no net increase of stormwater nutrient and sediment load as a result of the expansion of the industrial facility	Per SWPPP review
	Failure to provide information/records	Per request

When the frequency is described as "per SWPPP review" or "per SWPPP/O&M review," it indicates enforcement representatives should assess a violation for every DEQ inspection where a DEQ inspector reviews the SWPPP/O&M manual and identifies non-compliance with that permit requirement (ex. missing/incomplete quarterly visual monitoring examinations, missing

[56] Incomplete SWPPP and O&M items for line 1.a.11 are typically consolidated and assessed together per SWPPP/O&M review. Potential for harm increases as the number and severity of missing items increases. If a fillable form is used, and there are multiple items for incomplete SWPPP that were documented during a single SWPPP review, the appropriate violation boxes should be checked for each item. However, a corresponding penalty is only selected on one line of the fillable form and an explanation should be provided with the civil charge analysis form.

routine inspections) instead of assessing occurrences for every missed evaluation/inspection by the permittee. Each inspection type/permit requirement should be assessed as a separate violation, unless otherwise noted in this guidance. For example, missing routine inspections would be assessed separately from missing quarterly visual monitoring. These non-compliance items are usually kept with the SWPPP/O&M manual, not submitted to DEQ throughout the permit term, and are identified during the SWPPP/O&M review portion of an inspection. If DEQ does a follow-up inspection, and the permittee is still not doing these examinations/inspections, enforcement staff should assess another occurrence to capture the non-compliance since the last inspection unless the enforcement action has progressed to a point where including additional occurrences is not practical (e.g., there is a signed consent order going to public notice).

When the frequency is described as "per monitoring period," it means that enforcement staff should assess a violation for every monitoring period of non-compliance. Generally, enforcement staff should only consider the six monitoring periods leading up to the NOV when determining the number of violations. If a permittee continues to have violations after the referral NOV, enforcement staff should assess additional occurrences unless the enforcement action has progressed to a point where including additional occurrences in the enforcement action is not practical (example, there is a signed order going to public notice).

The frequency applied to annual reporting requirements is per year. Enforcement staff should only consider the three years leading up to the NOV when determining the number of violations. If the permittee continues to have violations after the referral NOV, enforcement staff should assess additional occurrences unless the enforcement action has progressed to a point where including additional occurrences in the enforcement action is not practical (e.g., there is a signed order going to public notice).

Line 1(a)(1) Effluent Limits

When determining the number of occurrences for the penalty calculation, each effluent limit is treated as a separate occurrence. For example, quantity average, quantity maximum, concentration minimum, concentration average, and concentration maximum limits for the same parameter are treated as separate occurrences. However, if the daily, weekly, and monthly effluent limits are the same for the same parameter, then it is considered one occurrence on the worksheet. Additionally, violations of the same limit at different outfalls are counted separately.

Line 1(a)(3) Monitoring

For missed Discharge Monitoring Reports (DMRs) or incomplete DMRs, enforcement staff should assess occurrences for each missed parameter and the number of occurrences depends on the highest frequency that is not performed for that parameter. For example, if TSS monthly average (frequency of 1/week) and monthly max (1/month) are not submitted and there are four weeks in the month, then 4 TSS occurrences are assessed. If the Responsible Party submits a DMR with 2 of the 4 TSS monthly average samples, then the number of occurrences will be 2. The parameters should not be combined into one occurrence for the DMR as a whole. Each DMR is evaluated separately and individual outfalls are assessed separately.

Line 1.a.4 Spills/Unpermitted Discharges

Multiple discharges from a sanitary sewer system to the same waterbody may be consolidated per day or per event, and assess based on total volume.

Line 1.a.5 Submissions

With regards to a late submission or failure to submit, it should only be assessed as a violation for the month when the report was due. The potential for harm can be increased as appropriate to capture the length of time the report was delayed or the importance of the report if it was never submitted. If a DMR is submitted late or not at all, then an occurrence would be assessed on this line, per late DMR. For incomplete and missed DMRs, occurrences are also assessed on line 1(a)(3) for the monitoring that was not completed.

Aggravating Factors as Multipliers

Aggravating factors are:

- Major Facility: If a VPDES facility is classified as "major" using EPA criteria, this factor applies. However, this multiplier does not apply to civil charges for SSOs from a collection system associated with a major facility.
- Flow Reduction Factor: The gravity-based component total may be reduced for small sewage treatment plants (STPs) or wastewater treatment facilities (WWTFs). The reduction is discretionary and is based on good faith efforts to comply. The factor relies on actual average daily flow57, as follows:

Flow Reduction Factor	
Average Daily Flow (gallons per day)	**Percent Reduction**
9,999 or less	50
10,000 – 29,999	30
30,000 – 99,999	10
100,000 and above	No Reduction

If the reduction is being considered for a non-municipal STP or WWTF, staff should ensure that neither the facility nor the parent company employs more than 100 individuals. In using the flow reduction factor, staff multiply the gravity-based component total by the appropriate percentage figure (e.g., for a facility with less than 5,000 gallons per day average daily flow, the reduction is 50%) to obtain the reduction amount. If flow at the facility fluctuates from month to month, then the percentage reduction will vary depending on the facility's flow during the months of violation. If the permit flow is monthly, divide by 30.4 to get the gallons per day. Using the appropriate civil charge worksheet, staff subtract the reduction amount from the gravity-based component total to obtain the flow-adjusted gravity-based component total.

[57] "Flow" means monthly average daily flow from the facility for the month in which the violation(s) occurred.

VPDES & VPA Civil Charge Worksheet

Va. Code § 62.1-44.15

(For Violations Other Than VWPP, Article 9, Article 11, Surface Water/Ground Water Withdrawal, AFO/Poultry and Const. Stormwater Programs)

Facility/Responsible Party	EA No.	Per./Reg. No.	NOV Date	
	NOV Observation #	**Potential for Harm**		
		Serious	**Moderate**	**Marginal**	***Amount***
1. Gravity-based Component					
a. Violations and Frequency (x = number of occurrences)		$ (x) occurrences	$ (x) occurrences	$ (x) occurrences	
(1) Effluent Limits		1,323 (x)	712 (x)	305 (x)	
(2) Operational Deficiencies		1,323 (x)	712 (x)	305 (x)	
(3) Monitoring/		509 (x)	254 (x)	102 (x)	
(4) Spills/Unpermitted Discharge Discharges of oil must be assessed using the Article 11 worksheet.		13,229 (x)	6,615 (x)	1,323 (x)	
(5) Submissions		1,323(x)	712 (x)	305 (x)	
(6) No Permit		5,292 (x)	2,646 (x)	916 (x)	
(7) Failure to Report		13,229 (x)	6,615(x)	1,323 (x)	
(8) Control measures/BMPs not implemented or maintained (stormwater)		6,615 (x)	2,646 (x)	1,323 (x)	
(9) Failure to record inspections		1,323 (x)	661 (x)	265 (x)	
(10) No SWPPP/O&M		5,292(x)	2,646 (x)	1,323 (x)	
(11) Incomplete SWPPP/O&M or SWPPP not on site (storm water)		2,646 (x)	1,323 (x)	661 (x)	
(12) Biosolids transport violation		6,615 (x)	2,646 (x)	1,323 (x)	
(13) Other		2,646 (x)	1,323 (x)	712 (x)	
Subtotal 1.a – Violations and Frequency					
b. Aggravating Factors					
(1) Major Facility	Y	N	Subtotal #1.a (x) 0.4		
(2) Compliance History					
Order or decree in another media program within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) subtotal line 1.a, or $5,000		
Order or decree in same media program within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) subtotal line 1.a (for 1 order in 36 mo.)		
(3) Degree of Culpability *(applied to specific line amount(s) or subtotal line 1.a)*	Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
(4) Natural gas transmission pipeline greater than 36 inches inside diameter (special order under § 62.1-44.15(8g))	Y	N	If yes, add 0.5 * *subtotal 1.a*		
Subtotal 1 b. – Aggravating Factors					
Subtotal - Gravity Based Component Subtotal *(Add Subtotal #1.a and Subtotal #1.b)*					
c. Flow Reduction Factor *(STP VPDES only) (discretionary based on good faith efforts to comply)*	Y	N	% Reduction	Reduction Amount	( )
Flow-Adjusted Gravity Based Component Subtotal *(Subtract Subtotal 1.c from Gravity Based Component Subtotal)*					
2. Economic Benefit of Noncompliance					
3. Ability to Pay *(based on information supplied by the facility)*					( )
Total Civil Charge/Civil Penalty *(Not to exceed $32,500 per day per violation)*					***$***

Renewable Energy Program

Virginia Code §§ 10.1-1197.5 through -1197.11 require DEQ to promulgate regulations governing small renewable energy projects. To date, DEQ has developed Permit by Rule Regulations for Wind, Solar and Combustion Projects.[58] Va. Code § 10.1-1197.9 provides for negotiated civil charges in consent orders for violations of the Small Renewable Energy Projects law, regulations, orders or permit conditions. A civil charge cannot exceed $32,500 for each violation. Each day of each violation constitutes a separate offense.

Violations of Renewable Energy Permit by Rule regulations may accompany violations of other DEQ programs, such as VWPP (unauthorized impacts to wetlands and/or streams) or Construction Stormwater Program requirements (unauthorized land disturbing activity). In these situations, staff use separate worksheets to calculate the appropriate civil charge to address the violations in each program.

Potential for Harm Examples

Potential for harm classifications are not used to determine whether a violation warrants formal enforcement, but to evaluate the civil charge in light of the facts of the case already in enforcement. Departure from the examples should be discussed with a Central Office enforcement manager and documented in the Enforcement Recommendation Plan.

Serious Classification examples include, but are not limited to:

- Solar and wind projects with a rated capacity greater than 80 megawatts (MW);
- Combustion projects with a rated capacity greater than 15 MW;
- Exceeding rated capacity for the permitted project;
- Failure to avoid, minimize, or mitigate damage to natural and cultural resources where those resources were eligible or potentially eligible to the Virginia Landmarks Register and the National Register of Historic Places, or an where irreparable damage results;59
- Potential for harm to any threatened or endangered state or federal species.

Moderate Classification examples include, but are not limited to:

- Solar and wind projects with a rated capacity between 5-80 MW;
- Combustion projects with a rated capacity between 5-15 MW;

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[58] Current regulations include Small Renewable Energy Projects (Wind) Permit by Rule, 9 VAC 15-40, Small Renewable Energy Projects (Solar) Permit by Rule, 9 VAC 15-60, and Small Renewable Energy Projects (Combustion) Permit by Rule, 9 VAC 15-70.

[59] Where cultural and natural resources means those features and values including all lands, minerals, soils and waters, natural systems and processes, and all plants, animals, topographic, geologic and paleontological components of an area as well as all modern, historic and pre-historic, sites, trails, structures, inscriptions, rock art and artifacts representative of a given culture occurring on or within an area. Damage in this context means actions that impair a cultural or natural resource value, usefulness, or normal function for current and future populations.

- Failure to avoid, minimize, or mitigate damage to natural and cultural resources where limited damage results;
- Potential for harm to any rare species listed with the Virginia Department of Conservation and Recreation (DCR).

Marginal Classification Examples include, but are not limited to:

- Failure to provide proper notice to the Department of the construction of a small renewable energy facility with a rated capacity less than 5 MW and a disturbance zone less than 10 acres in accordance Permit by Rule regulations;
- Failure to avoid, minimize, or mitigate damage to natural and cultural resources where no damage results;
- Potential for harm to any non-listed migratory fish, birds, or wildlife.

Calculating the Civil Charge

Staff should calculate an appropriate civil charge using the civil charge worksheet at the end of this section. The categories are the numbered items (1(a) through 1(i)) that make up the gravity based rows of the civil charge worksheet. When using the civil charge worksheet to address multiple violations discovered during the same inspection, staff calculates civil charges for each violation and then combine them to provide the total proposed civil charge. Applicable portions of the Worksheet may be copied to accommodate multiple violations. Staff uses this procedure to determine the appropriate civil charge for each category listed and enter it on the civil charge worksheet.

Line 1(a) – Failure to obtain permit coverage prior to commencing activity
This line item should be used to assess the effect on, and the extent of deviation from, the regulatory requirements, e.g., avoiding the permitting and evaluative process which ensures the appropriate avoidance and minimization options and alternative sites were fully explored.

Line 1(b) – Exceeding coverage authorized under a Permit by Rule
This line item should be used when a Responsible Party has impacted a geographic area beyond what is covered by the Permit by Rule. This line should be used to assess the extent of the deviation from the regulatory requirements.

Line 1(c) – Failure to implement mitigation plan
This line item should be used to capture the failure to perform or complete mitigation plan requirements

Line 1(d) – Failure to implement design and installation standards
This may include adjustment to the interconnection or entry points for the small renewable energy project or other changes to the project that require permit modification;

Line 1(e) – Exceeding rated capacity covered by Permit by Rule

Line 1(f) – Failure to conduct post-construction mitigation monitoring;

Line 1(g) – Failure to comply with a consent order or other order
In this category, DEQ assesses civil charges for consent or other order violations;

Line 1(h) – Failure to keep required records or meet reporting requirements

Line 1(i) – Other violations

Length of Time Factor Category

The longer a violation continues uncorrected, the greater the potential for harm. The Worksheet addresses this consideration in the category labeled "Length of Time Factor." Where separate civil charges are not assessed for daily, documented violations, DEQ calculates the civil charge for this factor as follows: (a) multiply the number of days the violation occurred by 0.274 (i.e., 1/365) - this is the Percent (%) Increase Factor; (b) divide this factor by 100 to obtain the decimal expression, which is then multiplied by the Preliminary Subtotal to obtain the additional civil charge.

The time span begins on the day the violation began and ends on the date the Responsible Party corrects the violation addressed by the civil charge, or on the date the Responsible Party agrees in principle to a set of corrective actions designed to achieve compliance with the regulatory requirement for which the civil charge was assessed. For violations where the length of time exceeds five years, DEQ calculates the civil charge based on a length of time of five years (1,826 days). This limitation on length of time does not apply to calculation of economic benefit.

- For construction without a permit, the length of time begins with the start of construction and ends when the source either begins operation of the equipment or the source submits a complete permit application for the small renewable energy project or agrees in principle to a set of corrective actions.
- For operation without a permit, the time span begins with the start-up of the equipment and ends when the source submits a complete permit application for the small renewable energy project.

The following is an example of how to calculate a "length of time" civil charge:

- Calculate the length of time in days that the noncompliance existed. For this example, 200 days elapsed between the beginning day of the noncompliance and the date the source agreed in principle to a set of corrective actions necessary to return to a state of compliance.
- Multiply the number of days by 0.274. Take 200 and multiply it by 0.274 to get 54.8, which is rounded up to the nearest whole number and divided by 100 to get 55%, or a factor of 0.55.
- Multiply the Preliminary Subtotal (or appropriate portion thereof) calculated on the Worksheet by the Length of Time Factor. Assume for this example that the Preliminary Subtotal is $1,300. $1,300 times 0.55 yields $715.

Renewable Energy Projects Civil Charge Worksheet
Va. Code §§ 10.1-1197.5-1197.11

Facility/Responsible Party	EA No.	Per./Reg No.	NOV Date	
	NOV Observation #	**Potential for Harm** *(Environmental Harm and Severity)*		
		Serious	**Moderate**	**Marginal**	***Amount***
1. Gravity-based Component					
Violations and Frequency		$ (x) occurrences			
a. Failure to obtain Permit by Rule coverage prior to commencing		13,229 (x)	6,615 (x)	3,307 (x)	
b. Exceeding permitted boundaries		7,938 (x)	3,664 (x)	1,832 (x)	
c. Failure to implement the mitigation plan		13,229 (x)	6,615 (x)	3,307 (x)	
d. Failure to implement design and installation standards		2,646 (x)	1,323 (x)	661 (x)	
e. Exceeding rated capacity covered by the Permit by Rule		5,201 (x)	3,664 (x)	1,832 (x)	
f. Failure to conduct or submit post-construction mitigation monitoring data		3,664 (x)	1,832 (x)	916 (x)	
g. Consent Order or other Order condition violated		7,938 (x)	3,664 (x)	1,832 (x)	
h. Other recordkeeping or reporting violations		2,646 (x)	1,323 (x)	661 (x)	
i. Other violations not listed above		5,291 (x)	2,646 (x)	1,323 (x)	
Preliminary Civil Charge/Civil Penalty					
2. Length of Time (enter days)	Days of Violation		Factor %		
3. Compliance History					
Order or decree in another media program within 36 months before initial NOV	Y	N	If yes, add lesser of 0.05 * preliminary subtotal or $5,000		
Order or decree in same media program within 36 months before initial NOV	Y	N	If yes, add 0.5 * preliminary subtotal		
4. Degree of Culpability *(applied to specific line amount(s) or preliminary subtotal)*	Low = (x)*0		Moderate = (x)*0.25	Serious =	High = (x)*1.0
5. Economic Benefit of Noncompliance					
6. Ability to Pay *(based on information supplied by the facility)*					( )
Total Civil Charge/Civil Penalty *(may not exceed $32,500 per day per violation)*					***$***

Surface Water Withdrawal Program[60]

The Virginia Water Protection Permit Program is authorized to assess civil charges for violations of Va. Code § 62.1-44.15:22 and 9 VAC 25-210-10 *et seq*. that involves the unauthorized withdrawal of surface water and other conditions necessary to protect beneficial uses.

Potential for Harm Examples

Staff may adjust the potential for harm thresholds based on case-specific factors such as but are not limited to: proximity to other surface water withdrawals, potential impacts to downstream uses; impacts to aquatic and wildlife habitat; fish kills and other harm to wildlife;[61] unique aspects or critical habitats; water quality; any applicable Total Maximum Daily Loads; or impacts to beneficial uses.

Serious Classification

Exceeding (daily, monthly, or annual) permitted or excluded water withdrawal limits greater than 25%;

- Unauthorized Withdrawal comprises greater than 25% of instream flow at the intake;
- Failure to implement a Water Conservation Management Plan or mandatory conservation measures during a declared drought emergency; or
- Exceeding withdrawal limits or failing to meet instream flow requirements or impoundment releases in streams resulting in harm to wildlife.

Moderate Classification

Exceeding (daily, monthly, or annual) permitted or excluded water withdrawal limits between 10% and 25%;

- Unauthorized Withdrawal comprises between 10% and 25% percent of instream flow at the intake;
- Failing to implement a drought management plan;
- Chronic late submission of monitoring reports or permit application, or failure to follow an operation & maintenance manual.

Marginal Classification

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[60] Surface water withdrawals in violation of the Virginia Water Protection Permit Program should not be confused with violations involving Surface Water Management Areas. Violations of this section of the State water control law are to be assessed pursuant to that pursuant to VA Code § 62.1-252(A) which states that, "Any person who violates any provision of this chapter shall be subject to a civil penalty not to exceed $1,000 for each violation. Each day of violation shall constitute a separate offense."

[61] Harm in this context should be defined broadly but generally includes any act which actually kills or injures fish or wildlife, and emphasizes that such acts may include significant habitat modification or degradation that significantly impairs essential behavioral patterns of fish or wildlife.

- Exceeding (daily, monthly, or annual) permitted or excluded water withdrawal limits by less than 10%;
- Unauthorized Withdrawal comprises less than 10% of the instream flow at the intake.

Civil Charge Calculations

Line 1(a), Unpermitted Withdrawal: An occurrence is defined by the regulation to be per day or per month based on the type of the withdrawal and location.

Line 1(e) through 1(g): Exceeding a Withdrawal Limit: When assessing a civil charge for these line items, one or more withdrawal limits may be violated from a single withdrawal. In the event that one or more of these line items is violated, staff should evaluate the potential for harm to determine whether its potential for harm should be increased.

Surface Water Withdrawal Civil Charge Worksheet

Va. Code §§ 62.1-44.15:20 -44.15:23

Permittee/Responsible Party	NOV Observation #	Reg. No.		Date	
		Potential for Harm *(Environmental Harm and Severity)*			
		Serious	**Moderate**	**Marginal**	***Amount***

1. Gravity Factors – Surface water Withdrawal *(Severity and Environmental Harm)*					
Violations and Frequency		*$ (x) occurrences*	*$ (x) occurrences*	*$ (x) occurrences*	
a. Unpermitted withdrawal		13,229 (x) __	6,615 (x) ___	3,307 (x) ___	
b. Failure to mitigate		13,229 (x) __	6,615 (x) ___	3,307 (x) ___	
c. Failure to implement a Water Conservation Management Plan		5,292 (x) ___	2,646 (x) ___	1,323 (x) ___	
d. Failure to submit a permit application		5,292 (x) ___	2,646 (x) ___	1,323 (x) ___	
e. Exceedance of withdrawal limit (Daily)		1,323 (x) ___	712 (x) ___	102 (x) ___	
f. Exceedance of withdrawal limit (Monthly)		2,646 (x) ___	1,323 (x) ___	712 (x) ___	
g. Exceedance of withdrawal limit (Annual)		5,292 (x) ___	2,646 (x) ___	1,323 (x) ___	
h. Failure to submit, complete record or reporting; (Failure to maintain and/or submit are separate occurrences)		2,646 (x) ___	1,323 (x) ___	712 (x) ___	
i. Failure to report (requested application, water audit, new well, etc.) (per event)		2,646 (x) ___	1,323 (x) ___	712 (x) ___	
j. Failure to install and/or maintain equipment or other operational deficiencies		2,646 (x) ___	1,323 (x) ___	712 (x) ___	
k. Other Violations; Permit, Special Exceptions, or Special Conditions NOT listed above (per event)		2,646 (x) ___	1,323 (x) ___	712 (x) ___	
Violations and Frequency Subtotal					
3. Aggravating Factors *(Severity and Compliance History)*					
a History of Noncompliance					
Order or decree in another media program within 36 mo. before initial NOV	*Y*	*N*	*If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or $5,000*		
Order or decree in same media program within 36 mo. before initial NOV	*Y*	*N*	*If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)*		
b Degree of Culpability(apply to violation(s)' Amount or to the Violations and Frequency Subtotal))	*Low = (x) 0*		*Moderate = (x) 0.25*	*Serious = (x) 0.5*	*High = (x) 1.0*
Aggravating Factor Subtotal					
Gravity-Based Component Subtotal (1+2)					
4. Economic Benefit of Noncompliance *(Economic Benefit)*					
5. Ability to Pay *(Ability to Pay)*					*( )*
Total Civil Charge/Civil Penalty *(may not exceed $32,500 per day per violation);* a civil penalty not to exceed $1,000 for each violation in a designated Surface Water Management Area.					***$***

Virginia Water Protection Permit Program

This section of the Enforcement Manual addresses unpermitted activities such as wetland excavation; draining, altering or degrading; filling or dumping; permanent flooding or impounding; new activities that cause significant alteration or degradation of existing wetland acreage or functions; or alteration of the properties of state waters.

Wetland and Stream Impacts

Potential for Harm Examples

In assessing the potential for harm, DEQ staff should first consider the relative level of impacts reflected by the permitting thresholds or the size of the compensatory mitigation. For example, discharges or impacts that would require an individual permit are considered serious, impacts that would have required a full general permit requiring compensation are considered moderate, and impacts that would have required reporting-only are considered marginal.

If staff believe that these thresholds should be adjusted, additional justification should be provided through consideration of the following factors: classification of a wetland type (*e.g.,* PFO, PSS, PEM)[62]; surrounding land use and cover types; nutrient, sediment, and pollutant trapping ability; flood control and flood storage capacity, and flood flow synchronization; erosion control and shoreline stabilization; groundwater recharge and discharge; aquatic and wildlife habitat; unique aspects or critical habitats; water quality; and recreation, education, aesthetics, or other beneficial uses. [63]

Calculating the Civil Charge

The Virginia Water Protection Permit (VWPP) Program is authorized under Va. Code §§ 62.1-44.15:20 through -44.15:23. Negotiated civil charges for Virginia Water Protection Permit (VWPP) violations are authorized by Va. Code § 62.1-44.15(8d). The maximum penalty is $32,500 per day for each violation.[64]

Civil charges for VWPP violations are assessed per occurrence. An occurrence is defined as a separate, identifiable, discrete act that results in a discharge of a pollutant to state waters. Separate civil charges are assessed: (1) for impacts to streams and/or (2) for impacts to wetlands. Each occurrence of a discharge to streams and wetlands is evaluated based on the potential for harm to the environment and the extent of deviation from regulatory program. Occurrences to wetlands and streams are evaluated separately because these two surface water types provide different ecosystem services and a different potential for harm may result from a discharge.

