CHAPTER 4
CIVIL CHARGES AND CIVIL PENALTIES

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CHAPTER 4
CIVIL CHARGES AND CIVIL PENALTIES

I. INTRODUCTION[1]

This chapter sets out the specific criteria used by DEQ to calculate appropriate civil charges and civil penalties[2] in administrative actions, including: (1) civil charges in consent orders; (2) civil penalties in Special Orders under Va. Code § 10.1-1186; and (3) civil penalties in Formal Hearing Orders. This chapter does not address charges and penalties in the "Air Check Virginia" Program, which is under separate guidance. Nor does this chapter address civil penalties in judicial proceedings or fines in criminal prosecutions.

Civil charges and civil penalties are authorized by the Virginia Code and support DEQ's mission "to protect the environment of Virginia in order to promote the health and well-being of the Commonwealth's citizens."[3] Assessing appropriate civil penalties and civil charges is consistent with DEQ's enforcement goals as set out in Chapter 1. The civil charge or civil penalty calculations in this guidance include an amount reflecting the gravity of the violation (the "gravity component") and are intended to remove any significant economic benefit of noncompliance. Noncompliance with environmental requirements must be more costly than compliance.

The Virginia Code sets out five factors as the basis for calculating appropriate civil charges and civil penalties in most cases:[4]

- the severity of the violations;[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;[6] and

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[1] Guidance documents set forth presumptive operating procedures. *See* Va. Code § 2.2-4001. 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. This guidance supersedes *Civil Enforcement Memoranda Nos. CEM-07A* (September 6, 2012) and CEM-07B (December 2, 2013).

[2] The Virginia Code does not define civil charges or civil penalties. Generally, civil charges are assessed with the consent of the responsible party (RP); civil penalties are assessed in adversarial administrative or judicial actions.

[3] Va. Code § 10.1-1183. The section also lists twelve purposes of DEQ including: "To promote environmental quality through … expeditious and comprehensive permitting, inspection, monitoring and enforcement programs…"; and "To ensure that there is consistency in the enforcement of the laws, regulations and policies as they apply to holders of permits or certificates issued by the Department, whether the owners or operators of such regulated facilities are public sector or private sector entities."

[4] 2005 Acts c. 706, amending Va. Code §§ 10.1-1316(D) (Air), 10.1-1455(L) (Waste), and 62.1-44.15(8e) (Water). *See* Va. Code § 10.1-1197.9(C)(3) (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).

[6] The General Assembly indicated the importance of this element previously in 1997 Acts c. 924, paragraph L.4: "It is the intent of the General Assembly that [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."

- the ability of the person to pay the penalty.

The Code requires the development of guidelines and procedures "that contain specific criteria for calculating the appropriate penalty for each violation" based on the statutory factors. This chapter constitutes those specific criteria, which are identified for the Air Program (Section II), the Land Protection and Remediation Programs (Section III), and the Water Programs (Section IV).[7] Each criterion identifies one or more of the five statutory factors supporting it.

A civil charge or civil penalty is not appropriate in every case. The Virginia Code grants immunity from civil charges and civil penalties for certain voluntarily disclosed violations.[8] Also, consistent with federal policy, DEQ exercises its enforcement discretion to mitigate most or all of the gravity portion of a charge or penalty, for violations that are discovered pursuant to a Voluntary Environmental Assessment and that are voluntarily and promptly self-reported and corrected.[9] Finally, the civil charge or civil penalty amount may be partially mitigated by a Supplemental Environmental Project (SEP).[10]

DEQ may depart from the recommended calculations in this guidance to seek penalties up to the maximum sums permitted by law where the interests of equity, deterrence, and justice require. While uncommon, such departure is appropriate in unusual cases of noncompliance, *e.g.*: 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 danger or death or serious bodily injury or harm; where the violation is contrary to the specific terms of a administrative order or judicial decree; where the violation or pattern of violations severely impacts an environmental media or resource, or prevents DEQ from carrying out its duties; or where the violation is the result of a pattern or practice that demonstrates the willful avoidance of regulatory requirements. In those cases where DEQ believes that the violation or its potential or actual harm justifies seeking up to the maximum penalties authorized by law, staff should apply the specific criteria described in this chapter as the qualitative basis in demonstrating how the applicable statutory factors substantiate the recalculation of the civil charge or civil penalty.

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[7] For purposes of the guidance, a "media program" means each of the following: the Air Stationary Source Program; the Land Protection Solid Waste, Hazardous Waste, and Remediation Programs; and the Water VPDES, VPA, VWPP, Article 9, Article 11, Ground Water, Surface Water, AFO, Poultry Waste, and Construction Stormwater Programs. Although the Article 9 and 11 Programs are authorized under State Water Control Law § 62.1-44.2 *et seq.* (Water Law), those programs are coordinated by the DEQ Division of Land Protection and Revitalization.

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

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

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

Ultimately, civil charges and civil penalties cannot exceed the statutory maximum, usually $32,500 per day for each violation. Certain statutes set out other maximum civil charges or civil penalties, especially for portions of the Water Programs.[11]

In all compliance and enforcement actions, the paramount priorities of DEQ are: to correct noncompliance promptly; to assure prompt implementation of all necessary remedial actions; to oversee appropriate process improvements; and to otherwise ensure protection of human health and the environment.

II. AIR