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[62] Under the U.S. Fish and Wildlife Service Wetland Classification System, wetlands are of two basic types: coastal (also known as tidal or estuarine wetlands) and inland, also known as non-tidal, freshwater, or palustrine wetlands which have three classes: palustrine emergent (PEM), palustrine scrub-shrub, (PSS), and palustrine forested (PFO).

[63] Va. Water Protection Functional Loss Criteria. *See,* 9 VAC 25-210-80(B)(1)(k)(1) and 9 VAC 25-210-116(A).

[64] Va. Code § 62.1-44.15 incorporates by reference the civil charge amount from Va. Code § 62.1-44.32.

Wetland type is not considered when determining the number of occurrences unless the different wetland types are subject to a separate occurrence. Wetland type is considered when evaluating the potential for harm. Also, an individual stream reach is not considered when determining the number of occurrences, unless there have been separate occurrences affecting the same or different portions of the stream(s).

Line 1(a): Failure to obtain coverage under an Individual Permit (IP) or a General Permit (GP) prior to commencing activity

This line should be used to assess the effect on, and the extent of the deviation from, the regulatory requirements, *e.g.,* avoiding and circumventing the permitting and evaluative process which ensures the appropriate avoidance and minimization options and alternative sites were fully explored, and any areas that could not be avoided were fully compensated for in a consistent and manner to ensure no net loss.

Description	Serious	Moderate	Marginal
Impacts to more than two (2) acres of wetlands or open water or more than 1,500 linear feet (LF) of stream	X		
Impacts from 1/10 to two (2) acres of wetlands or open water or from 301 to 1,500 LF of stream		X	
Impact to less than 1/10 acre of wetlands or open water or up to 300 LF of stream.			X

Line 1(b): Exceeding coverage authorized under an IP or GP

This line should be used when a Responsible Party has exceeded the impacts covered by the type of permit or registration it holds. This line should be used to assess the extent of the deviation from the regulatory requirements. The potential for harm for this line is assessed as follows:

Description	Serious	Moderate	Marginal
Exceedances that: Cause a project to move from requiring a GP to an IP (i.e., total project impacts now exceed 2 acres of wetlands or open water or 1,500 LF of streams); or Exceed permitted impacts by 2 or more acres of wetlands or open water, or 1,500 or more LF of stream.	X		
Exceedances that: Cause a project to move from requiring a reporting-only general permit to a full general permit (i.e., total project impacts now exceed 0.10 acre of wetlands or open water, or 300 LF of streams.); or		X	

Require a major modification of an individual permit (i.e., changes that cumulatively exceed 0.25 acre but less than 2 acres of wetlands/open water, or that cumulatively exceed 100 LF but less than 1,500 LF of stream); or Require an additional GP or reauthorization of a GP. This would be change(s) that cumulatively exceed 0.25 acre of wetlands/open water or 100 LF.			
Exceedances that would be equivalent to or less than a minor modification of an IP under 9 VAC 25-210-180(F) or a Notice of Planned Change under 9 VAC 25-690-80(B). Thresholds are cumulative increases in acreage of wetland or open water impacts up to 0.25 acre and cumulative increases in stream bed impacts up to 100 LF.			X

Line 1(c): Failure to perform or complete compensatory mitigation

This line should be used to capture the failure to perform or complete compensation requirements required by the permit, e.g., purchase of wetland or stream credits, preservation, restoration or enhancement, or wetland creation.

Line 1(d): Failure to perform or complete corrective action relative to unsuccessful compensation (after the monitoring period has begun)

This line should be used when the Responsible Party fails to implement corrective action to ensure compensation meets no net loss.

Line 1(e): Failure to conduct compensation monitoring or water quality monitoring

This line should be used when the Responsible Party fails to perform the affirmative act of monitoring or the totality of the circumstances indicates that the monitoring has not been conducted. Not to be used in place of 1(l) but in conjunction with it.

Line 1(f): Failure to conduct construction monitoring.
See, 1(e) above.

Line 1(g): Failure to submit preconstruction notice

Line 1(h): Failure to submit plans and specifications prior to commencing construction

Line 1(i): Unauthorized impacts to wetlands and/or streams (wetlands and streams will be assessed separately)

This line should be used when the Responsible Party has discharged pollutants to state waters (wetlands or streams) per occurrence in order to assess a civil charge for the harm to the environment, and should be used in conjunction with 1(a) or 1(b) which captures the harm to the regulatory program.

Where the discharge of pollutants is a result of, but not limited to, the failure of E&S controls and unattenuated stormwater, failure to stabilize disturbed lands, or the failure and/or inadequate use of BMP's, this violation should be used without assessing line 1(a) or line 1(b).

Line 1(j): Failure to comply with permit special conditions

This line should be used when the Responsible Party has failed to comply with permit special conditions including, but not limited to, storm water management; E&S controls; flagging non-impact areas; restoring temporary impacts; working in the dry time-of-year restrictions; maintain minimum instream flow; operating equipment in streams; discharge of concrete to waters; *etc.*

Line 1(k): Failure to submit a complete, final compensation plan

Not to be used with 1(h) or 1(l).

Line 1(l): Records or reporting violations

This line should be used, but is not limited to, when the RP has failed to: record easements (other than 1(c)); certify reports; submit complete construction, mitigation, or water quality monitoring reports; submit as-built surveys; notify of permit transfer, *etc*.

Line 1(m): Failure to report

Failure to notify DEQ of unpermitted discharge/fill to state waters. This can be assessed for failing to notify within 24 hours upon learning of the discharge or for the RP failing to submit the 5-day follow letter.

VWPP Civil Charge Worksheet

Va. Code §§ 62.1-44.15:20 through -44.15:23

Permittee/Responsible Party	NOV Observation #	Reg. No.		Date	
		Potential for Harm *(Environmental Harm and Severity)*			
		Serious	**Moderate**	**Marginal**	***Amount***
1. Gravity Factors – Surface Water and Wetlands *(Severity and Environmental Harm)*					
Violations and Frequency		$ (x) occurrences	$ (x) occurrences	$ (x) occurrences	(Comments)
a. Failure to obtain coverage under an Individual Permit (IP) or a General Permit (GP) prior to commencing activity		6,615 (x) ___	2,646 (x) ___	1,323 (x) ___	
b. Exceeding coverage authorized under an IP or GP		6,615 (x) ___	2,646 (x) ___	1,323 (x) ___	
c. Failure to perform or complete compensatory mitigation		26,549 (x) ___	13,229 (x) ___	6,615 (x) ___	
d. Failure to perform or complete corrective action relative to unsuccessful compensation.		13,229 (x) ___	6,615 (x) ___	2,600 (x) ___	
e. Failure to conduct compensation monitoring or water quality monitoring		6,615 (x) ___	2,646 (x) ___	1,323 (x) ___	
f. Failure to conduct construction monitoring		6,615 (x) ___	2,646 (x) ___	1,323 (x) ___	
g. Failure to submit preconstruction notice		13,229 (x) ___	6,615 (x) ___	2,646 (x) ___	
h. Failure to submit plans and specifications prior to commencing construction		6,615 (x) ___	2,646 (x) ___	1,323 (x) ___	
i. Unauthorized impacts to wetlands and/or streams (wetlands and streams will be assessed separately)		26,549 (x) ___	13,229 (x) ___	6,615 (x) ___	
j. Failure to comply with permit special conditions		6,615 (x) ___	2,646 (x) ___	1,323 (x) ___	
k. Failure to submit a complete, final compensation plan		6,615 (x) ___	2,646 (x) ___	1,323(x) ___	
l. Record or reporting violations (not otherwise specified)		2,646 (x) ___	1,323 (x) ___	712 (x) ___	
m. Failure to report a discharge		13,000 (x) ___	6,615 (x) ___	1,323 (x) ___	

Violations and Frequency Subtotal						
2. Aggravating Factors *(Severity and Compliance History)*						
a History of Noncompliance						
Order or decree in another media program within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or $5,000			
Order or decree in same media program within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)			
b Degree of Culpability *(apply to violation(s)' Amount or to the Violations and Frequency Subtotal)*	Low = (x) 0		Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
c. Natural gas transmission pipeline greater than 36 inches inside diameter (special order under § 62.1-44.15(8g))	Y	N	If yes, add 0.5 * *1 Violations and Frequency Subtotal*			
Aggravating Factor Subtotal						
Gravity-Based Component Subtotal (1+2)						
3. Economic Benefit of Noncompliance *(Economic Benefit)*						
4. Ability to Pay *(Ability to Pay)*						( )
Total Civil Charge/Civil Penalty *(may not exceed $32,500 per day per violation)*						

Civil Charge Adjustment form

(FOIA-exempt until after a proposed sanction resulting from the investigation has been proposed to the Director of the agency (i.e., public notice)

Responsible Party/Facility Name	**Permit/Registration**	**Enforcement Action No.**	**NOV Date**
			Amount
Total Civil Charge including Economic Benefit			$
1. Adjustments over 30% Requires Director of Enforcement Approval			
a.	Problems of Proof		$
b.	Impacts or Threat of Impacts (or Lack Thereof) to Human Health or the Environment		$
c.	Precedential Value of the Case		$
d.	Probability of Meaningful Recovery of a Civil Charge		$
e.	Litigation Potential		$
2. Total Adjustments from Section 1 and Section 2			$
3. Increase for continuing or uncorrected violations, economic benefit from delay			$
4. Adjusted Total Civil Charge			$

Reasoned Analysis:

Enforcement specialist: _____ Date _____

Regional Office Enforcement Manager: _____ Date _____

Director of Enforcement: _____ Date _____

Chapter Five – Incentives for Identifying and Resolving Violations

This chapter describes incentives for Responsible Parties to identify and disclose their own violations through voluntary environmental assessments – both a qualified privilege against production of information and a qualified immunity against civil charges and civil penalties. This chapter also describes how DEQ and Responsible Parties can include Supplemental Environmental Projects (SEPs) in consent orders and consent decrees in partial settlement of civil charges and civil penalties. These incentives are in addition to the ones available to every Responsible Party for an expeditious return to compliance and quick settlement, as described in Chapter 4.

Voluntary Environmental Assessments

DEQ promotes voluntary environmental assessments and encourages facility owners and operators to voluntarily discover, disclose, correct and prevent violations of environmental requirements.

Under Virginia statutes, facility owners or operators who perform voluntary environmental assessments enjoy a privilege from disclosing the resulting documents *and* immunity from all administrative or civil penalties for the violations they discover as a result, so long as the violations are voluntarily and promptly disclosed and corrected. The laws have qualifications, however, and they do not apply to programs that have been authorized, delegated, or approved by EPA ("federally authorized programs").[109] For federal enforcement of these programs, EPA has issued its own policy on "self-policing," commonly called the "Audit Policy." For state enforcement of federally authorized programs (or if the conditions of the immunity statute are not met), DEQ uses its enforcement discretion to adhere in large measure to the federal Audit Policy.[110]

These procedures describe the review and processing of assertions of state privilege and immunity, and the exercise of state enforcement discretion using criteria similar to those in the federal Audit Policy, for violations found during voluntary environmental assessments and voluntary environmental audits.

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[109] *See* January 12, 1998 letter from Virginia Attorney General Richard Cullen to EPA Region III Administrator Michael McCabe, styled *General Responses Regarding Virginia's Environmental Assessment Privilege and Immunity Law* (Attachment 1). Federally authorized programs potentially include: (1) the Virginia Pollutant Discharge Elimination System (VPDES), Pretreatment, and Wetlands programs under the Clean Water Act; (2) the Hazardous Waste (Subtitle C), Solid Waste (Subtitle D), and Underground Storage Tank (Subtitle I) programs under the Resource Conservation Recovery Act; and (3) the Title V, New Source Performance Standards, National Emission Standards for Hazardous Air Pollutants, and New Source Review Programs under the Clean Air Act. *See* EPA, *Statement of Principles – Effect of State Audit Immunity/Privilege Laws on Enforcement Authority for Federal Programs* (February 14, 1997) (Attachment 2). If there is a question whether a program or requirement is federally authorized, staff should contact the appropriate program office. For example, only portions of the Solid Waste Program are subject to federal approval under RCRA Subtitle D.

[110] See, U.S. EPA Federal Audit Policy.

Neither the state statutes nor the federal policy affects the obligation of facility owners and operators to correct violations and remediate their effects.[111]

Statutory Requirements and Enforcement Discretion

In 1995, the Virginia General Assembly passed Va. Code § 10.1-1198 - *Voluntary environmental assessment privilege* and Va. Code § 10.1-1199 - *Immunity against administrative or civil penalties for voluntarily disclosed violation*. These companion provisions encourage the use of voluntary environmental assessments (sometimes called "environmental audits") to identify noncompliance with environmental requirements and to provide qualified immunity against administrative and civil penalties, if violations are discovered during the course of such an assessment. The statutes do not provide relief from criminal sanctions, nor from civil injunctive relief or other appropriate regulatory action. Va. Code § 10.1-1198(A) defines an environmental assessment as:

> *[A] voluntary evaluation of activities or facilities or of management systems related to such activities or facilities that is designed to identify noncompliance with environmental laws and regulations, promote compliance with environmental laws and regulations, or identify opportunities for improved efficiency or pollution prevention. ...*

Va. Code § 10.1-1198: Voluntary Environmental Assessment Privilege

Va. Code § 10.1-1198 provides a privilege against compelled production of a document[112] resulting from a voluntary environmental assessment or information about its contents; a prohibition on the admissibility of such documents in administrative or judicial proceedings without the written consent of the facility owner or operator; and a privilege against production of the document under a state information request.

Exceptions to the privilege are as follows:

- Where information demonstrates a clear, imminent, and substantial danger to the public health or the environment;
- Where the information was generated or developed before the commencement of the voluntary environmental assessment showing noncompliance;
- Where the document is required by law (including documents or other information needed for civil or criminal enforcement of federally authorized programs);

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[111] These procedures does not address legislation on Brownfields, Va. Code § 10.1-1230 *et seq*.

[112] "Document" means information collected, generated or developed during, or resulting from, an environmental assessment, including but not limited to field notes, records of observation, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, videotape, computer-generated or electronically recorded information, maps, charts, graphs and surveys..." Va. Code § 10.1-1198.

- Where the document was prepared independently of the voluntary environmental assessment; or
- Where the document was collected, generated, or developed in bad faith.

If any of these exceptions apply, then the facility owner or operator is not entitled to the privilege under Va. Code § 10.1-1198.

Va. Code § 10.1-1199: Immunity from Penalties for Voluntarily Disclosed Violations

This section provides that any person making a voluntary disclosure of information to a state or local regulatory agency regarding a violation of an environmental statute, regulation, permit or administrative order is immune from **ANY** administrative or civil (not criminal) penalty, so long as **ALL** of the following criteria are met:

- Discovery is made through a voluntary environmental assessment.
- Disclosure is not already required by law, regulation, permit, or administrative order. For example, failure to report an oil spill would not qualify for immunity, since State Water Control Law requires immediate reporting of all oil spills.
- Disclosure is made promptly after discovery. To be prompt, notification should be provided to the Regional Director of the appropriate DEQ Regional Office within 21 calendar days after discovery.
- The violation is corrected in a diligent manner. Correction should occur within 60 calendar days of discovery, or under an acceptable compliance schedule submitted to the DEQ Regional Office within the same period. As necessary, correction should be incorporated into a letter of agreement or an order.
- The person making the disclosure has not acted in bad faith. Examples of bad faith include rushing to commence or complete an assessment in anticipation of a pending government inspection or investigation, or the ensuing report (unless DEQ determines that the facility owner or operator did not know of the pending inspection or investigation and that it is otherwise acting in good faith), and an audit following the transfer of a facility with a poor compliance history to a new subsidiary of the same company or group of companies.
- The disclosed violations are not violations of a federally authorized program. Federally authorized programs are described in footnote 2, above.

If any of the criteria are not met, then the disclosing owner or operator is not entitled to immunity from penalties under Va. Code § 10.1-1199. However, even if the disclosure fails to qualify for statutory *immunity* (either because the violation arises under a federally authorized program, or because the circumstances do not meet the criteria for statutory immunity), it is generally appropriate policy to exercise enforcement *discretion* as to penalties in keeping with the federal policy on self-policing.

Enforcement Discretion Using the Federal Policy on Self-Policing

There are no federal statutes conferring privilege or immunity for voluntary environmental assessments; however, EPA has a policy called *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations* (FRL-6576-3; effective May 11, 2000), [113] commonly called "the Audit Policy." The Audit Policy outlines circumstances in which EPA will exercise its enforcement discretion and forego some or all administrative or civil penalties for "regulated entities" that voluntarily discover, disclose and correct noncompliance, and take steps to prevent future noncompliance.

Virginia statutory immunity and federal enforcement discretion are not the same. Virginia immunity is available as a matter of law where it applies, while federal enforcement discretion is mere policy. Further, the criteria recited in the Virginia statute and the federal policy, while similar, are not identical. The terminology is also different – where Virginia statutes refer to "voluntary environmental assessments" and "facility owners or operators," the federal policy refers to "environmental audits" and "regulated entities."

In keeping with federal policy, DEQ should exercise enforcement discretion and forego collection of 100% of the gravity[114] portion of an administrative or civil penalty, if the regulated entity reports violations discovered during an environmental audit and meets **ALL** the following criteria:

- The violation is discovered using systematic methodology. Examples of systematic methodologies include an environmental audit; an environmental management system (EMS) that includes components for compliance due diligence in preventing, detecting and correcting violations; and a similar EMS at an extraordinary environmental enterprise (E4) or an exemplary environmental enterprise (E3) facility in the Virginia Environmental Excellence Program (VEEP).
- The discovery of the violation is voluntary. The violation should be discovered voluntarily, and not as a result of a mandatory monitoring, sampling or auditing procedure required by law, regulation, permit or enforcement action. Examples of mandatory actions include continuous emissions monitoring, VPDES sampling and media-specific compliance audits required by an enforcement action. However, the discovery is still considered voluntary if the violations are found under a comprehensive, multi-media EMS, even if the EMS was required by an enforcement action.115

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[113] DEQ"s practice for enforcement discretion is taken generally from this document; however, clarifications and changes have been made to better suit the requirements and needs of Virginia programs and constituents. DEQ will adhere to the federal policy to the extent described herein.

[114]DEQ retains its full authority to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage over complying entities; however, the Regional Office may forego collection of economic benefit in addition to the gravity component in the event that the economic benefit component is not significant.

[115] Both EPA and DEQ take this view to encourage and reward the implementation of EMS programs.

- Disclosure of the violation is prompt. Discovered violations should be disclosed in writing to the Regional Director of the appropriate DEQ Regional Office within 21 calendar days of discovery or when an officer, director, employee, or agent of the facility has an objectively reasonable basis for believing that a violation has, or may have, occurred. A shorter time may be prescribed by law. Disclosure should be immediate in the event that the violation poses a threat to human health or the environment. At the discretion of the Regional Director, an extension may be allowed for receipt of the final violation report or documentation.
- Discovery and disclosure are independent of government or third parties. The violation should be discovered and disclosed before the government or a third party likely would have identified the violation. Examples of disclosure not meeting the "independent" criteria include those made: during the pendency of a government inspection or investigation, or the ensuing report (unless DEQ determines that the regulated entity did not know of the pending inspection or investigation and that it is otherwise acting in good faith); after the issuance of an information request from the government to the entity; following notice of a citizen suit, report of a "whistleblower," or other complaint by a third party; and when discovery of the violation by a regulatory agency is imminent.
- Correction and remediation are timely. Corrections should be completed within 60 calendar days from the date of discovery and notification of such provided in writing to the DEQ Regional Office, or a satisfactory implementation plan and schedule for corrective action and remediation should be submitted to the DEQ Regional Office within 60 calendar days. Schedules for corrective action should be incorporated into enforcement orders if determined to be necessary by the Regional Office. Compliance schedules are public documents.
- Steps are taken to prevent reoccurrence. Regulated entities should document to DEQ the steps being taken to prevent a recurrence of the violation.
- The regulated entity cooperates fully in the documentation, disclosure, and correction of the violations.

If a regulated entity meets all criteria except "systematic discovery" (the first criterion listed above), DEQ should exercise enforcement discretion and forego collection of 75% of the gravity[116] portion of an administrative or civil penalty.

Privilege from Disclosure of Documents or Information

A person or entity asserting a voluntary environmental assessment privilege has the burden of proving a *prima facie* case as to the privilege. If DEQ seeks disclosure of a document or information, it has the burden of proving the applicability of an exception to the voluntary environmental assessment privilege. Va. Code § 10.1-1198(C) contains detailed procedures for asserting and contesting a claim of privilege against the production of documents. If a facility owner or operator asserts the privilege, Regional Office staff should contact Central

[116] See footnote 6.

Office enforcement staff for assistance. Note that owners or operators waive the privilege as to any information they disclose voluntarily.[117]

Immunity or Enforcement Discretion from Penalties

A facility owner or operator seeking relief should contact the Regional Office. A facility owner or operator seeking penalty relief for voluntary disclosure of violations should address a written request to the appropriate Regional Director detailing how its request meets Virginia immunity criteria, or the federal audit policy criteria as recited herein, or both. The full request and explanation need not be submitted within the 21 calendar days of discovery of the violation, so long as the violation at issue is fully disclosed within that time. If additional clarification or information is needed, the Regional Office should document the request to the file.

Regional Office evaluation. In reviewing the submitted information, the Region should consult with CO enforcement. If the facility is a VEEP participant, the Region should also consult with VEEP staff. The Regional Office should also notify the appropriate Central Office Division if one of programs operated primarily from Central Office is impacted. An evaluation of and recommendation on the request should then be made by Regional Office staff to the Regional Director by means of an Enforcement Recommendation and Plan (ERP). The ERP should also include an evaluation of the sufficiency of the corrective action measures taken and/or proposed, a recommendation whether part of the penalty should be collected (presuming enforcement discretion criteria are met, but not immunity criteria), and a recommendation whether an enforcement order is appropriate to ensure correction is completed. In no event should any DEQ staff acknowledge immunity or pledge enforcement discretion on penalties until corrective action is completed or substantially underway.

Response to regulated party. The Director fo Enforcement should attempt to respond to the requestor in writing within 30 calendar days of the request. If an enforcement order is needed to memorialize and make enforceable a plan and schedule for corrective action, DEQ should also schedule a meeting within that time to discuss and finalize the necessary enforcement order. It is appropriate that DEQ enforcement documents recite the facility owner or operator's level of cooperation and the voluntary nature of the violation's discovery and disclosure.

Agency Documentation. Both the state immunity statute and the federal Audit Policy impact only potential penalties resulting from violations, not the underlying violations themselves. Therefore, Regional Office responses to violations (documentation of violations in CEDS and transfer of data to appropriate federal authorities; issuance of Warning Letters, Notices of Violation, and consent orders for injunctive relief) should follow usual practice in recording and documenting the violation. The agency documents and database entries, however, should also show that the violation was self-disclosed. DEQ should notify EPA when DEQ exercises

[117] If access to a document or information is obtained, not voluntarily, but by order of a hearing examiner or a court, the information may not be divulged, except as specifically allowed by the hearing examiner or the court. Va. Code § 10.1-1198(C).

enforcement discretion in response to voluntary reporting at a major or other federally-tracked facility in a federally authorized program.

Consultation with Division of Enforcement. These procedures are summary in nature. Staff should consult with Central Office enforcement staff if they receive an assertion of privilege or a request for immunity or enforcement discretion regarding a voluntary environmental assessment or environmental audit.

Supplemental Environmental Projects

In settling enforcement actions, DEQ requires parties to comply with environmental laws and regulations, remediate environmental damage, and, as appropriate, pay civil charges or civil penalties (civil charges). In some limited and appropriate cases, settlement may include the Responsible Party's performance of an environmentally beneficial project, called a Supplemental Environmental Project (SEP), which goes beyond compliance. Performance of an approved SEP can mitigate a portion of a civil charge.

There is no presumption in favor of or against including an SEP in a given settlement. The Responsible Party must consent to and propose the SEP. DEQ's decision to agree or not agree to an SEP is wholly discretionary and not subject to appeal.[118] The benefits to human health and the environment should clearly outweigh the amount of the civil charges mitigated by the SEP and the resource costs to DEQ in reviewing the SEP Proposal and documenting its performance. Since DEQ is not obligated to settle a case, it is also not obligated to agree to an SEP as a partial settlement of civil charge liability. Still, SEPs are provided for by statute, and it is appropriate to incorporate SEPs into settlements, in accordance with statute and agency practice, where they are beneficial.

DEQ staff uses these procedures in evaluating proposals to include SEPs in administrative or judicial orders.[119] DEQ staff also use these procedures to calculate the resulting mitigation of civil charges and to review and document the performance of the SEP.[120]

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[118] The decision whether or not to agree to a SEP is not a "case decision" under the Virginia Administrative Process Act, Va. Code § 2.2-4000 *et seq.*

[119] For purposes of these procedures, the term "judicial order" includes a judicial consent decree.

[120] These procedures establishes a framework for DEQ to exercise its discretion in determining appropriate settlements of enforcement actions. It is not intended for use at a hearing or in trial. Nothing in this document shall be interpreted or applied in a manner inconsistent with applicable federal law or with any applicable requirement for the Commonwealth to obtain or maintain federal delegation or approval of any regulatory program. *See* Va. Code § 10.1-1186.2(F). *See also* U.S. EPA, EPA Supplemental Environmental Projects Policy (effective May 1, 1998) (1998 EPA SEP Policy) http://cfpub.epa.gov/compliance/resources/policies/civil/seps/. DEQ's practice for enforcement discretion is taken generally from this EPA document; however, clarifications and changes have been made to better suit the requirements and needs of Virginia programs and constituents. DEQ will adhere to the federal policy to the extent described herein.

Statutory Definition and Requirements

Va. Code § 10.1-1186.2 authorizes SEPs in administrative and judicial orders.[121] A consent order with an SEP must be entered "with the consent of the person subject to the order."[122] The Va. Code defines an SEP as, "an environmentally beneficial project undertaken as partial settlement of a civil enforcement action and not otherwise required by law." Va. Code § 10.1-1186.2(A).

Va. Code requires that SEPs have a "reasonable geographic nexus to the violation or, if no such project is available, shall advance at least one of the declared objectives of the environmental law or regulation that is the basis of the enforcement action." Va. Code § 10.1-1186.2(B). The elements of the SEP definition and the requirement for nexus are discussed in Section C, below.

The Code also provides that the following categories of projects may qualify as SEPs, if they meet all other requirements: public health, pollution prevention, pollution reduction, environmental restoration and protection, environmental compliance promotion, and emergency planning and preparedness. Va. Code § 10.1-1186.2(C). The categories of projects that may qualify as SEPs are discussed in Section D, below.

In determining the appropriateness and value of a proposed SEP, the statute requires consideration of all of the following factors: net project costs, benefits to the public or the environment, innovation, impact on minority or low income populations, multimedia impact, and pollution prevention. Va. Code § 10.1-1186.2(C). Statutory factors for evaluating SEP proposals are discussed in Section E, below.

Any decision whether or not to agree to a proposed SEP is within the sole discretion of the DEQ, or the court, and is not subject to appeal. Va. Code § 10.1-1186.2(E). Once an SEP is incorporated into an order, performance of the SEP is "enforceable in the same manner as any other provision of the order."[123]

Coordination Within and Outside DEQ

Once a civil charge amount has been negotiated, it is the responsibility of the party subject to the order, if it so chooses, to submit a complete SEP proposal in an expeditious manner, so that the proposal can be fully considered as part of the settlement process. In no event should

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[121]The authority extends to orders of the Director or any of the three citizen boards: the State Air Pollution Control Board, the State Water Control Board, or the Virginia Waste Management Board.

[122] Va. Code § 10.1-1186.2(B). *See also* Va. Code §§ 10.1-1300, 10.1-1400, 62.1-44.3 and 62.1-44.34:8, "Person" may include an individual, corporation, partnership, association, governmental body, municipal corporation, or any other legal entity. This document uses "person" and "party" interchangeably.

[123] Va. Code § 10.1-1186.2(B). SEPs do not alter a party"s obligation to return to compliance and remedy any violations expeditiously. Furthermore, a SEP does not reduce the stringency or timeliness of any applicable environmental statutes, regulations, orders, or permits. *See 1998 EPA SEP Policy* at page 5.

an SEP proposal be allowed to slow or unduly burden the settlement process. Informal communications concerning possible SEPs may begin early in the settlement process. When an SEP is proposed that has a reasonable expectation of meeting the statutory requirements, Regional Office enforcement staff should consult with staff from Central Office. If the SEP is proposed by a Responsible Party participating in the VEEP, or if the SEP is a pollution prevention (P2) project, staff should also consult with the Office of Pollution Prevention to ensure that the proposal is appropriately categorized as P2 and/or is not otherwise required in an existing VEEP agreement. If the proposed SEP is intended to restore impaired waters, staff should consult with staff in the Total Maximum Daily Load (TMDL) Program to confirm that the SEP appropriately addresses the pollutant(s) of concern. Staff may consult with specialists in any Regional Office, the Central Office, or federal, state, or local agencies, as needed, when evaluating a proposed SEP. If an SEP impacts more than the originating Region, the Regional Office should send the SEP proposal to each Region that may be impacted and invite its comments prior to giving approval.

Attachment 3 is a form entitled "Analysis of Proposed Supplemental Environmental Project" (SEP Analysis Addendum) for reviewing a proposed SEP under the Virginia statutory requirements. It functions as an addendum to the Enforcement Recommendation and Plan (ERP). The SEP Analysis Addendum includes a calculation of the civil charge mitigation (see Section F, below) and a recommendation by staff whether or not to approve the SEP. A Responsible Party may prepare a draft SEP Analysis Addendum and send it to DEQ electronically, but DEQ staff remain responsible for its contents, completeness and accuracy. Staff should forward the completed SEP Analysis Addendum, together with documentation of the projected net project costs, to DE for concurrence and then to Regional Office management for approval.

Elements of the SEP Definition and Nexus

Any proposed SEP must meet the statutory definition of an SEP and the following requirements:

Environmentally Beneficial

"Environmentally beneficial" means a SEP should improve, protect, or reduce risks to public health and/or the environment. *See 1998 EPA SEP Policy* . While in some cases an SEP may provide the violator with certain benefits, there should be no doubt that the project primarily benefits the public health and/or the environment. SEPs are not intended to reward Responsible Parties for undertaking activities that are in their individual economic interest. Rather, they should demonstrate a substantial, quantifiable benefit through the amelioration of an adverse impact to public health and/or the environment.

As Partial Settlement of a Civil Enforcement Action

"As partial settlement of a civil enforcement action" means that the SEP is a direct and sole result of a civil settlement of an alleged violation in a consent order. In other words, the

Responsible Party has not begun the project before DEQ: (1) identifies an alleged violation; (2) approves the SEP as part of the settlement of that violation; and (3) authorizes the Responsible Party to begin implementation of the SEP through the issuance of an order. DEQ should have the opportunity to review and approve, and in some cases help shape the scope of the project, before it is implemented.

An SEP is independent of any corrective action that may be required, and it can offset only a portion of the civil charge. The amount of offset of a civil charge is subject to the sole discretion of DEQ. The net project cost of the SEP and the consequent mitigation of civil charges are described below in Sections E and F, respectively.

Not Otherwise Required by Law

"Not otherwise required by law" means the project is not required to be performed by the party to the order or by another party, under any federal, state, or local statute, regulation, ordinance, order, or permit condition. In particular, the SEP cannot include actions that the party to the order or another party may be required to perform:

- As injunctive relief in the instant case;
- As part of a settlement or order in another legal action;
- By other federal, state, or local requirements;
- As part of a permit, including TMDL implementation required by a permit; or
- As part of activities pledged under VEEP or similar agreements.

SEPs may not include activities that any party will become legally obligated to undertake within two years of the date of the order (e.g., adopt a more stringent emission or discharge limit). An SEP will not be invalidated after the fact, however, if a regulatory requirement that is unknown at the time of SEP approval comes into effect within two years of the date of the order.

Nexus

SEPs must have "a reasonable geographic nexus to the violation," except as allowed by statute.[124] Determining if a reasonable geographic nexus exists begins by evaluating the relationship between the violation and the proposed project. For geographic nexus to be reasonable, the project should benefit the "general area" in which the underlying violation occurred (*e.g.*, immediate geographic area, same river basin, same air quality control region, same planning district, same TMDL watershed, or same ecosystem, generally not to exceed 50 miles from the location of the violation without justification). All SEPs should be performed in the Commonwealth and benefit public health and the environment within the Commonwealth.

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[124] *See* U.S. EPA, *Importance of the Nexus Requirement in the Supplemental Environmental Projects Policy* (October 31, 2002). http://cfpub.epa.gov/compliance/resources/policies/civil/seps/

Under Va. Code, if no project is available within the geographical area, the project may still be acceptable if it "advances at least one of the declared objectives of the environmental law or regulation that is the basis of the enforcement action." In federally authorized programs, the presence of geographic nexus alone by itself does not satisfy the nexus requirement.[125]

Categories of Projects That May Quality as SEPs

Va. Code § 10.1-1186.2(C) lists the categories of projects that may qualify as SEPs. An SEP must satisfy the requirements of at least one category below. The lists of examples in this section do not constitute an endorsement, recommendation, favoring, or pre-approval of any specific project or type of project.[126] A list of the types of projects that would not qualify as SEPs may be found in subsection 7, below.

Public Health

A public health project provides diagnostic, preventive, and/or remedial components of human healthcare that are related to the actual or potential damage to human health caused by the violation. Public health SEPs are acceptable only where the primary beneficiary of the project is the population that was harmed or put at risk by the alleged violations.[127]

Examples of potential public health projects include:

- Epidemiological data collection and analysis;
- Medical examinations of potentially affected persons;
- Collection and analysis of blood/fluid/tissue samples; and
- Medical treatment and rehabilitation therapy.

Pollution Prevention

A pollution prevention project reduces the generation of pollution through "source reduction," i.e., any practice which reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise being released into the environment, prior to recycling, treatment, or disposal. Some pollution prevention projects protect natural resources through conservation or increased efficiency in the use of energy, water, or other materials. "In-process recycling," where waste materials produced during a manufacturing process are returned directly to production as raw materials on site, may qualify as pollution prevention.

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[125] In federally authorized programs the proposed SEP must demonstrate a nexus with the statute and/or regulation being violated. *See*, U. S. EPA, *Importance of the Nexus Requirement in Supplemental Environmental Projects Policy* (October 31, 2002). http://www.epa.gov/compliance/resources/policies/civil/seps/sepnexus-mem.pdf

[126] *See* U.S. EPA, *Project Ideas for Potential Supplemental Environmental Projects*, (July 20, 2006). The list is a compilation of ideas for SEPs submitted by private individuals and entities, as well as federal, state and local governmental agencies. http://cfpub.epa.gov/compliance/resources/policies/civil/seps/

[127] *See 1998 EPA SEP Policy at Page 7*.

For a project to meet the definition of pollution prevention there should be an overall decrease in the amount and/or toxicity of pollution released to the environment, not merely a transfer of pollution among media. Once the pollutant or waste stream is generated, pollution prevention is no longer possible and the waste should be handled by appropriate recycling, treatment, containment or disposal methods.

Examples of potential pollution prevention projects include:

- Implementation of a comprehensive EMS with a strong pollution prevention component by a facility, provided the EMS conforms to the criteria described in the VEEP or in a comparable standard, such as International Organization for Standardization (ISO) 14000;
- Training programs that result in specified improved efficiency in the use of natural resources, energy, or in reductions in wastes;
- Substitution of raw materials with less toxic ones, such as eliminating the use of chlorinated solvents in cleaning operations;
- Process or procedure modifications, such as installing a powder coating paint system to replace traditional spray painting operations, resulting in lower emissions;
- Installation of a recovery system such as a distillation unit to purify unreacted materials and by-products for reuse in the process;
- Installing pollution control equipment that allows businesses, particularly small businesses, to implement voluntary pollution prevention measures; and Improved inventory control systems that demonstrably reduce the amounts of waste generated from the disposal of out-of-date materials.

Pollution prevention studies without a commitment to implement the results are not acceptable as SEPs.

Pollution Reduction

If the pollutant or waste stream has already been generated or released, a pollution reduction project - which employs recycling, treatment, containment or disposal techniques - may qualify as a SEP. *See 1998 EPA SEP Policy* at page 8. A pollution reduction project decreases the amount and/or toxicity of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment. “Out-of-process recycling” is a pollution reduction strategy where industrial or consumer wastes are used as raw materials for off-site production, resulting in a reduction in the need for treatment, disposal or consumption of energy or natural resources. In addition, pollution reduction can be achieved by installing more effective end-of-process control or treatment technology.

Examples of potential reduction projects include:

- Installation of “polishing equipment,” such as an ion-exchange unit, at the end of a facility’s wastewater pretreatment system that removes the final traces of toxic elements from its effluent; and

- Installation of a wet electrostatic precipitator to capture and remove particulate matter from the exhaust stream of a process equipment stack.

Environmental Restoration and Protection

Environmental restoration and protection projects include those that go beyond repairing the damage caused by the violation, i.e., the damage that can be corrected through injunctive relief.[128] Environmental restoration and protection SEPs may also be used for enhancing a site to "better-than-baseline" conditions. Such SEPs may be used to restore or protect natural environments (i.e., ecosystems), man-made environments (i.e., facilities and buildings) or endangered species.

Examples of potential environmental restoration and protection projects include:

- Remediating abandoned waste sites or brownfields areas;
- Installing or funding Best Management Practices (BMPs) such as, stream restoration, TMDLs or water quality impairments;
- Installing water lines or sewer lateral lines for private homeowners where no other party has responsibility for connecting homes;
- Protection or preservation of ground water quality, especially in Ground Water Management Areas;
- Conducting nonregulatory conservation projects;
- Conducting fish tissue studies in the watershed that was adversely affected or in a study area of statewide importance;
- Restoring a wetland along the same avian flyway in which the facility is located;
- Purchasing and managing a watershed area to protect a drinking water supply; Removing or mitigating contaminated materials at facilities or buildings, such as contaminated soils, asbestos and lead based paint, which are a continuing source of releases and/or threat to individuals; and
- Establishing conservation easements to protect in perpetuity sensitive or critical ecosystems.

In some projects where the party has agreed to restore and protect certain lands, the question arises whether the project may include the creation or maintenance of recreational improvements, such as hiking and bicycle trails. The costs associated with such recreational improvements may be included in the total SEP cost provided they do not impair the environmentally beneficial purposes of the project, and provided they constitute only an incidental portion of the total resources spent on the project.

Environmental Compliance Promotion

An environmental compliance promotion project provides training or technical support to other members of the regulated community and/or the general public to:[129]

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[128] *See 1998 EPA SEP Policy* at page 8
[129] *See 1998 EPA SEP Policy* at p. 10

- Monitor, identify, report, achieve and maintain compliance with applicable statutory and regulatory requirements (but not if the training or level of proficiency is required as part of a regulation, permit or order);
- Avoid committing a violation with respect to such statutory and regulatory requirements; and
- Go beyond compliance by reducing the generation, release or disposal of pollutants beyond legal requirements.

Environmental compliance promotion SEPs should focus on the same regulatory program requirements that were violated, and DEQ staff should have reason to believe compliance in the sector would be substantively advanced by the project. If the party proposing the SEP lacks the experience, knowledge or ability to implement the project itself, the party may arrange with an appropriate expert to develop and implement the compliance promotion project. DEQ staff should be cautious of resource requirements or other burdens on the agency as a result of such SEPs.

Examples of potential compliance promotion projects include:

- Producing or sponsoring a seminar directly related to correcting widespread or prevalent violations within the facility's industry sector;
- Producing or sponsoring a workshop directly related to BMP implementation in watersheds with TMDL implementation plans, TMDLs or water quality impairments; and
- Educational programs as part of identifiable initiatives with targeted audiences and specified goals to benefit the environment, such as anti-litter campaigns, BMP benefits campaign aimed at residential and agricultural audiences near impaired waters and training for developers on low-impact development.

Emergency Planning and Preparedness

An emergency planning and preparedness project provides assistance to a responsible state or local emergency response or planning entity. These projects enable organizations to fulfill their obligations under the federal Emergency Planning and Community Right-to-Know Act (EPCRA) to collect information and assess the dangers of hazardous chemicals at facilities within their jurisdiction, to train emergency response personnel, and to better respond to chemical spills.[130]

[130] *See* 42 USC 116 and regulations implementing U.S. EPA, "Emergency Management Program," http://www.epa.gov/oem/lawsregs.htm. *See also* U.S. EPA, "Emergency Management," http://www.epa.gov/oem/content/epcra/.

The need addressed by the project should be identified in an approved emergency response plan as an additional unfunded resource necessary to implement or exercise the emergency plan in accordance with EPCRA.

Examples of potential emergency planning and preparedness projects include:

- Funding the purchase of equipment needed for mass casualty trailers as identified in an approved emergency response plan;
- Funding expenses associated with training for hazardous materials (HAZMAT) personnel (i.e., tuition, lodging and travel) as identified in an approved emergency response plan; and
- Funding the purchase of computers and software, communication systems, chemical emission detection and inactivation equipment, or other HAZMAT equipment as identified in an approved emergency response plan.

Emergency planning and preparedness SEPs are acceptable where the primary benefit of the project occurs within the same emergency planning district affected by the violations.

Unacceptable Projects

Unless the project also meets the requirements of one or more of the categories above, the following types of projects are not acceptable SEPs:[131]

- General educational projects with little or no discernable environmental benefit (e.g., conducting tours of environmental controls at a facility, donating museum equipment, and educating the public on steps taken by industry to reduce pollution);
- Contributions toward environmental research to a college or university that lacks a quantifiable environmental benefit and the subject of which lacks an appropriate nexus to the impacted community or ecosystem, and the underlying violation;
- Conducting a project, which, though beneficial to a community, is unrelated to a discrete advancement of environmental compliance, restoration or protection (e.g., making a contribution to charity for a non-specific purpose or donating playground equipment);
- Studies (except fish tissue studies, as described above) undertaken without a commitment to implement the results and/or address specific environmental problems;
- Any project that will otherwise be performed by the Commonwealth, a local or the federal government, or that is legally required of another party;
- Any project that would be required as part of a TMDL allocation being implemented pursuant to a permit; and
- Settlements in which the facility agrees to spend a certain sum of money on a project(s) to be determined later (i.e., after the Consent Order is issued).

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[131] *See 1998 EPA SEP Policy* at p. 5

Determining the Appropriateness and Value of an SEP

In determining the appropriateness and value of an SEP, Va. Code § 10.1-1186.2(C) requires DEQ to consider all of the following factors. Though the six factors are not listed in order of priority, the quality of the SEP should be examined as to whether, and how effectively, it achieves each of the following factors.

Net Project Costs

The party should provide an accounting of the net present after-tax cost of the SEP, including tax savings, grants, and first-year cost reductions and other efficiencies realized by virtue of project implementation.[132] If the proposed SEP is for a project for which the party will receive an identifiable tax savings (e.g., tax credits for pollution control or recycling equipment), grants, or first-year operation cost reductions or other efficiencies, the value of the SEP should be reduced by those amounts. The statute provides that the costs of those portions of SEPs that are funded by state or federal low-interest loans, contracts or grants shall be deducted from the net project cost in evaluating the project. Va. Code §10.1-1186.2(C).

Unless DEQ specifies the accounting documentation, the facility may provide an accounting of the net project cost of the SEP to DEQ in one of several forms:

- The facility may submit an itemized cost statement or spreadsheet, accompanied by a certification from a Certified Public Accountant, that the cost statement represents net project costs, as described above;
- The facility may provide an itemized cost statement or spreadsheet, including invoices or similar documentation, accompanied by a certification by a responsible corporate officer that the total cost represents the net project costs, as described above; or
- The facility may provide detailed, documented cost estimates (by spreadsheet or otherwise) to DEQ for analysis using the EPA computer model PROJECT to calculate the net project costs.

A copy of the PROJECT software and the user's manual can be downloaded from EPA‟s financial analysis computer models web page. To employ PROJECT, the user needs reliable estimates of the costs and savings associated with the performance of an SEP. If the PROJECT model reveals that a project has a negative cost, it means that the SEP represents a positive cash flow to the party and, as a profitable project, is generally not acceptable as an SEP. See, U.S. EPA Enforcement Economic Models.

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[132] *See 1998 EPA SEP Policy* at p. 12

Benefits to the Public or the Environment

This factor evaluates the extent to which a proposed SEP will significantly and quantifiably reduce discharges of pollutants to the environment, reduce risk to the general public, provide measurable progress in protecting and restoring ecosystems (including wetlands and endangered species habitats), and/or facilitate compliance.[133] Community involvement in the development or performance of an SEP increases the benefits to the public and the Responsible Party is encouraged to incorporate public input when appropriate. An SEP proposing a clean-up activity should be at least as beneficial to the environment as a clean-up DEQ could perform with the civil charges deposited to the Virginia Environmental Emergency Response Fund (VEERF). See Va. Code § 10.1-2500.

Innovation

This factor evaluates the extent to which a proposed SEP further develops and implements innovative processes, technologies or methods - including "technology forcing" techniques which may establish new regulatory "benchmarks" - that more effectively:

- Reduce the generation, release or disposal of pollutants;
- Conserve natural resources;
- Restore and protect ecosystems;
- Protect endangered species; or
- Promote compliance.

Impact on Minority or Low-Income Populations

This factor evaluates the extent to which a proposed SEP mitigates damage or reduces risk to minority or low-income populations that may have been disproportionately exposed to pollution or are at environmental risk.[134]

Multimedia Impact

This factor evaluates the extent to which a proposed SEP provides environmental benefits in more than one media.

Pollution Prevention

This factor evaluates the extent to which a proposed SEP develops, promotes and implements pollution prevention techniques and practices.

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[133] See 1998 EPA SEP Policy at p. 15.
[134] *See 1998 EPA SEP Policy* at p. 16

Calculating the Civil Charge Mitigation

DEQ should not approve an SEP until after it calculates a civil charge using the appropriate procedures. The amount of any civil charge mitigation that may be given for a particular SEP is wholly within the discretion of DEQ and there is no presumption as to the correct percentage of mitigation. Generally, if an order includes an SEP, the DEQ should recover, as a cash civil charge payment, the greater of:

- The ascertainable economic benefit of noncompliance plus 10% of the gravity-based portion of the civil charge (i.e., the total civil charge excluding the economic benefit), or
- 25% of the gravity component of the civil charge matrix/table amount.

The remainder of the calculated civil charge may be mitigated by an SEP, at the discretion of the Director.

If a proposed SEP enhances the value and/or profitability of the business or reduces the responsible party's tax burden, the mitigation amount calculated should be reduced by no less than 30%.

In cases involving government entities or quasi-government entities, such as a locality's utility authorities or non-profit organizations, a greater percentage of the civil charge may be considered for mitigation with an SEP. Civil charge mitigation in these special cases, however, should not exceed 90% of the total civil charge (economic benefit plus gravity). By statute, an SEP can only be a *partial* settlement.

Approval or Disapproval of a SEP

The Va. Code provides: "Any decision whether or not to agree to an SEP is within the sole discretion of the applicable board, official, or court and shall not be subject to appeal."[135] Even though a project appears to satisfy all of the provisions of the Va. Code and these procedures, the Director or a designee may determine that an SEP is not appropriate. Without limitation, the following are examples of when an SEP may be denied:

- Where the primary beneficiary of the SEP appears to be the party rather than the public;
- Where the total civil charge is $10,000 or less;
- Where the cost of reviewing an SEP proposal or evaluating compliance with the approved SEP may be disproportionate or excessive in comparison to the overall civil charge;
- Where the benefit to human health and the environment is insignificant or the SEP will not result in substantial or sustained benefits;

[135] Va. Code § 10.1-1186.2(E).

- Where the Responsible Party may not have the ability or reliability to complete the proposed SEP (e.g., the party has demonstrated an inability or unwillingness to comply with existing requirements; or has repeated alleged violations of the same requirement);
- Where the party has already proffered two SEP proposals (or one proposal and a substantial revision) which DEQ has denied; or
- Where funding has already been allocated.

If DEQ agrees to the SEP proposal, it is incorporated into the order.

Incorporation into a Consent Order

To ensure enforceability and conformity with the statute, DEQ includes the requirements of SEP projects in administrative consent orders or judicial orders. Any public notice should indicate that the order includes an SEP and the nature of the SEP.

The order should accurately and completely describe the SEP, including specific actions to be taken, the timing of such actions, and the result to be achieved. It should also contain a means for verifying both compliance and the final overall cost of the project, including periodic reports, if necessary. A final report certified by an appropriate corporate official, acceptable to DEQ, evidencing completion of the SEP and documenting SEP expenditures should also be required. Model language for an order is in Chapter 2A.

DEQ prefers that SEPs be performed by the Responsible Party subject to the order. However, if a third party performs the SEP (e.g., a contribution is made to an organization to fund a specific project), the order should state that the RP remains responsible for satisfactory completion of the project, which includes its quality and timeliness. Failure to perform the SEP by the third party shall trigger the obligation for the Responsible Party to pay the original civil charge sum within a required period of time. The mere transfer of funds to a third party does not discharge the Responsible Party's SEP obligation.

Performance of an SEP should be stated in the order in terms of a partial settlement of the civil charge. Failure of the Responsible Party to perform or complete the SEP will trigger the Responsible Party's obligation to pay the portion of the civil charge intended to be settled by the SEP, unless there is an alternate or additional SEP. The order should provide a time period for paying the remainder of the civil charge in the case of failure to perform or complete the SEP.

If an SEP involves performing an environmental assessment or environmental audit, the order should require the submission of the report and documenting the correction of any violations discovered as a result of the assessment or audit.

Orders containing SEPs should contain a provision that, whenever publicizing an SEP or the results of an SEP, the Responsible Party will state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action.

Enforceability: SEP Performance and Completion

Once the administrative or judicial order is executed, the SEP is "enforceable in the same manner as any other provision of the order."[136] It is the party's responsibility to perform the SEP.

Occasionally when a third party performs the SEP, an officer or other official of the Responsible Party subject to the order may also be an officer or have another representative role with the third party performing the SEP. In such a case, DEQ should note this fact in the SEP Analysis Addendum and any public notice and comment materials.

The Responsible Party should verify to DEQ the completion of the project and the final net project costs, along with proof of payment. The final verification may be in the form of a Certified Public Accountant certification or certification from a responsible corporate officer or owner.

If the final cost of the SEP is less than the amount of the penalty agreed to be mitigated, the difference shall be paid to the Commonwealth, unless an alternate or additional SEP is agreed to. An additional SEP may require modifications to the order and additional public notice. However, if the SEP is satisfactorily completed and the party has spent at least 90%of the projected net project costs on the project, payment of the difference may be waived upon receipt of written approval the Director or his designee. Case Files and Database Documentation.

Va. Code § 10.1-1186.2(C) states: "In each case in which a supplemental environmental project is included as part of a settlement, an explanation of the project with any appropriate supporting documentation shall be included as part of the case file." The explanation should include a completed and approved SEP Analysis Addendum and documentation of net project costs (including the PROJECT Model printout, where applicable). The documentation should also include the SEP proposal, as well as any periodic and final reports.

SEPs and associated information in support of an SEP are generally considered public information. However, the Va. Code states that "[n]othing in this section shall require the disclosure of documents exempt from disclosure pursuant to the Virginia Freedom of Information Act (FOIA) (Va. Code § 2.2-3700 *et seq.*)." Trade secrets (*See* Va. Code § 59.1-336) and other proprietary information that may be include in an SEP may be exempt from disclosure under FOIA. Responsible Parties that include information in an SEP that may qualify for a FOIA exemption are required to clearly identify that information on the document before submission to DEQ.

All SEPs should be entered into the appropriate state and/or federal databases, in accordance with the instructions for those systems.

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[136] Va. Code §10.1-1186.2

Chapter Six – APA Adversarial Proceedings

Introduction

The Virginia Administrative Process Act (APA), Va. Code §§ 2.2-4000 *et seq.*, provides for two types of proceedings that agencies can use to make case decisions. They are: (1) Informal Fact Finding Proceedings (IFFs) as provided in Va. Code § 2.2-4019 and (2) Formal Hearings as provided in Va. Code § 2.2-4020. The DEQ statute at Va. Code § 10.1-1186 also provides for the issuance of special orders by the Director of DEQ with penalties up to $10,000 following an IFF. The media statutes authorize DEQ to issue special orders with penalties up to $100,000 following a formal hearing.[137]

The following procedures address how to prepare for and conduct these proceedings at DEQ. In addition, the Regional Offices are to consult with the Central Office Division of Enforcement in pursuing an enforcement action pursuant to the APA.

IFFs and 1186 Special Orders

After a Notice of Alleged Violation (NOAV) is issued, enforcement staff may request an IFF in accordance with § 2.2-4019 of the APA, in order to make a case decision regarding a contested issue. A responsible party may also request that DEQ hold an IFF to determine whether a violation alleged in a notice of alleged violation has occurred.[138] Pursuant to Va. Code § 2.2-4020.1, a recipient of a notice of alleged violation may alternatively request a summary case decision on questions of law, where no material facts are in dispute.[139] The intent of the adversarial IFF is to make a required or necessary case decision[140] without holding a Formal Hearing and, in some cases, to impose an order requiring a responsible party

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[137] Va. Code §§ 10.1-1307, 10.1-1309, 10.1-1455(G), and 62.1-44.15.

[138] The Responsible Party may also request Process for Early Dispute Resolution (PEDR) to assist in the resolution of disagreements with DEQ concerning the issuance of notices of alleged violation or notices of deficiency. The requirement for PEDR is found in 2005 Acts c. 706, clause 2 at the end of the Act. It is not codified. Agency Policy Statement No. 8-2205 provides additional guidance on PEDR. The resolution of a dispute provided through PEDR is not a case decision.

[139] The request for a summary case decision must be in writing, signed on behalf of the requester, and include "1. A statement that no material facts are in dispute; 2. A proposed stipulation of all such undisputed material facts concerning the application or notice; 3. A clear and concise statement of the questions of law to be decided by summary case decision; and 4. A statement that the requestor waives his right to any other administrative proceeding provided in this article by the agency on the questions of law to be decided by summary case decision." DEQ has 21 day from receipt of the request to determine whether the matter may be decided by summary case decision, and DEQ must notify the requestor of its decision in writing. If DEQ grants a request for summary case decision, the DEQ decisionmaker shall accept briefs on the questions of law at issue and may hear oral arguments. The decision must state the findings, conclusions, reasons, and basis for the decision and be conveyed to the requestor.

[140] Va. Code § 2.2-4001 defines a "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."

to take certain actions or refrain from taking certain actions. These case decisions and orders are not rendered and entered into by consent.

Unlike Consent Orders that may include agreed-to civil charges, unilateral orders issued after an IFF cannot include civil charges or penalties unless the proceeding is a Special Order proceeding under Va. Code § 10.1-1186 or under State Water Control Law authority regarding certain local programs.[141]

DEQ's media programs may also hold programmatic IFF's outside of the enforcement process to issue case decisions For the most part, the following procedures apply to both types of proceedings with differences noted where necessary.

Programmatic IFFs

An APA proceeding (typically an IFF) or waiver thereof, is required whenever a DEQ media program issues a case decision determining whether a party has violated a legal requirement or has met requirements for obtaining or retaining a permit or other right or benefit.

Programmatic IFFs may be used for the following purposes:

- To determine whether a Responsible Party operating pursuant to a solid waste permit by rule has violated certain requirements to justify loss of permit by rule status pursuant to 9 VAC 20-81-410.
- To issue a Notice to Comply under the Erosion and Sediment Control Law at Va. Code § 62.1-44.15:58 or the Stormwater Management Act at Va. Code §§ 62.1-44.15:37.[142]
- To issue a Stop Work Order under Va. Code § 62.1-44.15:58 of the Erosion and Sediment Control Law.[143]

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[141] Pursuant to current statutory authority in the Stormwater Management Act at Va. Code § 62.1-44.15:38, the Erosion and Sediment Control Law at Va. Code 62.1-44.15:54, and the Chesapeake Bay Preservation Act at Va. Code 62.1-44.15:71, if a local program fails to comply with a corrective action agreement issued by the State Water Control Board, the Board may issue a special order following an APA proceeding. Such orders may include a civil penalty up to $5,000 per day, with a maximum of $20,000 per violation. Beginning thirty days after the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, those statutes will expire, and a new provision in Va. Code § 62.1-44.15(19) will take effect authorizing the Board to issue a special order to a locality that failed to bring its program into compliance in accordance with a compliance schedule established by the Board. Such orders may impose a civil penalty up to $5,000 per violation with the maximum amount of $50,000. The Board may not delegate to DEQ its authority to issue special orders under this section.

[142] Beginning thirty days after the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, those statutes will expire, and a new provision in Va. Code § 62.1-44.15:37 will state, "The issuance of a notice to comply by the Board shall not be considered a case decision as defined in § 2.2-4001." Therefore, an IFF will no longer be required to issue a notice to comply.

[143] Currently, a formal hearing is required for DEQ to issue stop work order under the Stormwater Management Act, Va. Code § 62.1-44.15:37, or following a complaint by an aggrieved landowner under the Erosion and Sediment Control Law, Va. Code § 62.1-44.15:64. Beginning thirty days after the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, those statutes will expire, and a new provision in Va. Code § 62.1-44.15:37 will require only an IFF prior to issuing a stop work order.

- To determine whether a local program is deficient under the Stormwater Management Act, the Erosion and Sediment Control Law, or the Chesapeake Bay Preservation Act and to establish a compliance schedule.[144]
- To determine whether underground storage tanks are in violation of regulatory requirements and are ineligible for delivery, deposit, or acceptance of a petroleum product or other regulated substance.[145]
- To determine whether to certify equipment or facilities as pollution control equipment or facilities for tax exemption purposes, pursuant to Va. Code §§ 58.1-3660 or 58.1-3660.1.
- To determine whether certain types permit coverage should be denied.
- To determine whether a specific type of equipment or activity would require a permit.

Regional Office staff should consult with the relevant Central Office media program in conducting programmatic IFFs. The same APA provisions applicable to enforcement IFFs also govern programmatic IFFs, including Va. Code §§ 2.2-4019 (Informal fact finding proceedings), 2.2-4020.1 (Summary case decisions), 2.2-4020.2 (Default), 2.2-4021 (Timetable for decision; exemptions), 2.2-4023 (Final orders), and 2.2-4024.1 (Disqualification).

1186 Special Order Proceedings

Section 10.1-1186(10) of the Code authorizes the DEQ Director to issue 1186 Special Orders following an IFF. Pursuant to Va. Code § 10.1-1182, an 1186 Special Order is "an administrative order issued to any party that has a stated duration of not more than twelve months and that may impose a civil penalty of not more than $10,000." Only the DEQ Director can impose civil penalties in an 1186 Special Order, and that authority cannot be delegated.

This enforcement action should be pursued only if (i) the relief sought can be achieved within twelve months and (ii) a maximum penalty of $10,000 is adequate.
As provided in Va. Code § 10.1-1186(10), 1186 Special Orders may be issued to any person to comply with:

- The provisions of any law administered by the DEQ.
- Any condition of a permit or certification.
- Any regulation of the Boards.
- Any case decision of the DEQ Director.

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[144] Va. Code §§ 62.1-44.15:38, 62.1-44.15:54, 62.1-44.15:71. Beginning thirty days after the adoption of regulations to implement the Virginia Erosion and Stormwater Management Act, those statutes will expire, and a similar provision will take effect in Va. Code § 62.1-44.15(19). At that point, Article 2.3 of the State Water Control Law, which is currently the Stormwater Management Act, will be replaced by the Virginia Erosion and Stormwater Management Act.
[145] 9 VAC 25-580-370.

Pre-Proceeding Matters

Referral Process

Prior to referring a case for an 1186 Special Order proceeding, Regional Office staff should prepare an enforcement recommendation and plan, civil penalty worksheet, and proposed consent order. If consent order negotiations do not resolve the case, then an APA referral is an appropriate next step. If Regional Office staff believe case-specific factors warrant moving forward with an 1186 Special Order proceeding without first proposing a consent order to the responsible party, they should consult with Central Office enforcement staff prior to submitting a referral.[146]

To refer a case for an 1186 Special Order or other enforcement adjudication, Regional Office staff Central Office APA Enforcement Coordinator. Relevant records may include any registration statement, permit, inspection report, warning letter, notice of violation, substantive communications between DEQ and the responsible party, enforcement recommendation and plan, civil charge worksheet, and proposed consent order. The agency record should be complete and in ECM before consultation with Central Office. Any requests for an APA action must be approved by the Director of Enforcement.

Presiding Officer and Agency Advocate

After approving a referral for an enforcement IFF, the Director of Enforcement appoints the Presiding Officer from DEQ staff. The Director of Enforcement issues a "Presiding Officer appointment memo" naming the Presiding Officer and describing their responsibilities in the case at hand, copying the Regional Office Enforcement Staff, Regional Director, and the Adjudication Manager. The Agency Advocate provides the Presiding Officer procedural information about their role in the IFF. The Presiding Officer is responsible for running the IFF meeting and making a recommendation to the DEQ Director in an 1186 Special Order proceeding.[147]

The Presiding Officer should have basic knowledge of the laws and regulations involved in the case. All staff within Pay Band 6 and above are authorized by DEQ's Delegation Memo to serve in the capacity of a Presiding Officer. The Director of Enforcement may also authorize staff at lower pay bands to fill this role on as needed basis. Unlike a Hearing Officer who presides over a Formal Hearing, it is not necessary for a Presiding Officer to be an attorney.

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[146] In such cases, Regional Office staff should still develop an enforcement recommendation and plan and civil penalty worksheet prior to referral, justifying the injunctive actions and penalties available through an 1186 Special Order.

[147] In other types of IFFs, including delivery prohibition proceedings, a Presiding Officer with delegated authority may be the ultimate decision maker. In dual track underground storage tank cases, in which a delivery prohibition proceeding is combined with an 1186 Special Order proceeding, the Presiding Officer issues the delivery prohibition decision and makes a recommendation to the DEQ Director regarding the 1186 Special Order.

Va. Code § 2.2-4024.1 prohibits the role of Presiding Officer from being filled by any person "who has served as investigator, prosecutor, or advocate at any stage" in the case or by any person "who is subject to the authority, direction, or discretion of an individual who has served as investigator, prosecutor, or advocate at any stage" in the case. Additionally, a Presiding Officer "is subject to disqualification for any factor that would cause a reasonable person to question the impartiality of the Presiding Officer . . . . which may include bias, prejudice, financial interest, or ex parte communication," and must disclose information relevant to any such factor to the parties. Va. Code § 2.2-4024.1. A Presiding Officer should disqualify him or herself and withdraw from a case if they do not believe that they can preside over the matter impartially or if they are aware of a factor that would cause a reasonable person to question their partiality. DEQ or the named party may petition for disqualification of the Presiding Officer upon notice that they will preside or upon discovering facts that are grounds for disqualification.

To avoid any appearance of partiality, it is best practice to select a Presiding Officer from a different regional office than where the case arose or from central office and to select an individual with no prior involvement in the case. To maintain the Presiding Officer's impartiality, the Agency Advocate, DEQ witnesses, and other staff involved in the case must not communicate with the Presiding Officer regarding the substance of the case outside of the IFF itself.

In an 1186 Proceeding or enforcement IFF, an Agency Advocate presents the agency's case. The Agency Advocate may be the Enforcement Adjudication Coordinator, other DEQ staff as designated in their EWP, or by appointment by the Director of Enforcement.[148] The Agency Advocate schedules the proceeding, drafts the notice for signature by the Director of Enforcement, conveys the notice and exhibits, prepares any DEQ witnesses for the proceeding, presents DEQ's case and questions any witnesses during the IFF, prepares a proposed Findings of Fact and Conclusions of Law and Proposed Order for the Presiding Officer's consideration following the IFF, and transmits the final case decision/order to the named party.

Statutory Rights of the Parties

Va. Code § 2.2-4019 provides that parties to an IFF have the right to:

- Have reasonable notice of the conference, including contact information for the DEQ staff person designated to answer questions and assist the named party;
- Appear in person or by counsel or other qualified representative for the informal presentation of factual data, argument or proof;
- Have notice of any contrary fact, basis or information in the possession of the agency which can be relied upon in making an adverse decision;
- Receive a prompt decision;

[148] Additinonal appioinmtnes can be authorized by the Office of the Attorney General to represent DEQ in administrative proceedings, pursuant to Va. Code § 2.2-509.

- Be informed, briefly and generally in writing, of any factual or procedural basis for an adverse decision; and
- Be notified if DEQ intends to consider public data, documents or information.

The Notice of the Proceeding

The notice of the proceeding lays out the basis for the case against a responsible party and explains the purpose and nature of the proceeding. The notice is drafted by the Agency Advocate and is signed by the Director of Enforcement. Some components of the notice letter mirror elements of a notice of violation; however, the notice letter is issued as a separate document after a case has been referred to enforcement.[149]
The notice must be in writing and contain:

- A recitation of the rights of the party found in Va. Code § 2.2-4019 and set forth above.
- The date and time set for the proceeding.
- The place where an in-person IFF will be held and/or call-in information for a telephonic IFF.
- The nature and purpose of the proceeding.
- The basic law or laws under which the agency intends to exercise its authority, including Va. Code §§ 2.2-4019 and 10.1-1186 if applicable.
- The facts and pertinent law or regulations implicated for each alleged violation.
- What type of remedy will be sought, to include an 1186 Special Order with civil penalties and injunctive relief if applicable.
- Any public data, document and information upon which the agency plans to rely, as provided in § 2.2-4019(B). The notice should be accompanied by the exhibits upon which DEQ intends to rely.
- The name, telephone number, and email address of the DEQ staff designated to answer questions and assist the named party.
- Notification that a default order may be issued against the named party if they fail without good cause to attend or appear at the IFF.

Although not provided in the statute, it is recommended the notice be sent to the named party 30 calendar days prior to the proceeding. If the named party has provided DEQ with an email address in an official communication with the Agency (e.g., in a permit application), the notice may be sent to the named party by email.

The DEQ exhibits accompanying the notice may be sent to the responsible party by Vitashare transfer or email. The email conveying the notice should request that the named party acknowledge receipt. If the named party fails to acknowledge receipt, the Agency Advocate should call the named party to confirm that they received the notice. If DEQ is not able to confirm receipt of the notice by email, the notice should also be mailed to the Responsible Party at least two weeks prior to the date of the proceeding. If the named party has not

[149] Regional Office and Central Office concurrence is necessary to combine the Notice with the NOV.

provided an email address to DEQ, the notice and exhibits should be conveyed by mail. When the named party is a corporation, limited liability company, or other entity registered with the SCC, the notice should be sent (mailed, or emailed) to the registered agent for the company in addition to any contact-person on file with DEQ.

Fast-Track Process

A fast-track process is available for cases in which the civil charge amount calculated pursuant to DEQ guidance does not exceed $15,000 and necessary injunctive relief can be completed within one year. For these cases, the initial transmittal of the proposed consent order is combined with an IFF notice letter. The fast-track letter states that if the responsible party does not sign the proposed consent order within 60 days of the date of the letter (or other deadline as appropriate), DEQ will hold an IFF on a specified date, seeking the full civil charge amount authorized by law, injunctive relief, and/or delivery prohibition. The fast track letter provides the date and time of the IFF, call-in information, and the standard information included in the notice of the proceeding listed above with following modifications:

- Incorporating by reference Section C of the proposed consent order as the alleged violations for the IFF.
- Incorporating by reference Appendix A of the proposed consent as the recommended injunctive relief for the IFF.
- Generally referring to information that will be relied upon in the IFF, rather than enclosing specific exhibits.

If the responsible party fails to sign the consent order by the deadline provided, the agency advocate will send a reminder email for the IFF conveying DEQ's exhibits.

Conducting the Proceeding

The IFF is conducted to ensure that each party has a fair and adequate opportunity to present data, views, and argument. Section 2.2-4019 does not provide for cross examination of witnesses or rules of evidence. The Presiding Officer, however, is free to ask any questions necessary to make sure the record is complete and sufficient to base a decision.

Venue

In most cases, DEQ holds IFFs telephonically because it is the most efficient forum for the agency, as well as being most accessible for responsible parties. However, if the responsible party requests an in-person proceeding, DEQ should accommodate that request to the extent practicable. In some cases, DEQ may elect to hold a proceeding in person if warranted due to case-specific circumstances. To accommodate participation by all parties, DEQ may also hold a hybrid proceeding, in which some parties participate in person and others participate via conference call.

Pursuant to Va. Code § 2.2-4003, the appropriate venue for in-person proceedings is in the city or county where DEQ maintains its principal office or as the parties may otherwise agree. DEQ typically holds in-person IFFs at the regional office for the region where the facility is located or where the alleged violations occurred, but IFFs may alternatively be held at DEQ's Central Office. The Regional Office will provide adequate equipment and adequate rooms in which to conduct the proceeding and to accommodate potential witnesses.

Recording the Proceeding

Although a transcript or recording is not required by law, an audio recording of the proceeding is recommended. An accurate record of the proceedings is essential if the decision maker is not present during the proceeding and if the case is appealed.

Presentation of Information

The Presiding Officer opens the proceeding by asking the parties to introduce themselves and providing background information about the type of proceeding at hand and an explanation of the process. As a preliminary matter, the Agency Advocate explains how the notice was conveyed and enters DEQ's exhibits into the record.

The Agency Advocate then presents DEQ's case, primarily relying on agency records introduced as DEQ's exhibits. On a case-by-case basis, the Agency Advocate may elicit information by questioning DEQ witnesses, or DEQ staff may attend the proceeding to answer any technical questions that may arise.

The named party or their representative is then given the opportunity to present any relevant information. If a responsible party has documentary evidence that they would like to introduce, the Presiding Officer should accept delivery of such evidence by any reasonable method (e.g., email, fax, mail, hand delivery). In appropriate circumstances, the Presiding Officer should keep the record of the proceeding open to allow for submittal of documentation following the meeting.

Throughout the proceeding, the Presiding Officer may ask questions of any of the participants to elicit relevant information. Although cross examination of the parties is not available, participants may direct questions to the Presiding Officer, who may ask the appropriate person to speak to the issue if warranted.

At the end of the proceeding, the Agency Advocate and the named party or their representative may each give a closing statement summarizing their position.

Post Proceeding Matters

Time Restrictions on Rendering Case Decisions

The DEQ Director must render the decision in an 1186 Special Order proceeding within 90 days of the IFF or a later date as agreed by the party and the agency.[150] The IFF proceeding is concluded on the date the record closes, and the decision is due within 90 days from the date the record closes. The APA must be consulted for the pertinent time restriction when a Hearing Officer is used to make a recommendation or to render the decision.

[150] Va. Code § 2.2-4021.

The case may automatically be decided against the agency if the time frames in the APA are not followed. If the agency does not make a decision within 90 days of the conclusion of the IFF proceeding, the party may notify the agency in writing that a decision is due.[151] If the agency does not make the decision within 30 days of receiving the notice, the decision is deemed in favor of the named party, precluding DEQ from ordering penalties or injunctive relief, or precluding DEQ from issuing a case decision finding the Responsible Party in violation of legal requirements in the case.[152] Provisions are made in the APA for situations where the agency personnel who conducted the informal proceeding are unable to attend to official duties due to sickness, disability, or termination of their official capacity with the agency.

In some cases, the presiding officer may request briefs, or other post-proceeding documents. The parties may agree in writing that time limits for rendering a decision should not begin to run until all such post-proceeding activities are completed.

Agency Advocate's Proposal

Following the completion of the IFF, the Agency Advocate prepares a Proposed Findings of Fact and Conclusions of Law and a Proposed 1186 Special Order or case decision for the Presiding Officer's consideration. The Agency Advocate conveys the proposal to the Presiding Officer within approximately two weeks of the date the record closes for the proceeding and sends a copy to the named party. The named party may also submit Proposed Findings of Fact and Conclusions of Law.

Recommendation of the Presiding Officer

At the conclusion of the IFF, the Presiding Officer prepares a Recommendation Packet for the DEQ Director's consideration. The recommendation itself must contain an accurate summary of the issues to include the pertinent facts and the relevant law. The format should be Findings of Fact and Conclusions of Law. The Presiding Officer's recommended action would be included in the Conclusion section of the document. If the Presiding Officer recommends issuance of an 1186 Special Order, the recommendation packet should include a Recommended Order. The Presiding Officer conveys the Recommended Findings of Fact and Conclusions of Law and Recommended Order to the Director of Enforcement by email and provides a link to a file on a network drive. The file should contain the complete record of the proceeding, to include the exhibits, recording of the proceeding, and all submittals by the parties.

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[151] Va. Code § 2.2-4021.

[152] This provision does not apply to case decisions before the State Water Control Board or DEQ to the extent necessary to comply with the federal Clean Water Act, the State Air Pollution Control Board or DEQ to the extent necessary to comply with the federal Clean Air Act, or the Virginia Soil and Water Conservation Board or the Department of Conservation and Recreation to the extent necessary to comply with the federal Clean Water Act.

In order to give the DEQ Director adequate time to make a decision within the required 90 days, the Presiding Officer should submit the Recommendation Packet within approximately 45 days after concluding the proceeding.

Default

If a named party fails to attend an IFF without good cause the Presiding Officer may issue a default order and conduct all further proceedings to complete the IFF, including issuing a recommended decision.[153] DEQ must notify the named party of the Presiding Officer's recommended decision after a default order.[154] The named party may petition the Presiding Officer to vacate the recommended decision within 15 days of notification of its issuance.[155] The Presiding Officer must vacate the recommended decision if the named party shows good cause for their failure to appear. In considering whether the named party failed to appear for good cause, the Presiding Officer should consider factors including:

- Whether the failure to appear has caused prejudice to DEQ — e.g., whether DEQ has had to expend additional resources or delay other administrative matters to address the party's failure to appear.
- Whether the failure to appear has caused any prejudice to the Commonwealth — e.g., whether the party's failure to appear has caused any additional harm to the Commonwealth's environment or has delayed DEQ's ability to remedy some harm to the environment.
- Whether the failure to appear was caused by the party's negligence or carelessness.
- Whether there are any documented extenuating circumstances which account for the party's failure to appear.
- Whether the party acted promptly to address his or her failure to appear.
- Whether the party has a potentially strong claim or meritorious defense — e.g., whether the underlying issue presents a close question of law or fact, or an untested legal issue (such as claims involving environmental justice).

The Presiding Officer may request that DEQ's Agency Advocate provide a response to the Petition to Vacate. Any such response shall be on the record and communicated to both the Presiding Officer and named party.

If the Presiding Officer vacates the recommended decision, the Agency Advocate should issue a new notice to the named party and hold a second IFF before the Presiding Officer. If the Presiding Officer determines that the named party has not shown good cause for failure to appear, the Presiding Officer should deny the motion to vacate, and the DEQ Director may proceed with issuing a final case decision based on the Presiding Officer's recommendation and the record from the initial IFF.

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[153] Va. Code § 2.2-4020.2 (A) and (C). For these provisions to apply, the notice letter must have notified the named party that a default order may be issued against them if they failed to appear without good cause. Va. Code § 2.2-4020.2(B).
[154] Va. Code § 2.2-4020.2 (E).
[155] Va. Code § 2.2-4020.2 (E).

When a default order has been issued in an 1186 Special Order Proceedings, the DEQ Director should delay issuing a final decision until one of the following has occurred 1) the 15 days after notification of the recommended decision have passed without the named party filing a petition to vacate, 2) the Presiding Officer has denied a petition to vacate the recommended decision, or 3) the Presiding Officer has granted a petition to vacate, held another IFF, and issued a new recommended decision based on the record of the second IFF.

The Case Decision and Order

The named party to the proceeding is entitled to be informed briefly and generally in writing of the factual or procedural basis for an adverse decision in any case.[156] If the decision is in the favor of the named party, the case decision need only indicate that fact. An adverse decision, however, must contain:

- The legal authority for the agency action.
- A recitation of the facts that form the basis for the decision.
- A recitation of the procedural events leading to the informal proceeding.
- The factual basis for the decision, including any statements as to the credibility of witnesses.
- The conclusion as to what violations if any, have occurred.
- In an 1186 Special Order, the injunctive relief and/or penalty ordered.
- The relief must be within that authorized by the basic law such as compliance with regulations, cessation of unlawful discharge, etc.
- The relief must be within that authorized by regulations.
- The relief must make sense in the factual setting.
- The relief must be possible.
- Deadlines must be included for injunctive relief, within one year of the date of the order for 1186 orders.
- Civil penalties in 1186 orders are limited to $10,000.
- Signature of the ultimate decision maker. All 1186 Special Orders containing civil penalties can be signed only by the Director of DEQ.

In an 1186 Special Order, the DEQ Director will approve, disapprove, or modify the recommendations of the Presiding Officer within the remaining days provided by statute. Where appropriate the Director can adopt the Findings of Fact and Conclusions of Law recommended by the Presiding Officer or proposed by the named party.

Rule 2A:2: Party's Rights of Appeal

The following language should be included in the transmittal letter of any final agency decision pursuant to an IFF or a formal hearing:

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[156] Va. Code § 2.2-4019 (A)(v).

You have the right to appeal any part or all of this decision pursuant to Va. Code § 2.2- 4026 in the manner provided by Rule 2A:2 of the Rules of the Virginia Supreme Court. You have 33 days from the date of service of this decision within which to initiate an appeal. Rule 2A:2 also requires that "[t]he notice of appeal shall identify the regulation or case decision appealed from, shall state the names and addresses of the appellant and of all other parties and their counsel, if any, shall specify the circuit court to which the appeal is taken, and shall conclude with a certificate that a copy of the notice of appeal has been mailed to each of the parties." A copy of Rule 2A:2 is enclosed with this letter. If you chose to appeal this decision, a Notice of

Appeal must be directed to:

[Name], Director
Department of Environmental Quality
P.O. Box 1105
Richmond, VA 23218
Attention: Enforcement Division

Service of Case Decision and Order

The case decision and order must be served by mail within five days of the decision being rendered unless service by another means is acknowledged by the named party in writing. If DEQ has an email address for the named party, the case decision should also be conveyed by email.

Data Entry and Compliance Tracking

During the time between the approval of an APA referral and issuance of the final decision, the Agency Advocate is responsible for entering data into CEDS regarding the administrative proceeding and its outcome. After a decision has been issued, the case is returned to the original Regional Office enforcement representative, who is responsible for tracking subsequent compliance.1186 Special Orders are tracked for the same purposes using the same systems as Consent Orders, but are considered a separate category of orders.

If the named party fails to comply with requirements of an 1186 Special Order, Regional Office staff should confer with Central Office enforcement staff to develop a plan for addressing the noncompliance. When a responsible party misses a deadline in an 1186 Special Order by at least 60 days, Central Office enforcement staff may refer the matter to the Office of the Attorney General to enforce the terms of the order.

The Agency Advocate enters the records from the APA proceeding into ECM, including the Presiding Officer appointment memorandum if applicable, notice letter, exhibits, Agency Advocate's proposed findings of facts and conclusions of law and proposed order, Presiding Officer's Recommended Findings of Fact and Conclusions of Law, and the final decision and transmittal letter. Regional Office staff are responsible for entering into ECM records preceding the APA referral and records subsequent to the final decision.

Formal Hearings

DEQ uses Formal Hearings to issue certain types of unilateral case decision and orders when required by statute or regulation. Like IFFs, Formal Hearings may be used to resolve enforcement cases or programmatic issues. When DEQ's legal authority requires a "hearing," DEQ must provide a Formal Hearing under Va. Code § 2.2-4020.[157]

Uses of Formal Hearings include the following:

- Issuing special orders assessing civil penalties of up to $32,500 per violation, up to $100,000 per order, if specified conditions are met pursuant to Va. Code §§ 10.1-1309 (air); 10.1-1455(G) (waste); and 62.1-44.15(8a) and (8b), (water).[158]
- Issuing special orders to persons constructing or operating natural gas transmission pipelines greater than 36 inches inside diameter, assessing civil penalties of up to $50,000 per violation, up to $500,000 per order, if specific conditions are met.
- Affirm emergency orders pursuant to Va. Code §§ 10.1-1309(B); 10.1-1455(G); and 62.1-44.15(8b)
- Issuing sanitary sewer overflow (SSO) hearing special orders; or reviewing SSO consent orders upon petition by any person who commented on the SSO Consent Order, where the evidence presented in support is material and not considered in the issuance of the order.[159]
- Revoking most types of permits issued by DEQ.[160]
- When demanded by certain owners under the State Water Control Law "aggrieved by any action of the State Water Control Board taken without a formal hearing, or by inaction of the Board."[161]

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[157] Va. Code § 2.2-4020 states, "The agency shall afford opportunity for the formal taking of evidence upon relevant fact issues in any case in which the basic laws provide expressly for decisions upon or after hearing."
[158] Chapter 706, 2005 Acts of Assembly (S.B. 1089) authorized the State Water Control Board, the Virginia Waste Management Board and the State Air Pollution Control Board ("Boards") to issue special orders assessing civil penalties of up to $32,500 per violation, up to $100,000 per order, if specified conditions are met. These requirements have been codified at Va. Code §§ 10.1-1309 and 10.1-1316 (air); 10.1-1455 (waste); and 62.1-44.15, 62.1-44.32 and 62.1-44.34:20 (water). The legislation also required DEQ to develop uniform procedures to govern the formal hearings conducted pursuant to these sections to ensure they are conducted in accordance with the Administrative Process Act, any policies adopted by the Boards and to ensure that facility owners and operators have access to information on how such hearings will be conducted. In response, DEQ has developed these Procedures. Although prompted by the legislature's directive to develop procedures for formal hearings pursuant to Va. Code §§ 10.1-1309, 10.1-1455, and 62.1-44.15, it is recommended that these Procedures be used for any formal hearing conducted for DEQ.
[159] Va. Code § 62.1-44.15(8f).
[160] *See* Va. Code § 62.1-44.15(5b); 9 VAC 20-81-570(C); 9 VAC 5-170-40(A)(3)(a).
[161] Va. Code § 62.1-44.25. The statute currently applies to owners under Va. Code §§ 62.1-44.16 (industrial wastes), 62.1-44.17 (other wastes), and 62.1-44.19 (sewerage systems and sewage treatment works). . Beginning thirty days after the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, the statute will also apply to owners under the Virginia Erosion and Stormwater Management Act and Erosion and Sediment Control Law.

- When requested by an "owner or other party significantly affected by an action of the [Air Pollution Control Board] taken without a formal hearing or by inaction of the board."[162]

Regional Office staff should consult with the relevant Central Office media program and Central Office enforcement staff regarding programmatic formal hearings. Central Office staff should also consult with the Office of the Attorney General throughout the formal hearing process to ensure compliance with the APA and other legal requirements. The same APA provisions applicable to enforcement hearings also govern programmatic hearings, including Va. Code §§ 2.2-4020 (Formal Hearings), 2.2-4020.2 (Default), 2.2-4021 (Timetable for decision; exemptions), 2.2-4022 (Subpoenas, depositions and requests for admissions), 2.2-4023 (Final orders), 2.2-4023.1 (Reconsideration); 2.2-4024 (Hearing officers); 2.2-4024.1 (Disqualification); 2.2-4024.2 (Ex parte communications).

Special Orders After a Formal Hearing

Va. Code §§ 10.1-1309; 10.1-1455(G); and 62.1-44.15(8a) and (8b)[163] set forth specific procedural pre-requisites that must be met for the Department to issue special orders with penalties up to $100,000 per order:

q. DEQ must have issued the responsible party at least two notices of alleged violation (NOAVs) for the same or substantially related violations at the same site. Note that both Warning Letters and Notices of Violation are NOAVs for purposes of this requirement, so it is not always necessary for DEQ to issue two Notices of Violation prior to the formal hearing. The NOAVs must have been issued to the same person for the same site or facility. If the alleged violations in the two NOAVs are not identical, Regional Office staff should consult with Central Office enforcement staff when drafting the second NOAV in anticipation of a potential formal hearing to ensure that the NOAVs demonstrate a clear nexus between substantially related violations.

r. The violations at issue must not have been resolved by demonstration that there was no violation, by an order the Director, or by other means,

s. At least 130 days must have passed since DEQ issued the first NOAV. DEQ should not issue a Notice of Formal Hearing until at least 130 days after issuing the first NOAV (either Warning Letter or Notice of Violation) in the case. The statutes do not require a certain amount of time to pass between issuance of the two NOAVs, nor do they specify an amount of time after issuance of the second NOAV.

t. There is a finding that such violations have occurred after a formal hearing. Under the Air Pollution Control Law and Virginia Waste Management Act, the hearing must be conducted before a Hearing Officer appointed by the Supreme Court (as discussed in Part II.D.3 below). Under the State Water Control Law, the hearing must be held before a quorum of the State Water Control Board if requested by the Responsible Party; otherwise, the hearing must be held before a Hearing Officer appointed by the Supreme Court.

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[162] 9 VAC 5-170-200.

[163] The State Water Control Law includes slightly different requirements for special orders issued after formal hearings to natural gas transmission pipelines greater than 36 inches inside diameter. Va. Code § 62.1-44.15(8g). The statute includes higher penalty authority for such orders--$50,000 per violation, up to $500,000 per order. The NOAV requirement in this subsection also differs from other State Water Control Law special orders. DEQ must have issued at least two NOAVs to the responsible party for violations involving the same pipeline (the violations do not have to be substantially similar, and there is no requirement for 130 days to have passed after the first NOAV).

In addition the above procedural criteria, Va. Code §§ 10.1-1309, 10.1-1455(G), and 62.1-44.15(8a) each set forth a list of violations for which the Department may issue a unilateral special order after a formal hearing. While the statutes are broadly worded to include most classes of violations, enforcement staff should reference the relevant media statute to ensure the violation types at issue falls within one of the specified categories.

The penalty guidance set forth in Chapter Four applies to calculation of the proposed penalty for unilateral special orders after formal hearings. However, the maximum penalty per order is statutorily capped at $100,000. If the calculated penalty amount exceeds $100,000, Regional Office enforcement staff should consult with Central Office enforcement staff regarding whether a special order would be an appropriate resolution to the case or whether the case warrants referral to the Office of the Attorney General. The statutes require the penalty calculation to be provided to the responsible party prior to the formal hearing, and DEQ should include the Civil Charge/Civil Penalty worksheet as an exhibit with the Notice of Formal Hearing.

The State Water Control Law and Virginia Waste Management Act require DEQ to provide at least 30 days' notice of the time, place, and purpose of a formal hearing. The Air Pollution Control Law requires reasonable notice of the time, place, and purpose of the hearing. DEQ does not have delegated authority under the State Water Control Law to issue unilateral special orders after formal hearings.[164] DEQ conducts the formal hearing and presents the hearing officer's recommendation to the Board, but the State Water Control Board must issue the final decision.

Va. Code §§ 10.1-1309; 10.1-1455(G); and 62.1-44.15(8b) and 62.1-44.12 include specific requirements for service of special orders issued after formal hearings, and tie the effective date of the orders to the date of service, as discussed in Part II.F.8 below.

[164] Va. Code § 62.1-44.14.

Emergency Orders

In certain emergency circumstances the citizen boards are authorized to issue emergency orders requiring immediate injunctive relief without a prior hearing.[165] However, a formal hearing must be held after issuance of the emergency order.
If Regional Office staff believe that there is an emergency warranting issuance of an emergency order, they should consult with Central Office enforcement and media staff immediately. Each media statute has a different standard for when an emergency order may be issued:

- Under the Virginia Waste Management Act, a qualifying emergency is when a Responsible Party is "adversely affecting the public health, safety or welfare, or the environment." [166]
- Under the Air Pollution Control Law, a Responsible Party must be "unreasonably affecting the public health, safety or welfare, or the health of animal or plant life, or property."[167]
- Under the State Water Control Law, a Responsible Party must be "grossly affecting or presents 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."[168]
- Under Article 11 of the State Water Control Law, an oil discharge must pose a serious threat to (i) the public health, safety or welfare or the health of animals, fish, botanic or aquatic life; (ii) a public water supply; or (iii) recreational, commercial, industrial, agricultural or other reasonable uses."[169]

Under the Virginia Waste Management Act and Air Pollution Control Law, DEQ must make a reasonable attempt to give notice prior to issuing an emergency order. This prior notice should be issued by email (or mail if DEQ does not have an email address for the responsible party). The prior notice should include a summary of the factual observations indicating the existence of an emergency situation and notification of DEQ's intent to issue an emergency order pursuant to the relevant statute. The State Water Control Law does not require prior notice. Waste and air emergency orders may include requirements for the responsible party to both cease the activity causing the emergency conditions and to undertake any needed corrective action. Water emergency orders may only direct the responsible party to cease the pollution or discharge immediately.

A hearing is required soon after issuance of an emergency order to affirm, modify, amend, or cancel the emergency order. Under the Virginia Waste Management Act and Air Pollution Control Law, the hearing must be held within 10 days of the date of the emergency order.

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[165] Va. Code §§ 10.1-1309; 10.1-1455(G); and 62.1-44.15(8b).
[166] Va. Code § 10.1-1455(G).
[167] Va. Code § 10.1-1309.
[168] Va. Code § 62.1-44.15(8b).
[169] Va. Code § 62.1-44.34:20

Under the State Water Control Law, when the order requires cessation of a discharge, the hearing must be held within 48 hours of issuance of the emergency order.
Due to the short time period between issuance of an emergency order and the formal hearing, DEQ should provide notice of the time and place of the hearing at the time the emergency order is issued or as soon thereafter as possible.

SSO Hearing Special Orders

Proposed Orders, Notice and Comment

In 2007, the General Assembly enacted Senate Bill 798 ("SB 798"), which added subdivision (8f) to Va. Code § 62.1-44.15, which added requirements for the Board to provide public notice and an opportunity for public comment on proposed SSO hearing special orders. [170] Subdivision (8f) also imposed requirements to notify commenters of any hearing, or to allow them to be heard and present evidence.

Accordingly, before initiating a formal hearing, staff will develop a proposed SSO hearing special order for public notice and comment, containing proposed findings of fact and conclusions of law and the injunctive and penalty relief requested. Any draft consent order that was developed during failed negotiations with the owner can be used as the basis for preparing the proposed SSO hearing special order. In developing the proposed order, however, staff are not bound by positions taken in negotiation, and staff should prepare the strongest order supported by the available evidence, including the assessment of any civil penalty. [171]

Public notice follows the process in 9 VAC 25-31-910(B)(3). DEQ staff should inform the owner of the impending public notice and comment on the order. Any person who comments on the proposed order must also be given notice of any hearing to be held on the order, and a reasonable opportunity to be heard and to present evidence there. The notice to commenters should set a deadline (e.g., 30 days after the notice) for commenters to request an opportunity to be heard and present evidence. DEQ may name a person separate from the agency advocate to coordinate public comment and to work with those who request to be heard and present evidence at the hearing.

SSO Hearing Special Orders – Hearing and Decision

After notice and comment, the hearing follows the requirements of Va. Code § 2.2-4020 and the procedures in this chapter. DEQ and the facility owner (and the petitioner, if the hearing is the result of a successful petition) are parties to the hearing. Any person who has commented on the proposed order shall have a reasonable opportunity to be heard and to present evidence

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[170] SSO hearing special orders are special order issued after a hearing pursuant to Va. Code § 62.1-44.15(8a) to an owner of a sewerage system requiring corrective action to prevent or minimize overflows of sewerage from such system.
[171] *See* Va. Code § 62.1-44.15(8a). Orders issued pursuant to this subsection may include civil penalties of up to $32,500 per violation, not to exceed $100,000 per order.

in accordance with the notice. [172] The hearing officer, or quorum of the Board, may make such arrangements as are appropriate for the taking of evidence from commenters.

Any person who participated in the prior proceeding, whether conducted by a hearing officer or the Board itself, must be provided an opportunity to respond at the Board meeting to any summaries of the prior proceeding prepared by or for the Board.[173] The Board may, in its discretion, take other public comment. The Board will then issue the SSO hearing special order, amend and issue the SSO hearing special order, reject the order or take other action as it deems appropriate under Va. Code § 2.2-4020, in accordance with the timetables for decisions set out in Va. Code § 2.2-4021.

Following the issuance of the SSO hearing special order, parties and persons who commented on the proposed order may seek judicial review, subject to the requirements of Va. Code § 62.1-44.29.

SSO Consent Special Order Hearing Following Successful Petition

Subdivision (8f) of Va. Code § 62.1-44.15 sets out new rights for persons who comment on a proposed SSO consent special order[174] after the order is issued. Any person who commented on the proposed order may file a petition, within 30 days after the issuance of the order, requesting that the Board set aside the SSO consent special order and provide a formal hearing on it. The Director, as authorized by the Board, may rely on the written record or staff certifications in considering the petition. If the evidence presented by the petitioner (1) is material and (2) was not considered in the issuance of the order, the Director should immediately set aside the order, provide for a formal hearing, and make the petitioner a party to the hearing. All other persons who commented on the proposed SSO consent special order should be given notice of the formal hearing and should have a reasonable opportunity to be heard and to present evidence there.

If a hearing is being held as the result of a successful petition of an SSO consent special order, public notice and comment **on the order** need not be repeated. The petitioner, however, is a party to the formal hearing, and any person who commented on the proposed SSO consent special order must be given notice of the hearing and the opportunity to be heard and present evidence there. Again, the notice to commenters should set a deadline (e.g., 30 days after the notice) for commenters to request an opportunity to be heard and present evidence. The process for a hearing on the SSO consent special order then follows that for SSO hearing special orders, as described above. After the hearing, the Director may issue the SSO consent special order or decline to issue the SSO consent special order. If the Director declines to issue the SSO consent special order, DEQ staff may re-negotiate the SSO consent special order with the responsible party or decide on a different course of action.

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[172] *See* Va. Code § 62.1-44.27 (rules of evidence in Board hearings).
[173] Va. Code § 2.2-4021(A).
[174] SSO consent special orders are special orders issued by consent pursuant to Va. Code § 62.1-44.15(8d) to an owner of a sewerage system requiring corrective action to prevent or minimize overflows of sewerage from such system.

Pre-Hearing Matters

Referral for Formal Hearing

A referral to the Central Office Division of Enforcement is required for formal hearings to resolve enforcement cases. Prior to referring a case for a formal hearing seeking a special order with a penalty, regional office staff should prepare an enforcement recommendation and plan, civil penalty worksheet, and proposed consent order. If consent order negotiations do not resolve the case, then a formal hearing referral is an appropriate next step.

To refer a case for a formal hearing, Regional Office staff shall submit a Request for APA Action to Central Office, along with the agency records relevant to the enforcement action. Relevant records may include any registration statement, permit, inspection report, warning letter, notice of violation, substantive communications between DEQ and the responsible party, enforcement recommendation and plan, civil charge worksheet, and proposed consent order. The referral package is reviewed by the Enforcement Adjudication Manager, who provides a recommendation to the Director of Enforcement. The referral must be approved by the Director of Enforcement to move forward with a formal hearing.

If expedited action is necessary for issuance of an emergency order, Central Office enforcement and programmatic staff should be consulted immediately upon discovery of the emergency condition.

Agency Advocate

Upon approval of a formal hearing referral, the Director of Enforcement designates an Agency Advocate to represent DEQ in the hearing. Due to the formal, legal nature of a hearing under the APA, the Agency Advocate should be an attorney; the Agency Advocate may be either an attorney on DEQ staff or an attorney with the Office of the Attorney General. To serve as the Agency Advocate in a formal hearing, DEQ staff must be authorized by the Office of the Attorney General to represent DEQ in administrative proceedings, pursuant to Va. Code § 2.2-509.

The Agency Advocate requests appointment of the Hearing Officer, arranges for a court reporter to prepare a transcript of the hearing, drafts the notice for signature by the Director of Enforcement, conveys the notice and exhibits, participates in any pre-hearing conferences, drafts a pre-hearing statement if requested by the Hearing Officer, drafts any necessary motions or briefs, exchanges information with the named party or their counsel, requests any necessary subpoenas, prepares DEQ witnesses for the proceeding, presents DEQ's case and conducts direct and cross examination during the proceeding, prepares a proposed Findings of Fact and Conclusions of Law for the Hearing Officer's consideration following the hearing, and transmits the final case decision/order to the named party.

Hearing Officer

With the exception of special order hearings held before a quorum of the State Water Control Board at the responsible party's request, DEQ's formal hearings are presided over by a Hearing Officer appointed by the Supreme Court of Virginia. The Executive Secretary of the

Supreme Court of Virginia maintains a list of Hearing Officers who may preside over formal hearings. At an agency's request, the Executive Secretary will name a Hearing Officer from this list, selected on a rotation system maintained by the Executive Secretary. Hearing Officers are attorneys in good standing in the Virginia State Bar who have practiced law for at least five years and have completed required trainings.[175]

DEQ's Agency Advocate requests appointment of a Hearing Officer by emailing the Office of the Executive Secretary at hearingofficer@vacourts.gov. The email should provide general information regarding the proceeding, including the requesting party (DEQ), the parties involved (the Responsible Party and DEQ and/or the citizen board), and the hearing location (typically the regional office serving the location where the violation occurred). The Office of the Executive Secretary will then provide the name and contact information for the Hearing Officer.

Upon designation of the Hearing Officer by the Office of the Executory Secretary, DEQ should issue an appointment letter to the Hearing Officer. The appointment letter advises the Hearing Officer of their authorities and responsibilities with respect to conducting the formal hearing and pre- and post-hearing matters.

A Hearing Officer "is subject to disqualification for any factor that would cause a reasonable person to question the impartiality of the… hearing officer, which may include bias, prejudice, financial interest, or ex parte communication," and must disclose information relevant to any such factor to the parties.[176] A Hearing Officer should disqualify him or herself and withdraw from a case if they do not believe that they can preside over the matter impartially or if they are aware of a factor that would cause a reasonable person to question their partiality. DEQ or the named party may petition for disqualification of the Hearing Officer upon notice that they will preside or upon discovering facts that are grounds for disqualification.

The Agency Advocate must include the named party or their counsel on all communications with the Hearing Officer regarding the case, copying them on any email or letters to the Hearing Officer and avoiding any ex parte verbal conversations with the Hearing Officer.

A Hearing Officer's responsibilities include the following:

- Establish the date and place of the hearing and provide notice of these to the parties, if not previously set by DEQ (such as in the case of a hearing following an emergency order).
- Manage the pre-hearing exchange of information so that all parties have access to the information that may be entered into evidence and the identity of the witnesses who may be called.

[175] Va. Code § 2.2-4024.
[176] Va. Code § 2.2-4024.1.

- Establish the hearing procedure to be used and communicate this to the parties so they will know what to expect. This should be done during a pre-hearing conference.
- Manage the transcript and record of the case. The record should include a transcript of the hearing from a court reporter, all evidence submitted or information exchanged, and any subsequent motions and pre- and post-hearing filings.
- Control the hearing and the parties in a professional manner. This includes creating a setting that enables the parties to provide the Hearing Officer with the evidence needed to make a recommendation. Accordingly, the Hearing Officer must be prepared to deal with and make any necessary accommodations for parties with special needs. The Hearing Officer must also manage the attendance and participation of third parties as appropriate. In the absence of a statute or agency regulation to the contrary, DEQ hearings are open to the public, and the Hearing Officer has a duty to control media and spectators in the interest of providing a fair hearing and protecting the interests of all involved.
- On a timely basis, make a recommendation to the decision maker.

Statutory Rights of the Parties

Va. Code § 2.2-4020 provides that parties to a formal hearing have the right to:

- Have reasonable notice of:
- The time, place, and nature of the hearing;
- The basic law under which the DEQ contemplates exercising its authority;
- Matters of fact and law asserted or questioned by DEQ;
- Contact information of the DEQ staff designated to respond to questions or otherwise assist a named party;
- Be accompanied by and represented by counsel;
- Submit oral and documentary evidence and rebuttal proofs;
- Conduct such cross-examination as may elicit a full and fair disclosure of the facts;
- Have the proceedings completed and a decision made with dispatch;
- Have the opportunity, on request, to submit proposed findings and conclusions and statements of reasons therefore, and
- Have the opportunity, on request, for oral argument to the Hearing Officer.

The Notice of the Formal Hearing

The notice of the Formal Hearing explains the purpose and nature of the proceeding. The notice is drafted by the Agency Advocate and is signed by the Director of Enforcement.

The notice must be in writing and contain:

- A recitation of the rights of the party found in Va. Code § 2.2-4020;
- The nature and purpose of the proceeding;

- The basic law or laws under which the agency intends to exercise its authority, including Va. Code § 2.2-4020;
- The facts and pertinent law or regulations implicated for any alleged violation;
- Any other factual assertions that form the basis for DEQ's intended action;
- What type remedy or decision will be sought (e.g., a special order with civil penalties and injunctive relief, a case decision revoking a permit, a case decision affirming an emergency order, or a case decision affirming a prior action of the State Water Control Board);
- The names of the Hearing Officer and Agency Advocate;
- The name, telephone number, and email address of the DEQ staff designated to answer questions and assist the named party;
- Notification that a default order may be issued against the named party if they fail without good cause to attend or appear at the hearing; and
- For hearings regarding emergency orders, the date, time, and location of the Hearing (other hearings will typically be scheduled via a pre-hearing conference after issuance of the notice);

The notice should be accompanied by the exhibits upon which DEQ intends to rely.

For most types of formal hearing, the notice should be issued at least 30 calendar days prior to the hearing. However, reasonable notice for hearings regarding emergency orders will be shorter due to statutory requirements to conduct the hearing within 15 days (air and waste) or 48 hours (water) after issuance of the emergency order.[177] Due to the short time period between issuance of an emergency order and the formal hearing, DEQ should issue the notice of formal hearing concurrently with issuance of the emergency order, or as soon thereafter as possible.

If the named party has provided DEQ with an email address in an official communication with the Agency (e.g., in a permit application), the notice may be sent to the named party by email. The DEQ exhibits accompanying the notice may be sent to the responsible party by Vitashare transfer or email. The email conveying the notice should request that the named party acknowledge receipt. If the named party fails to acknowledge receipt, the Agency Advocate should call the named party to confirm that they received the notice. If DEQ is not able to confirm receipt of the notice by email, the notice should also be mailed to the Responsible Party. If the named party has not provided an email address to DEQ, the notice and exhibits should be conveyed by mail. When the named party is a corporation, limited liability company, or other entity registered with the SCC, the notice should be sent to the registered agent for the company in addition to any contact-person on file with DEQ. The Hearing Officer should be copied on the Notice of Formal Hearing.

Absent instructions from DEQ to the contrary, the Hearing Officer is responsible for scheduling the hearing (which may be accomplished during a pre-hearing conference, as discussed below) and providing notice to the parties. Hearings should be scheduled at a time

[177] Va. Code §§ 10.1-1309; 10.1-1455(G); 62.1-44.15(8b); 62.1-44.34:20.

and manner convenient to all parties. Unless previously specified by DEQ, the place at which the hearing will be held shall be determined by the Hearing Officer. The hearing should be held at a place that satisfies venue requirements (see Part I.B.2.a above) and is convenient to the parties.

Pre-Hearing Conferences and Statements

In the notice of formal hearing, or by separate motion, DEQ may request that the Hearing Officer schedule a pre-hearing conference.[178] Any pre-hearing conference is to be scheduled with due regard for the convenience of all parties, and should allow reasonable notice of the time, place, and purpose of the conference to all parties. The pre-hearing conference is on the record and may be held by telephone or in person. Topics that may be included in a pre-hearing conference are:

- Identification, simplification, and clarification of the issues;
- Explanation of procedures, establishment of dates and deadlines (i.e., for hearings or submission of documents), and explanation of the roles of the parties, representatives, and Hearing Officer;
- Stipulations and admissions of fact and of the content and authenticity of documents;
- Disclosure of the number and identities of witnesses;
- Exploration of the possibility of settlement179; and
- Exploration of such other matters as shall promote the orderly and prompt conduct of the hearing.

A Hearing Officer may require all parties to prepare pre-hearing statements at a time and in a manner established by the Hearing Officer. Topics that may be included in a pre-hearing statement are:

- Issues involved in the case;
- Stipulated facts (together with a statement that the parties have communicated in a good faith effort to reach stipulations);
- Facts in dispute;
- Witnesses and exhibits to be presented, including any stipulations relating to the authenticity of documents and witnesses as experts;
- A brief statement of applicable law;
- The conclusion to be drawn; and
- The estimated time required for presentation of the case.

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[178] A pre-hearing conference may also be requested by the named party or scheduled on the Hearing Officer's own initiative.

[179] The Hearing Officer should not attend or preside at any settlement or alternative dispute resolution conferences, and settlement discussions shall not be made a part of the record.

Exchange of Information and Subpoenas

The hearing officer may require all parties to exchange information that they intend to rely upon in advance of the hearing. Information to be exchanged should include a list of witnesses each party intends to call and any documents that will be entered into evidence. The hearing officer may also require copies of all such documents be sent to him or her in order to prepare for the hearing. A copy of any document submitted to the hearing officer must be provided to all parties. The hearing officer should set a date for the exchange of information that will provide the parties with adequate time to prepare for the hearing and object to admissibility of evidence.

The APA does not permit discovery proceedings; however, there are certain procedures available to procure relevant information by subpoena.[180] Va. Code § 2.2-4022 provides that "[t]he agency or its designated subordinates may, and on request of any party to a case shall, issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence." Additionally, "[d]epositions de bene esse and requests for admissions may be directed, issued, and taken on order of the agency for good cause shown; and orders or authorizations therefore may be challenged or enforced in the same manner as subpoenas." The authority to issue subpoenas is retained by the Director of DEQ or his or her designee unless it is delegated to the Hearing Officer.[181]

Any person who is subpoenaed may petition the hearing officer to quash or modify the subpoena. A hearing officer may quash or modify a subpoena where the evidence sought is irrelevant or inadmissible, or when the subpoena was illegally or improvidently granted. If a hearing officer refuses to quash a subpoena, the objecting party may petition the circuit court for a decision on the validity of the request for the subpoena. If a party refuses to comply with a subpoena, the hearing officer may procure enforcement from the circuit court. The appropriate circuit court is determined by Va. Code § 2.2-4003.

The statutory right to a subpoena duces tecum is not unlimited. Va. Code § 2.2-4022 creates a right for the parties to subpoena only evidence that is relevant and admissible as evidence in the administrative proceeding. *See State Health Dept. Sewage Handling & Disposal Appeal Review Board v. Britton*, 15 Va. App. 68, 70 (1992).

Conducting the Hearing

The Hearing Officer will introduce the case and make whatever introductory comments he or she deems appropriate. The Hearing Officer is expected to promote and maintain decorum at all times.

The party with the burden of proof ("the proponent") will make an opening statement, which will be followed by the opposing party's opening statement. Generally, the standard of proof

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[180] Va. Code § 2.2-4022.

[181] For hearings under the State Water Control Law, 9 VAC 25-230-150 authorizes the Hearing Officer to issue subpoenas. DEQ may also authorize a Hearing Officer to issue subpoenas in an appointment letter.

in administrative hearings is a preponderance of the evidence. In enforcement proceedings, DEQ bears the burden of proof. In a permitting appeal, the Petitioner bears the burden of proof. The proponent will then present its case. Witnesses shall be placed under oath prior to rendering testimony. After the proponent has completed its case, the opposing party will present its case.

Each party will be allowed to make a closing argument at the end of the hearing. The proponent will speak first. A party may waive a closing argument and rely on written findings of fact and conclusions of law in lieu thereof.

The Agency Advocate presents DEQ's opening statement, conducts direct examination of DEQ's witnesses, cross-examines the named party's witnesses, and may make a closing argument. The Agency Advocate may also object to admission of evidence proffered by the named party on evidentiary grounds, including relevance.

The APA provides that the Hearing Officer may receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination and rule upon offers of proof.[182]

Formal rules of evidence do not apply to administrative hearings, and evidence which would not be admissible in a court may be admitted and considered by the Hearing Officer. The Virginia Supreme Court has stated that the rules of evidence are relaxed in administrative proceedings and that the findings of administrative agencies will not be reversed solely because evidence was received which would have been inadmissible in court.[183] Hearsay may be admissible, provided it is otherwise reliable. The probative weight of hearsay evidence is left to the Hearing Officer's discretion.

Unless a statute or agency regulation requires otherwise, any evidence may be admitted if it appears to be relevant, reliable, and not otherwise improper.

A foundation must be laid for documentary evidence and such evidence must be authenticated by the custodian of the record or by a witness who can testify that the document is genuine. Documentary evidence should be marked for identification and the exhibit number referred to whenever the document is mentioned.

Expert opinions may be admitted in administrative proceedings. Before the date of the hearing, all parties should exchange the names, addresses, and qualifications of any expert that may testify. It is within the Hearing Officer's discretion to qualify an expert and determine the weight afforded to expert opinions. Hearing Officers are not bound by expert opinions presented to them, and it is up to the Hearing Officer to weigh the credibility of expert testimonies and at times must resolve conflicts between expert testimonies. By statute, in civil cases, no expert or lay witness shall be prohibited from expressing an opinion on the

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[182] Va. Code § 2.2-4020 C.
[183] *Virginia Real Estate Comm'n v. Bias*, 226 Va. 264, 270, 308 S.E. 2d 123, 126 (1983).

ultimate issue of fact.[184] However, this section prohibits such witnesses from expressing any opinion which constitutes a conclusion of law.

DEQ should arrange for a court reporter to attend the hearing and produce a transcript of the hearing.

Post-Hearing Issues

Time Restrictions on Rendering Case Decisions

A Hearing Officer must issue a recommendation within 90 days from the date of the formal hearing, or from a later date agreed to by DEQ and the named party.[185] In cases in which a Hearing Officer presided over the hearing, DEQ or the board must issue a decision within 30 days from receipt of the Hearing Officer's recommendation. If the agency does not make a decision within that 30 day period, the party may notify the agency in writing that a decision is due.[186] If the agency does not make the decision within 30 days of receiving the notice, the decision is deemed in favor of the named party, precluding DEQ from ordering penalties or injunctive relief, or issuing a case decision finding the Responsible Party in violation of legal requirements in the case.[187] Provisions are made in the APA for situations where the agency personnel who conducted the informal proceeding are unable to attend to official duties due to sickness, disability, or termination of their official capacity with the agency.

In a formal hearing before a quorum of the State Water Control Board, the Board must issue a decision within 90 days from the hearing date, or a later date agreed by the parties. If no decision is made within that period, the named party may notify the agency that a decision is due. If no decision is made within 30 days from receipt of the notice, the decision shall be deemed in favor of the named party.[188]

Proposed Findings of Fact and Conclusions of Law

The APA provides that the parties may submit proposed findings and conclusions and statements of reasons therefor.[189] The Agency Advocate prepares the proposed findings of fact and conclusions of law on behalf of DEQ.

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[184] Va. Code § 8.01-401.3(B).
[185] Va. Code § 2.2-4024(D)(2).
[186] Va. Code § 2.2-4021.
[187] This provision does not apply to case decisions before the State Water Control Board or DEQ to the extent necessary to comply with the federal Clean Water Act, the State Air Pollution Control Board or DEQ to the extent necessary to comply with the federal Clean Air Act, or the Virginia Soil and Water Conservation Board or the Department of Conservation and Recreation to the extent necessary to comply with the federal Clean Water Act.
[188] This provision does not apply to case decisions before the State Water Control Board or DEQ to the extent necessary to comply with the federal Clean Water Act, the State Air Pollution Control Board or DEQ to the extent necessary to comply with the federal Clean Air Act, or the Virginia Soil and Water Conservation Board or the Department of Conservation and Recreation to the extent necessary to comply with the federal Clean Water Act.
[189] Va. Code § 2.2-4020(D).

The parties may also file other documents with the Hearing Officer, including corrections to the transcript, and memorandum of law in support of proposed conclusions of law. The parties are encouraged to submit their findings in and electronic format unless hard copies are requested by the Hearing Officer.

The Hearing Officer determines the date such filings are due, which is usually done at the conclusion of the formal hearing.

Hearing Officer's Recommendation

The Hearing Officer's recommendation should include findings of fact and conclusions of law on all material issues of fact and law presented on the record, including specific citations to the applicable portions of the record. The findings of fact should be linked to the testimony and other evidence in the record and give a basis for the conclusion drawn. The hearing officer must submit a recommendation within the statutory timeframe (90 days from the date of the formal hearing), unless otherwise agreed by DEQ and the named party.
The Hearing Officer should submit the recommendation to DEQ electronically, copying the named party, and deliver the record as directed by the agency.

Default

If the named Party fails to attend the Hearing without good cause, the default provisions of Va. Code § 2.2-4020.2 apply, as described in PartI.B.3.d. above.

Exceptions to Hearing Officer Recommendation

Pursuant to Va. Code § 2.2-4020, "Where hearing officers or subordinate presiding officers, as the case may be, make recommendations, the agency shall receive and act on exceptions thereto." Upon receipt of the Hearing Officer's recommendation, DEQ's Agency Advocate will notify all parties in writing that any written exceptions to the Hearing Officer's recommendation should be filed within fourteen days of receipt of the notice that exceptions are due, or such other time as stated therein. If the Hearing Officer's recommendation, or components thereof, are contrary to DEQ's position(s) in the case, the Agency Advocate may submit exceptions on behalf of DEQ.

Participants' Opportunity to Respond to Summaries at Board Meeting

When a Citizens' Board will be meeting to render a decision, and considering information from a prior hearing, whether conducted by a hearing officer or the Board itself, any person who participated in the prior proceeding must be provided an opportunity to respond at the Board meeting to any summaries of the prior proceeding prepared by or for the Board.

Agency Case Decision

A case decision issued after a formal hearing must "briefly state… the findings, conclusions, reasons, or basis therefor upon the evidence presented by the record and relevant to the basic law under which the agency is operating together with the appropriate order, license, grant of

benefits, sanction, relief, or denial thereof."[190] In the final agency decision, the decision maker may approve, disapprove, or modify the recommendations of the Hearing Officer. Where appropriate the decision maker may adopt the Findings of Fact and Conclusions of Law recommended by the Hearing Officer or may incorporate exceptions filed by DEQ or the named party.

The final decision will be issued by the Director of DEQ, the Director's designee, or the applicable Board and will include:

- An order as to the final disposition of the case, including relief (injunctive relief and/or penalty ordered), if appropriate;
- The legal authority for the agency action;
- A recitation of the procedural events leading to the informal proceeding;
- The factual basis for the decision, including any statements as to the credibility of witnesses;
- The conclusion as to what violations if any, have occurred, and any other conclusion of law;
- Signature of the ultimate decision maker; and
- The date upon which the decision will become effective.

Service of the Case Decision

The APA requires DEQ to serve copies of all case decisions and orders on the parties by mail within five days of the decision.[191]

Va. Code §§ 10.1-1309; 10.1-1455(G); and 62.1-44.15(8b) and 62.1-44.12 include specific requirements for service of special orders issued after formal hearings, and tie the effective date of the orders to the date of service:

- A water special order, must be served on the Responsible Party by certified mail sent to their last known address, and the special order takes effect not less than 15 days after mailing.[192]
- A waste special order must be delivered to the responsible party or mailed by certified mail to their last known address, and the special order becomes effective five days after delivery or mailing.
- An air special order must be served on the Responsible Party by certified mail, return receipt requested, sent to their last known address, or by personal delivery by an agent of the Board; the special order takes effect not less than five days after receipt by the responsible party.

[190] Va. Code § 2.2-4020(E).
[191] Va. Code §§ 2.2-4021 and 2.2-4023.
[192] Va. Code §§ 62.1-44.15(8b) and 62.1-44.12.

The transmittal letter for the case decision should notify the named party of their right to appeal pursuant to § 2.2- 4026 and Rule 2A:2 of the Rules of the Virginia Supreme Court as described in Part I.B.3.f above.

Reconsideration of Formal Hearings

When DEQ or a citizen's board issues a final decision after a formal hearing, a party may file a petition for reconsideration within 15 days from service of the decision. The petition must include a full and clear statement of pertinent facts, grounds for reconsideration, and a statement of relief. The petition does not suspend the execution of the decision or toll the time for filing an appeal, unless the agency grants the petition and provides for suspension of the decision.

In considering a petition for reconsideration, DEQ may consider:

- Evidence in the administrative record;
- New material evidence that was not in existence before the administrative record closed; or
- Newly discovered material evidence that could not, with reasonable diligence, have been discovered and produced before the administrative record closed.

DEQ must issue a written decision on a petition for reconsideration of a DEQ decision within 30 days of receipt. A citizen board may consider a petition for reconsideration of the board's decision at the next regularly scheduled board meeting; schedule a special meeting to decide upon the petition within 30 days of receipt; or delegate to the DEQ director, the board chairman, or a board subcommittee the authority to issue a decision within 30 days of receipt by the board.

The agency must state the reasons for its decision on a petition for reconsideration, and the written decision must:

- Deny the petition,[193]
- Modify the case decision, or
- Vacate the case decision and set a new hearing for further proceedings.

DEQ may modify the case decision or vacate the case decision and set a new hearing for further proceedings on the basis of:

- Error on the face of the decision;
- Clear error of fact;
- New material evidence that was not in existence before the administrative record closed; or newly discovered material evidence that could not, with reasonable

[193] Denial of a petition for reconsideration is not a separate case decision and is not subject to judicial review on its own merits.

diligence, have been discovered and produced before the administrative record closed;
- Issuance of a decision contrary to law; or
- Failure to conduct the hearing in accordance with Va. Code § 2.2-4020.

In addition to responding to petitions for reconsideration, DEQ or a citizen board may also act on its own initiative to reconsider final decisions within 30 days of issuance. If DEQ staff identifies an error of the type listed above in a decision issued by DEQ or a citizen board following a formal hearing, they should notify the Director of Enforcement, Enforcement Adjudication Manager, and signatory of the decision to discuss whether reconsideration is warranted.

Chapter Seven – Access to Private Property

DEQ Policy and Procedures for Accessing Private Property

General Procedures

To carry out the mission of DEQ and meet the statutory mandates to protect human health, safety, and the environment, DEQ staff often must enter onto private property to conduct inspections and investigations, or respond to environmental contamination, threats, or hazards. In order to ensure that such inspections, investigations, and responses would be legally defensible in court, they should be conducted within the confines of all laws as well as DEQ's policies and procedures.

It shall be the policy and procedure of DEQ for staff to obtain consent from the property owner or an authorized representative of the property owner prior to or at the time of conducting an inspection or investigation on private property, absent urgent circumstances. Often, DEQ permits include right of entry and inspection provisions. Staff should review these permit provisions prior to conducting an inspection or investigation at a permitted facility. Additionally, rights of entry and inspection provisions are found in several sections of the Virginia Code.[194]

Staff is also encouraged to use public spaces such as parks and roadways to perform their duties.

Staff may enter a private property in cooperation with other local, state, or federal authorities if the purpose of the site inspection or visit is administrative or civil in nature and the subject of the inspection is within the authority of DEQ.[195]
Private property, as used in this document, means property that is not owned by a governmental entity but rather a private citizen or legal entity such as a company.

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[194]Appendix A provides the statutory language found in the Virginia Code that allows DEQ to inspect or conduct investigations.

[195] Generally, staff is carrying out administrative or civil functions and not criminal functions. Different legal requirements and policies govern entry onto private property for criminal investigations. This guidance only covers access to private property for routine program inspections or administrative inspections and not criminal investigations or warrants obtained pursuant to a criminal investigation or criminal enforcement proceedings. These procedures should not be used to attempt to obtain criminal evidence or for criminal investigations. If a criminal investigation is underway, staff must not use a civil or administrative inspection or investigation to collect or identify information or evidence for a criminal investigation.

Inspections of Permitted and Non-Permitted Properties

Upon arrival at the site, staff must locate the property owner or authorized representative,[196]present his or her DEQ credentials,[197] and identify the reason for being on the property.

Staff must then obtain the consent of the property owner or authorized representative of the property owner. This step is not required if previous permission has been granted to enter the property and to conduct the inspection. Also, if staff is conducting an unannounced inspection, consent should be obtained upon arrival at the site but not in advance.
For leased properties, staff must obtain consent from the person who leases the property or authorized representative, and ensure that the representative granting consent has authority to grant consent on the lessee's behalf.

Staff should conduct the inspection during regular business or operating hours. Staff should maintain a professional, courteous demeanor while gaining access and should not threaten, harass, coerce, or otherwise act unreasonable when seeking entry.
Staff may enter upon property, even property that is marked with "No Trespassing," only to determine if the property owner or authorized representative is on-site and to obtain consent. Staff should never enter onto or remain on property where a risk to his or her safety or health is present or possible.

Upon arrival, if staff cannot locate the property owner or an authorized representative and prior permission has not been given to enter the site, staff shall not continue to conduct an inspection and must exit the property.
If staff cannot locate the property owner or authorized representative, after exiting the property, staff should discuss their findings with their immediate supervisor to determine next steps, which may include:

- Searching governmental agencies' websites or databases to determine if an entity is still operating or exists;
- Searching local property records to determine who the legal owner of the property is;
- using public access points or property to observe and document issues;
- Asking adjoining property owners for access to make observations from adjacent properties;
- Petitioning the appropriate Circuit Court for access to abandoned waste sites;

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[196] An authorized representative is an individual other than the property owner who has the authority to grant access to the site. For example, environmental managers usually have the authority to allow staff on-site to conduct inspections. Other examples would include spouses, corporate officers, managers, waste water treatment plant operators, and landfill operators. If staff isnot sure if the individual has such authority, staff should inquire of the individual.
[197]Credentials are the employee's state-issued DEQ identification.

- Issuing an NOAV, which cites permit provisions for the agency to be able to conduct inspections or other permit requirements such as a requirement that certain individuals to be on-site.

Additionally, staff may consider using the procedures outlined in Section IV to obtain an inspection warrant.

Once consent has been obtained, staff does not have to be accompanied by the property owner or an authorized representative during the inspection unless it is called for under media-specific procedures, but should be accompanied by facility personnel when possible. If the property owner or authorized representative demands to be present during the inspection but is unavailable to accompany staff at the time, then staff should consult with their supervisor and may consider returning when the property owner is available or pursuing an administrative inspection warrant using the procedures outlined in Section IV, depending upon the circumstances and urgency for the inspection.

Apparent Violations or Circumstances Requiring Immediate Action Including Fish Kills and Suspected Spills of Hazardous or Toxic Substances

If an obvious and immediate damage to human health or the environment has occurred or is about to occur and an immediate investigation or other action to determine the source and/or mitigate its effects may be warranted, such as investigating a fish kill or spill/release of a hazardous or toxic substance, staff should immediately notify their Regional Director or designee. After notification to the Regional Director or designee, staff will notify the property owner or an authorized representative and seek immediate access to the site. If the property owner or an authorized representative cannot be reached, staff may enter the property to conduct a limited investigation to determine immediate risks to human health and the environment if the violations or circumstances involve air or water violations. However, staff should make repeated attempts to contact the property owner or an authorized representative and notify the property owner or an authorized representative after exiting the site as soon as possible.

If the apparent violations or circumstances involve waste media, staff should consult with the Central Office Division of Enforcement (DE) prior to entering the site.
Staff should not enter the property if a risk is present to the employee's health and safety. If staff has a concern about the safety of a site, they should consult with their supervisor. If appropriate, staff should notify the proper emergency or first responders, if not already present on-site, and wait for proper clearance to enter the site.

If a property owner or authorized representative objects to staff entering their property, staff should exit the property and notify their Regional Director of the hazard, threat, damage, and other observations. Staff should then follow the procedures outlined in Section IV and discuss available options with DEQ Central Office management.

Denial of Access

In an attempt to conduct an investigation or inspection, DEQ may consider the following a denial of access:

- Expressed denial of access to the property to conduct an investigation or inspection;
- Limiting the scope of inspection to exclude areas that are necessary to properly conduct an inspection or investigation;
- Requiring staff to sign waivers of liability or waivers limiting liability including register logs or badges which contain such language. However, staff may sign a sign-in sheet at the facility so that facility is aware of who is on-site as long as the sheet does not contain a waiver of liability or a confidentiality agreement. In this case, staff should request the ability to sign-in on a separate document or if possible strike through the waiver language and initial over the strike through;
- Requiring staff to sign confidentiality agreements;
- Denial of ability to take photographs of items that are reasonably related to the inspection or investigation or are evidence of non-compliance. Staff should check with the Media Compliance Manager and Media Enforcement Manager if a question arises as to the ability to protect information as confidential;
- Refusing or limiting staffs ability to use equipment necessary to conduct the inspection;
- Refusing or limiting staff's ability to take samples or conduct monitoring necessary to conduct the inspection;
- Refusing or limiting staffs ability to view documents necessary to conduct the inspection;
- Unreasonably delaying staff conducting the inspection. Whether a delay is unreasonable depends on the circumstances such as length, reason for the delay, urgency that the inspection needs to be conducted, and other circumstances which must be examined on a case-by-case basis;
- Making threats, intimidating, harassing, or coercing staff;
- Other unreasonable actions or conditions placed upon staff.

If an individual other than the property owner or authorized representative denies access, staff should attempt to make contact with the property owner or an authorized representative to gain access. In the case of a leased property, if a person other than the person who leases the property denies access, staff should attempt to make contact with the person who leases the property to gain access.

In the event that staff is denied access to a property, staff may ask why the individual is denying access and discuss the denial with the individual in attempt to resolve the situation. Staff should inform the individual the basis of the inspection and the agency's authority to conduct inspections. However, staff should not in any way threaten or attempt to coerce an individual who denies access. Staff should not imply any penalties, repercussions, or actions that may result against the individual or the facility if access is denied.

In the event of a denial of access, staff should note the denial and the reasons provided by the individual, and exit the property immediately. Upon exiting the property after a denial, staff should notify his or her immediate manager of the denial. In the event of a denial of access, staff should discuss next steps with his or her immediate manager, including possible actions such as using public access points or public property to observe issues of non-compliance, rescheduling the inspection, issuing an NOAV, or obtaining an inspection warrant as outlined in Section IV.

Inspection Warrants

The ability to inspect and investigate regulated facilities and possible non-compliant activity is essential to DEQ's mission. On the rare occasion that a DEQ employee is denied access or unable to gain access to a property, staff may obtain an inspection warrant to conduct the inspection or investigation.

An administrative inspection warrant is a warrant issued to conduct a regulatory inspection or investigation and is not the same as a criminal warrant to search a property or seize evidence to be used in a criminal investigation or trial.[198] Outlined below is the basis for obtaining an inspection warrant and the procedure staff should follow to attempt to obtain an inspection warrant.

Basis for Obtaining Administrative Inspection Warrants

An inspection warrant may generally be obtained under two circumstances. First, an inspection warrant may be granted by a court where the inspection or investigation and actions to be undertaken during the inspection are being conducted pursuant to reasonable "legislative or administrative standards."[199] Usually, this criterion is satisfied where a facility is being inspected pursuant to routine permitting, monitoring, or federal grant commitments. Second, an inspection warrant may be granted where probable cause exists to believe that a noncompliant activity is occurring.[200] Usually, this criterion is satisfied where probable cause exists to show a violation of one of the laws or regulations under the purview of one of the DEQ.

In addition to these two circumstances, staff must have either been refused admission to the property or demonstrate to the court that facts or circumstances warrant the court issuing the inspection warrant without DEQ staff having consent to enter the property. This later

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[198] "An inspection warrant is an order in writing, made in the name of the Commonwealth, signed by any judge of the circuit court whose territorial jurisdiction encompasses the property or premises to be inspected or entered, and directed to a state or local official, commanding him to enter and to conduct any inspection, testing or collection of samples for testing required or authorized by state or local law or regulation in connection with the manufacturing, emitting or presence of a toxic substance, and which describes, either directly or by reference to any accompanying or attached supporting affidavit, the property or premises where the inspection, testing or collection of samples for testing is to occur." Va. Code § 19.2-393.

[199] Va. Code § 19.2-394 describes the circumstances under which a Circuit Court may issue an inspection warrant. These criteria must be demonstrated to the court.

[200] Va. Code § 19.2-394 describes the circumstances under which a Circuit Court may issue an inspection warrant. The court will determine if probable cause exists based upon the information provided to the court.

condition is generally satisfied where facts or circumstances indicate that evidence may be lost or destroyed if consent is first attempted to be obtained or that other actions may occur that undermine DEQ's ability to effectively enforce laws or regulations.[201]

Procedures to Obtain Administrative Inspection Warrants

The first step in obtaining an inspection warrant to conduct the inspection or investigation is to discuss the need for the inspection warrant with the Regional Media Program Manager. The reason may be due to a denial of access, as discussed in Section II, or circumstances that indicate a preemptive inspection warrant may be needed. If staff believes that, under the circumstances, an inspection warrant may be needed; staff should implement these procedures as soon as possible.

If the Regional Media Program Manager believes an inspection warrant should be obtained, staff and the Regional Media Program Manager should discuss the issue with regional management.

Upon agreement by regional management, the regional office should contact the DE in the Central Office and Central Office Media Program Managers to discuss the basis and appropriateness for the inspection warrant and next steps, including the drafting of necessary court documents.

Upon agreement that an inspection warrant should be obtained, DE will contact and coordinate with the Office of the Attorney General (OAG).
Obtaining an inspection warrant will require the staff member who is seeking to conduct the inspection to complete an affidavit which indicates the basis for the inspection, what is to be inspected, and whether the inspection warrant is being sought due to a denial of access or circumstances where consent should not be requested prior to the inspection.[202] Template affidavits, applications for warrants, and warrants are available from DE.

After coordination with the OAG, staff and the OAG will present the affidavit, application for warrant, and the warrant to the Circuit Court in the jurisdiction where the inspection is to occur.

Upon Circuit Court approval, staff will immediately execute the warrant. An inspection warrant only remains valid for 10 days.[203] If staff cannot execute the warrant within the time indicated in the inspection warrant, staff should notify DE, and DE will coordinate with the OAG to request an extension.

Staff may request that the warrant be served by a local or county sheriff or other law enforcement personnel. Staff may also request that a local or county sheriff or other law

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[201] Va. Code § 19.2-394
[202] Va. Code § 19.2-394 outlines what must be contained in an affidavit to the Circuit Court.

[203] Va. Code § 19.2-395

enforcement personnel accompany them on the inspection. Staff shall not use force to execute the inspection warrant.[204]

Staff must conduct the inspection or investigation as prescribed or limited in the inspection warrant and strictly adhere to any terms in the inspection warrant.
Staff should coordinate with DE and the OAG to file a return of service[205] after execution of the inspection warrant in the Circuit Court where the inspection warrant was obtained.[206]

[204] Va. Code § 19.2-396 prohibits use of force to execute an inspection warrant unless specifically authorized by the court under special circumstances.
[205] A "return of service" is a document filed with the court affirming that the warrant has been served.
[206] Va. Code § 19.2-395

Appendix A: Letter from Attorney General of Virginia

COMMONWEALTH of VIRGINIA

Richard Cullen
Attorney General

Office of the Attorney General
Richmond 23219

900 East Main Street
Richmond, Virginia 23219
804-788-2071
804-371-8948 TDD

January 12, 1998

The Honorable Michael McCabe
Regional Administrator, Region III
U.S. Environmental Protection Agency
841 Chestnut Building
Philadelphia, Pennsylvania 19107

General Responses Regarding Virginia's
Environmental Assessment Priviledge and Immunity Law

Dear Mr. McCabe:

We have received EPA's September 4, 1997 letter requesting information regarding whether Virginia's. Environmental Assessment Privilege and Immunity Law (§§ 10.1-1198 and 10.1-1199 of the Code of Virginia ("Code")) ("Environmental Privilege/Immunity Law") deprives the Commonwealth of adequate authority to enforce various requirements of our environmental programs that have been authorized, delegated, or approved by EPA or whose authorization, delegation, or approval by EPA is pending (collectively, "Virginia's federally authorized environmental programs"). With this letter, I respond to the questions presented in the Cross-Programmatic Enclosure to that letter. As explained fully below, none of Virginia's federally authorized environmental programs are subject to the Environmental Privilege/Immunity Law.

1. **Virginia's Environmental Privilege/Immunity Law**

Virginia's Environmental Privilege/Immunity Law was enacted hi 1995 and is found at §§ 10.1-1198 and 10.1-1199 of the Code. Section 10.1-1198 provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment Not protected by the privilege are documents or information (1) that are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent, and substantial danger to the public health or environment;or (4) that are required by law. "Document" is defined to include "field notes, records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, videotape, computer-generated or electronically recorded information, maps, ducts, graphs and surveys." Any document submitted to the Commonwealth pursuant to its federally authorized environmental programs would fall within this definition. See Cross-Programmatic Enclosure, No. 3. As discussed below, however, documents (and information about the content of those documents) that are *needed* for civil and criminal enforcement of Virginia's federally authorized environmental programs would not be privileged.

Section 10.1-1199 provides that immunity from administrative or civil penalty, "[t]o the extent consistent with requirements imposed by federal law," may be accorded to persons making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order. As explained below, this immunity is not available in civil and criminal enforcement of Virginia's federally authorized environmental Programs-

2. Non-Applicability of Environmental Privilege/Immunity Law

In general, the Environmental Privilege/Immunity Law does not limit the Commonwealth's civil and criminal enforcement authority for Virginia's federally authorized environmental programs because § 10.1-1198 precludes granting a privilege to documents required by law and any immunity accorded under § 10.1-1199 is conditioned on its being consistent with federal law.[1] As you know, in order to obtain full authorization, delegation, or approval from EPA for any of these programs, the Commonwealth is required by federal law to have fall authority to enforce those programs, both civilly and criminally. As such, all aspects of Virginia's environmental laws and regulations that are necessary to implement and enforce Virginia's federally authorized environmental programs in a manner that is no less stringent than their federal counterparts are necessarily "required by law." [2]

Regarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in the manner required by federal law to maintain program delegation. authorization, or approval. As to § 10.1-1199, no immunity could be afforded from administrative, civil, or criminal penalties because granting such an immunity would not be consistent with federal law, which is one of the criteria for the immunity. Granting immunity would be inconsistent with the federal requirement to have full civil and criminal enforcement authority, which is necessary for the Commonwealth's programs to remain at least as stringent as the federal counterparts.

3. Definition of "Environmental Law"

In the definition of "environmental assessment," Code § 10.1-1198 refers to "environmental laws and regulations." As noted in the September 4 letter, "environmental laws" is not defined in § 10.1-1198. See Cross-Programmatic Enclosure, No. 1. "Environmental laws" would include statutes adopted by the Virginia General Assembly to protect Virginia's environment and the

[1]Accordingly, I will not respond to the questions set forth in Number 15 of the Cross-Programmatic Enclosure.

[2]Any other interpretation would conflict with a variety of general and specific grants of authority to state agencies to obtain federal authorizations, delegations, and approvals for implementation of environmental programs.

public, mainly in terms of air, water, and waste pollution. "Regulations" would include any and all regulations adopted pursuant to these environmental laws. In addition, "environmental laws and regulations" includes permits, consent agreements, and orders by virtue of the fact that they are issued pursuant to these statutes and regulations.

4. Criminal Violations

The Environmental Privilege/Immunity Law applies by its terms only to administrative and civil enforcement actions. Thus, it does not provide a privilege from disclosure of documents and does not authorize immunity to be accorded from prosecution from criminal violations of environmental laws, regulations, permits, or orders pertaining to any of Virginia's federally authorized environmental programs. The Commonwealth retains full enforcement authority to prosecute criminal conduct As such, the Environmental Privilege/Immunity Law has no effect on the activities listed in Number 2 of the Cross-Programmatic Enclosure. A privilege cannot be asserted under. § 10.1-1198 in any criminal investigation arising under any federally authorized, delegated, or approved environmental program for any document (and information about the content of such document) that is the product of a voluntary environmental assessment.

Moreover, as noted above, the Commonwealth retains full authority for criminal enforcement because it is a requirement of federal law that Virginia have such authority in order to obtain and maintain full authorization, delegation, or approval from EPA for any of these programs. For this additional reason, the Environmental Privilege/Immunity Law does not apply to criminal prosecutions or investigations.

5. Documents Required by Law

As noted in Number 8 of the Programmatic Enclosure to the September 4 letter, Virginia's federally authorized environmental programs contain comprehensive monitoring, recordkeeping, compliance certification, and reporting requirements. For this very reason, the phrase "documents required by law" in Code § 10.1-1198 renders the privilege provision in that statute inapplicable to these programs. Likewise, the phrase "to the extent consistent with requirements imposed by federal law" in Code § 10.1-1199 renders the immunity provisions of the statutes inapplicable to these programs.

Similarly, in response to Number 4 of the Cross-Programmatic Enclosure, Code § 10.1-1198 does not provide a privilege for documents and information required to be collected, maintained, reported, or otherwise made available to the Commonwealth by statute, regulation, ordinance, permit, order, consent agreement, settlement agreement, or otherwise as provided by law. Accordingly, the privilege in § 10.1.1198 would not apply to any documents or information relevant to noncompliance with Virginia's federally authorized environmental programs.

6. Investigations by DEQ

In response to the inquiry in Number 5 of the Cross-Programmatic Enclosure, I note that the Environmental Privilege/Immunity Law does not impede or adversely affect the Commonwealth's authority to investigate possible violations of any program requirement (including any requirement of statute, regulation, ordinance, permit, order, consent agreement, settlement agreement, or as otherwise provided by law),'as well as the Commonwealth's authority to verify adequate correction of any such violations and to inspect and copy any records pertaining to compliance with program requirements for the reasons set forth in the introductory paragraphs.

7. Access of Public to Documents

The Environmental Privilege/Immunity Law don not impede the public's access to documents that are required to be collected, maintained, reported, or otherwise made available to the Commonwealth or made available directly to the public under Virginia's federally authorized environmental programs. Cross-Programmatic Enclosure, No. 6.

The Law also does not impede public access to documents and information in the Commonwealth's files, whether those documents and information are voluntarily submitted or are collected pursuant to Virginia's information gathering authorities.[3] Cross-Programmatic Enclosure, No. 7. This is true because the Environmental Privilege/Immunity Law does not alter the right of Virginia's citizens to acquire any such documents pursuant to the Virginia Freedom of Information Act ("FOIA"), Code §§ 2.1-340 *d seq*. FOIA ensures that the public has ready access to records in the custody of public officials and agencies, which would include the types of documents and information addressed here. Public access is withheld only if one of the narrowly construed FOIA exceptions or exemptions apply. There is no exception or exemption in FOIA, however, for documents and information claimed as privileged under the Environmental Privileged Immunity Law. The public, therefore, would not be precluded access to documentI and information in the possession of Virginia's information gathering authorities based upon a claim of privilege under § 10.1.1198. Further, because the Environmental Privileged Immunity Law does not expressly retain the privilege for voluntarily disclosed documents or information, any claim of privilege for such documents or information would be waived by such voluntary disclosure.

EPA has asked about the access of moving parties to documents as contemplated in§ 10.11198(C). As provided in that statute, in an administrative or judicial proceeding a moving party would be given limited access to documents and information claimed as privileged for the purpose of proving an exception to the privilege. That limited access is available is consistent with the last sentence of § 10.1-1198(C), which provides for restrictions on that party's use of those documents and information. Furthermore, as to § 10.1-1198, if the fact-finder in the administrative or judicial proceeding concludes that the privilege does not apply, the documents or information would be

[3]"Virginia's information gathering authorities" means any. agency responsible for the administration and enforcement of Virginia's federally authorized environmental programs.

subject to production through the normal discovery process. In the administrative context, this would mean the documents and information would be subject to the provisions of Code § 9-6.14:13 of the Virginia Administrative Process Act which authorizes the fact-finder to issue subpoenas requiring testimony or the production of books, papers, and physical and other evidence.

8. Protection for Whistle Blowers

In Number 9 of the Cross-Programmatic Enclosure, EPA asks whether Code § 10.1-1198 conflicts with various federal statutory protections for employee disclosure or "whistle blowers" provided for public and private employees. The Environmental Privilege/Immunity Law has no effect on any such protections. The Law serves only to prevent the Commonwealth from compelling a person to produce a document covered by the privilege. It would not sanction an employee or other person for disclosing such a document.

9. Injunctive Relief, Civil Penalties, and Emergency Orders Regarding Harmful Activities

As noted above, documents and information that demonstrate a clear, imminent, and substantial danger to the public health or environment are not protected under the Environmental Privilege/Immunity Law. Accordingly, Virginia's ability to obtain injunctive relie4 civil penalties, and emergency orders to restrain activities that are endangering or causing damage to public health or the environment would not be affected. See Cross-Programmatic Enclosure, No. 10 and No. 12. The Commonwealth would not be obstructed in the collection of evidence in such situations because the evidence, pursuant to Code § 10.1-1189, would not be protected under the Environmental Privilege/Immunity Law.

EPA has asked whether voluntary testing that indicated levels greater than regulatory limits, but not so high as to be a "clear, imminent, and substantial danger to public health or environment," would be privileged. The answer is no. As noted in the introductory section above, documents and other information — which would include results of such testing — needed for civil or criminal—enforcement of one of Virginia's federal environmental programs would not be privileged because they are required by law in order for the Commonwealth to meet the federal requirement to have full civil and criminal enforcement authority at least as stringent as the federal counterparts.

10. "Federal Law" as Used in Code 810.1-1199

The term "federal law" in Code § 10.1-1199 includes federal statutes, federal common law (as decided by federal courts and administrative tribunals), federal regulations, and the Federal Rules of Evidence, Civil Procedure, and Appellate Procedure. See Cross-Programmatic Enclosure, No. 11.

11. Citizen Suits

In Number 13 of the Cross-Programmatic Enclosure, EPA inquires whether Code § 10.1-1199 would bar civil penalty recovery by citizens pursuant to § 304 of the CAA and § 7002 of RCRA. Section 10.1-1199 would not bar citizen suits and civil penalty recovery by citizens bringing those suits because the immunity could not be used to defend against an action in federal court. That defense is available only in suits brought in Virginia state court. In addition,- the immunity would not be available because § 10.1-1199 conditions the use of that immunity on it being consistent with requirements imposed by federal law. Use of the immunity to preclude the imposition of civil penalties in federal citizen suits would not be consistent with requirements of federal law.[4]

It is the Commonwealth's intention to append this letter to and incorporate it by reference in all Attorney General's statements or certifications included in applications for any program that is to be delegated, approved, or authorized by EPA. Further, we will apprise you if any changes in Virginia state law alter the conclusions of this letter. Please let me know if you have any questions about the above.

Sincerely yours,

Richard Cullen
Attorney General of Virginia

cc: The Honorable Becky Norton Dunlop
The Honorable Robert C. Metcalf
Randolph L. Gordon
Thomas L. Hopkins

[4] Virginia law does not provide for citizen suits, so your inquiry does not apply in that context.

Appendix B: Effect of State Audit Immunity/Privilege Laws on Enforcement Authority for Federal Programs

U.S. EPA, Statement of Principles – Effect of State Audit Immunity/Privilege Laws on Enforcement Authority for Federal Programs (February 14, 1997)[207]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MEMORANDUM

SUBJECT: Statement of Principles
Effect of State Audit Immunity/Privilege Laws
On Enforcement Authority for Federal Programs

TO: Regional Administrators

FROM: Steven A. Herman
Assistant Administrator, OECA

Robert Perciasepe
Assistant Administrator, OAR

Mary Nichols
Assistant Administrator, OAR

Timothy Fields
Acting Assistant Administrator, OSWER

[207] https://www.epa.gov/sites/default/files/2016-03/documents/audit.pdf

Under federal law, states must have adequate authority to enforce the requirements of any federal programs they are authorized to administer. Some state audit immunity/privilege laws place restrictions on the ability of states to obtain penalties and injunctive relief for violations of federal program requirements, or to obtain information that may be needed to determine compliance status. This statement of principles reflects EPA's orientation to approving new state programs or program modifications in the face of state audit laws that restrict state enforcement and information gathering authority. While such state laws may raise questions about other federal program requirements, this statement is limited to the question of when enforcement and information gathering authority may be considered adequate for the purpose of approving or delegating programs in states with audit privilege or immunity laws.

I. Audit Immunity Laws

Federal law and regulation requires states to have authority to obtain injunctive relief, and civil and criminal penalties for any violation of program requirements. In determining whether to authorize or approve a program or program modification in a state with an audit immunity law, EPA must consider whether the state's enforcement authority meets federal program requirements. To maintain such authority while at the same time providing incentives for self-policing in appropriate circumstances, states should rely on policies rather than enact statutory immunities for any violations. However, in determining whether these requirements are met in states with laws pertaining to voluntary auditing, EPA will be particularly concerned, among other factors, with whether the state has the ability to:

1) Obtain immediate and complete injunctive relief;
2) Recover civil penalties for:
    a. significant economic benefit;
    b. repeat violations and violations of judicial or administrative orders;
    c. serious harm;
    d. activities that may present imminent & substantial endangerment.
3) Obtain criminal fines/sanctions for willful and knowing violations of federal law, and in addition for violations that result from gross negligence under the Clean Water Act.

The presumption is that each of these authorities must be present at a minimum before the state's enforcement authority may be considered adequate. However, other factors in the statute may eliminate or so narrow the scope of penalty immunity to the point where EPA's concerns are met. For example:

1) The immunity provided by the statute may be limited to minor violations and contain other restrictions that sharply limit its applicability to federal programs.
2) The statute may include explicit provisions that make it inapplicable to federal programs.

II. Audit Privilege Laws

Adequate civil and criminal enforcement authority means that the state must have the ability to obtain information needed to identify noncompliance and criminal conduct. In determining whether to authorize or approve a program or program modification in a state with an audit privilege law,

EPA expects the state to:

1) retain information gathering authority it is required to have under the specific requirements of regulations governing authorized or delegated programs;
2) avoid making the privilege applicable to criminal investigations, grand jury proceedings, and prosecutions, or exempted evidence of criminal conduct from the scope of privilege;
3) preserve the right of the public to obtain information about noncompliance, report violations and bring enforcement actions for violations of federal environmental law. For example, sanctions for whistleblowers or state laws that prevent citizens from obtaining information about noncompliance to which they are entitled under federal law appear to be inconsistent with this requirement.

III. Applicability of Principles

It is important for EPA to clearly communicate its position to states and to interpret the requirements for enforcement authority consistently. Accordingly, these principles will be applied in reviewing whether enforcement authority is adequate wider the following programs:

1) National Pollutant Discharge Elimination System (NPDES), Pretreatment and Wetlands programs under the Clean Water Act;
2) Public Water Supply Systems and Underground. Injection Control programs under the Safe Drinking Water Act;
3) Hazardous Waste (Subtitle C) and Underground Storage Tank (Subtitle I) programs under the Resource Conservation Recovery Act;
4) Title V, New Source Performance Standards, National Emission Standards for Hazardous Air Pollutants, and New Source Review Programs under the Clean Air Act.

These principles are subject to three important qualifications:

u. While these principles will be consistently applied in reviewing state enforcement authority under federal programs, sate laws vary in their detail. It will be important to scrutinize the provisions of such statutes closely in determining whether enforcement authority is provided;

v. Many provisions of state law may be ambiguous, and it will generally be important to obtain an opinion from the state Attorney General regarding the meaning of the state law and the effect of the state's law on its enforcement authority as it is outlined in these principles. Depending on its conclusions, EPA may determine that the Attorney General's opinion is sufficient to establish that the state has the required enforcement authority.

w. These principles are broadly applicable to the requirements for penalty and information gathering authority for each of the programs cited above. To the extent that different or more specific requirements for enforcement authority may be found in federal law or regulations, EPA will take these into account in conducting its review of state programs. In addition, this memorandum does not address other issues that could be raised by state audit laws, such as the scope of public participation or the availability to the public of information within the state's possession.

IV. Next Steps

Regional offices should, in consultation with OECA and national program offices, develop a state-by-state plan to work with states to remedy any problems identified pursuant to application of these principles. As a first step, regions should contact state attorneys general for an opinion regarding the effect of any audit privilege or immunity law on enforcement authority as discussed in these principles.

Appendix C: Analysis of Proposed Supplemental Environmental Project

Va. Code § 10.1-1186.2

Source/Facility/Regulated Party:
Project Description:

1. Explain in detail how the project is environmentally beneficial and, if possible, provide a quantifiable measure of the benefit (*e.g.*, pounds of nutrient and/or emission reduction):

2. A SEP may only be a partial settlement: show what initial civil charge was computed, along with the appropriate SEP amount and final civil charge figure:

   Civil Charge/Penalty without a SEP $_____

   Minimum Payment Amount with a SEP (see Section II(F)) $_____

   Projected Net Project Costs (see No. 6, below) $_____

   SEP Mitigation Amount $_____

   Final Monetary Civil Charge/Penalty $_____

3. Explain how the SEP is not otherwise required by law and is solely the result of the settlement of an alleged violation:

4. Is there reasonable geographic nexus? If YES, explain:

   If NO, then does the SEP advance one of the declared objectives of the law or regulation that is the basis of the enforcement action (always preferred)? Explain:

5. Check all the qualifying categories that may apply (at least one must be checked):

   ☐ Public Health
   ☐ Pollution Prevention
   ☐ Pollution Reduction
   ☐ Environmental Restoration and Protection
   ☐ Environmental Compliance Promotion
   ☐ Emergency Planning and Preparedness

6. Does the SEP require a significant amount of DEQ management, resource investment or evaluation such that DEQ is unable to provide active oversight?

7. Does the proposed SEP require a significant amount of DEQ time and resources for negotiation, administration, SEP oversight or other management activities in comparison to the value of the SEP?

8. Does the Responsible Party have the ability or reliability to complete the proposed SEP and demonstrated an ability or willingness to comply with existing requirements?

9. Each of the following factors MUST be considered. Respond to each:

    - Net Project Costs (zero out all State or Federal government loans, grants and tax credits for project) (net cash flow to party should not be positive). Explain:

    - Benefits to the Public or the Environment (should exceed VEERF value; include any Community Involvement). Explain:

    - Innovation. Explain:

    - Impact on Minority or Low-Income Populations. Explain:

    - Multimedia Impact. Explain:

    - Pollution Prevention. Explain:

SEP Approval

_____

Regional Director

_____

Director f Enforcement

Appendix D: Template Letter Declining a SEP Proposal

[date]

[RP Contact] [Title]
[RP Name]
[RP Address]
[City, State, Zip Code]

Re: Proposed SEP
[Facility or Source, and Permit or Facility Number]

Dear **[RP Contact]**:

The Department has reviewed the proposal for a Supplemental Environmental Project (SEP) offered by **[RP]** on **[date]**, pertaining to **[general nature of SEP proposal]**. Under Va. Code § 10.1-1186.2, a SEP is "an environmentally beneficial project undertaken as partial settlement of a civil enforcement action and not otherwise required by law." The **[RP]** has proposed **[short summary of SEP, if needed]**.

It is our desire to return **[RP]** to compliance as quickly and straightforwardly as possible. Based on the facts and circumstances of this case, however, the Department does not agree to the proposed SEP. **[If appropriate, short statement of reasons for not agreeing with the proposal.]** Under the Code section cited above, "Any decision whether or not to agree to a supplemental environmental project is within the sole discretion of the applicable board, official or court and shall not be subject to appeal."

If you have any questions about this letter, please contact **[DEQ Contact]**, **[Title]**, at **[(xxx) xxx-xxxx]** or **[Contact.Name]**@deq.virginia.gov.

Sincerely,

[Regional Director] or
[Regional Enforcement Mgr.] or
[Regional Enforcement Rep.]

ECM 124-2

Appendix E: List of Acronyms

APA - Administrative Process Act, Va. Code § 2.2-4000 *et seq.*
AST - Aboveground Storage Tank
CAPP - Commonwealth Accounts Payable Procedures
CAS – Compliance Auditing System (Water)
CO – Central Office
DD – Division Director
DE – Division of Enforcement
DEQ – Virginia Department of Environmental Quality
DL – Deficiency Letter
DMR – Discharge Monitoring Report (Water)
DWR – Virginia Department of Wildlife Resources
EA- Enforcement Action Number, assigned by CEDs for tracking Enforcement Case
ECA – Executive Compliance Agreement
ECM - Enterprise Content Management. ECM is DEQ's electronic document management system. An ECM number refers to the file series and document type of a document in ECM (e.g., ECM 127-1 signifies a consent order or ECA).
EPACT - Federal Energy Policy Act of 2005
ERP – Enforcement Recommendation and Plan
FOIA – Virginia Freedom of Information Act, Va. Code § 2.2-3700 *et seq*.
GWM – Ground Water Management Act, Va. Code § 62.1-254 *et seq.*
IFF – Informal Fact Finding under the APA
HPV – High Priority Violator in the Air Program
ICL – Informal Correction Letter
LOA – Letter of Agreement
NOAV – Notice of Alleged Violation
NOV – Notice of Violation
OAG – Office of the Attorney General, or Department of Law
OFM – Office of Financial Management
ORA - Office of Regulatory Affairs
PC/IR No. – Pollution complaint or incident response number
PEDR – Process for Early Dispute Resolution
RCA – Request for Corrective (or Compliance) Action
RD – Regional Director
REM – Regional Enforcement Manager
RO – Regional Office
RP - Responsible Party
SCC – State Corporation Commission
SEP – Supplemental Environmental Project
SNC – Significant Noncomplier (Hazardous Waste); Significant Noncompliance (Water)
SSO – Sanitary Sewer Overflow
SWCB – State Water Control Board
UST – Underground Storage Tank
VEEP – Virginia Environmental Excellence Program
VEERF – Virginia Environmental Emergency Response Fund, Va. Code § 10.1-2500 *et seq*.

VPA – Virginia Pollution Abatement
VPDES – Virginia Pollutant Discharge Elimination System
VPSTF - Virginia Underground Petroleum Storage Tank Fund, Va. Code § 62.1-44.34:11
VWP – Virginia Water Protection

Appendix F: State Statutes on Right of Entry by DEQ

§ 10.1-1197.10. Right of entry to inspect, etc.; warrants.

Upon presentation of appropriate credentials and upon consent of the owner or custodian, the Director or his designee shall have the right to enter at any reasonable time onto any property to inspect, investigate, evaluate, conduct tests or take samples for testing as he reasonably deems necessary in order to determine whether the provisions of any law administered by the Director or the Department, any regulations of the Department, any order of the Department or Director or any conditions in a permit by rule, license or certificate issued by the Director are being complied with. If the Director or his designee is denied entry, he may apply to an appropriate circuit court for an inspection warrant authorizing such investigation, evaluation, inspection, testing or taking of samples for testing as provided in Chapter 24 (§ 19.2-393 et seq.) of Title 19.2.

Air Pollution Control Law

The Executive Director or an authorized DEQ staff member may use the following authority for air quality inspections:

Va. Code § 10.1-1307.3. Executive Director to enforce laws.

A. The Executive Director or his duly authorized representative shall have the authority to:
1. Supervise, administer, and enforce the provisions of this chapter and regulations and orders of the Board as are conferred upon him by the Board;
2. Investigate any violations of this chapter and regulations and orders of the Board;
3. Require that air pollution records and reports be made available upon request, and require owners to develop, maintain, and make available such other records and information as are deemed necessary for the proper enforcement of this chapter and regulations and orders of the Board;
4. Upon presenting appropriate credentials to the owner, operator, or agent in charge:
   a. Enter without delay and at reasonable times any business establishment, construction site, or other area, workplace, or environment in this Commonwealth; and
   b. Inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, without prior notice, unless such notice is authorized by the Director or his representative, any such business establishment or place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and question privately any such employer, officer, owner, operator, agent, or employee. If such entry or inspection is refused, prohibited, or otherwise interfered with, the Director shall have the power to seek from a court having equity jurisdiction an order compelling such entry or inspection;

B. The Executive Director or his duly authorized representative may pursue enforcement action for a violation of opacity requirements or limits based on (i) visual observations conducted pursuant to methods approved by the U.S. Environmental Protection Agency, (ii) data from

certified continuous opacity monitors, or (iii) other methods approved by the U.S. Environmental Protection Agency.

Va. Code § 10.1-1315. Right of entry.

Whenever it is necessary for the purposes of this chapter, the Board or any member, agent or employee thereof, when duly authorized by the Board, may at reasonable times enter any establishment or upon any property, public or private, to obtain information or conduct surveys or investigations.

Virginia Waste Management Act

The Executive Director or an authorized DEQ staff member may use the following authority for waste inspections:

Va. Code § 10.1-1456. Right of entry to inspect, etc.; warrants.

Upon presentation of appropriate credentials and upon consent of the owner or custodian, the Director or his designee shall have the right to enter at any reasonable time onto any property to inspect, investigate, evaluate, conduct tests or take samples for testing as he reasonably deems necessary in order to determine whether the provisions of any law administered by the Board, Director or Department, any regulations of the Board, any order of the Board or Director or any conditions in a permit, license or certificate issued by the Board or Director are being complied with. If the Director or his designee is denied entry, he may apply to an appropriate circuit court for an inspection warrant authorizing such investigation, evaluation, inspection, testing or taking of samples for testing as provided in Chapter 24 (§ 19.2-393 et seq.) of Title 19.2.

Va. Code § 10.1-1418.4. Removal of waste tire piles; cost recovery; right of entry.

Notwithstanding any other provision, upon the failure of any owner or operator to remove or remediate a waste tire pile in accordance with an order issued pursuant to this chapter or § 10.1-1186, the Director may enter the property and remove the waste tires. The Director is authorized to recover from the owner of the site or the operator of the tire pile the actual and reasonable costs incurred to complete such removal or remediation. If a request for reimbursement is not paid within 30 days of the receipt of a written demand for reimbursement, the Director may refer the demand for reimbursement to the Attorney General for collection or may secure a lien in accordance with § 10.1-1418.5.

Va. Code § 10.1-1406.1. Access to abandoned waste sites.

A. For the purposes of this section, "abandoned waste site" means a waste site for which (i) there has not been adequate remediation or closure as required by Chapter 14 (§ 10.1-1400 et seq.) of this title, (ii) adequate financial assurances as required by § 10.1-1410 or § 10.1-1428 are not provided, and (iii) the owner, operator, or other person responsible for the cost of cleanup or remediation under state or federal law or regulation cannot be located.
B. Any local government or agency of the Commonwealth may apply to the appropriate circuit court for access to an abandoned waste site in order to investigate contamination, to abate any hazard caused by the improper management of substances within the jurisdiction of the Board, or to remediate the site. The petition shall include (i) a demonstration that all

reasonable efforts have been made to locate the owner, operator or other responsible party and (ii) a plan approved by the Director and which is consistent with applicable state and federal laws and regulations. The approval or disapproval of a plan shall not be considered a case decision as defined by § 2.24001.

C. Any person, local government, or agency of the Commonwealth not otherwise liable under federal or state law or regulation who performs any investigative, abatement or remediation activities pursuant to this section shall not become subject to civil enforcement or remediation action under this chapter or other applicable state laws or to private civil suits related to contamination not caused by its investigative, abatement or remediation activities.

D. This section shall not in any way limit the authority of the Board, Director, or Department otherwise created by Chapter 14 of this title.

§ 10.1-1425.3. Inspection of battery retailers; penalty.

The Department shall produce, print, and distribute the notices required by § 10.1-1425.2 to all places in the Commonwealth where lead acid batteries are offered for sale at retail. In performing its duties under this section, the Department may inspect any place, building, or premise subject to the provisions of § 10.1-1425.2. Authorized employees of the Department may issue warnings to persons who fail to comply with the provisions of this article. Any person found guilty of failing to post the notice required under § 10.1-1425.2 after receiving a warning to do so pursuant to this section shall be punished by a fine of not more than fifty dollars.

State Water Control Law

The Executive Director or an authorized DEQ staff member may use the following authority for water inspections:

Va. Code § 62.1-44.20. Right to entry to obtain information, etc.

Any duly authorized agent of the Board may, at reasonable times and under reasonable circumstances, enter any establishment or upon any property, public or private, for the purpose of obtaining information or conducting surveys or investigations necessary in the enforcement of the provisions of this chapter.

State Ownership of Sub-Aqueous Bottoms, State Waters, and Aquatic Life

The Executive Director or an authorized DEQ staff member may use the following authority for inspection of water features and aquatic life:

Va. Code § 28.2-1200. Ungranted beds of bays, rivers, creeks and shores of the sea to remain in common.

All the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of the Commonwealth, not conveyed by special grant or compact according to law, shall remain the property of the Commonwealth and may be used as a common by all the people of the Commonwealth for the purpose of fishing, fowling, hunting, and taking and catching oysters and

other shellfish. No grant shall be issued by the Librarian of Virginia to pass any estate or interest of the Commonwealth in any natural oyster bed, rock, or shoal, whether or not it ebbs bare.
NOTE: *The statute indicates the identified bays, rivers, creeks, and shores of the sea within the jurisdiction of the Commonwealth are public property and subject to uninterrupted entry by the Executive Director or an authorized DEQ staff member. All streambeds east of the Appalachian Mountains are public property. Some streams west of the mountains, e.g., the Jackson River, are the subject of crown grants and are privately owned. To further complicate matters, the Jackson is navigable, so staff may access the river by boat, albeit they might require landowner permission to wade in that river. See Kraft v. Burr, 252 Va. 273 (1996).*

Appendix G: State Statutes on Administrative Inspection Warrants

Va. Code § 19.2-393. Definitions.

An "inspection warrant" is an order in writing, made in the name of the Commonwealth, signed by any judge of the circuit court whose territorial jurisdiction encompasses the property or premises to be inspected or entered, and directed to a state or local official, commanding him to enter and to conduct any inspection, testing or collection of samples for testing required or authorized by state or local law or regulation in connection with the manufacturing, emitting or presence of a toxic substance, and which describes, either directly or by reference to any accompanying or attached supporting affidavit, the property or premises where the inspection, testing or collection of samples for testing is to occur. Such warrant shall be sufficiently accurate in description so that the official executing the warrant and the owner or custodian of the property or premises can reasonably determine from the warrant the activity, condition, circumstance, object or property of which inspection, testing or collection of samples for testing is authorized.

For the purposes of this chapter, "manufacturing" means producing, formulating, packaging, or diluting any substance for commercial sale or resale; "emitting" means the release of any substance, whether or not intentional or avoidable, into the work environment, into the air, into the water, or otherwise into the human environment; and "toxic substance" means any substance, including (i) any raw material, intermediate product, catalyst, final product and by-product of any operation conducted in a commercial establishment and (ii) any biological organism, that has the capacity, through its physical, chemical, or biological properties, to pose a substantial risk to humans, aquatic organisms or any other animal of illness, death or impairment of normal functions, either immediately or over a period of time.

Va. Code § 19.2-394. Issuance of warrant.

An inspection warrant may be issued for any inspection, testing or collection of samples for testing or for any administrative search authorized by state or local law or regulation in connection with the presence, manufacturing or emitting of toxic substances, whether or not such warrant be constitutionally required. Nothing in this chapter shall be construed to require issuance of an inspection warrant where a warrant is not constitutionally required or to exclude any other lawful means of search, inspection, testing or collection of samples for testing, whether without warrant or pursuant to a search warrant issued under any other provision of the Code of Virginia. No inspection warrant shall be issued pursuant to this chapter except upon probable cause, supported by affidavit, particularly describing the place, things or persons to be inspected or tested and the purpose for which the inspection, testing or collection of samples for testing is to be made. Probable cause shall be deemed to exist if either reasonable legislative or administrative standards for conducting such inspection, testing or collection of samples for testing are satisfied with respect to the particular place, things or persons or there exists probable cause to believe that there is a condition, object, activity or circumstance which legally justifies such inspection, testing or collection of samples for testing. The supporting affidavit shall

contain either a statement that consent to inspect, test or collect samples for testing has been sought and refused or facts or circumstances reasonably justifying the failure to seek such consent in order to enforce effectively the state or local law or regulation which authorizes such inspection, testing or collection of samples for testing. The issuing judge may examine the affiant under oath or affirmation to verify the accuracy of any matter indicated by the statement in the affidavit.

Va. Code § 19.2-395. Duration of warrant.

An inspection warrant shall be effective for the time specified therein, for a period of not more than ten days, unless extended or renewed by the judicial officer who signed and issued the original warrant, upon satisfying himself that such extension or renewal is in the public interest. Such warrant shall be executed and returned to the judicial officer by whom it was issued within the time specified in the warrant or within the extended or renewed time. After the expiration of such time, the warrant, unless executed shall be void.

Va. Code § 19.2-396. Conduct of inspection, testing or collection of samples for testing; special procedure for dwelling.

An inspection, testing or collection of samples for testing pursuant to such warrant may not be made in the absence of the owner, custodian or possessor of the particular place, things or persons unless specifically authorized by the issuing judge upon a showing that such authority is reasonably necessary to effectuate the purpose of the law or regulation being enforced. An entry pursuant to this warrant shall not be made forcibly, except that the issuing judge may expressly authorize a forcible entry where facts are shown sufficient to create a reasonable suspicion of an immediate threat to public health or safety, or where facts are shown establishing that reasonable attempts to serve a previous warrant have been unsuccessful. In the case of entry into a dwelling, prior consent must be sought and refused and notice that a warrant has been issued must be given at least twenty-four hours before the warrant is executed, unless the issuing judge finds that failure to seek consent is justified and that there is a reasonable suspicion of an immediate threat to public health or safety.

Va. Code § 19.2-397. Refusal to permit authorized inspection; penalty.

Any person who willfully refuses to permit an inspection, testing or collection of samples for testing lawfully authorized by warrant issued pursuant to this chapter shall be guilty of a Class 3 misdemeanor.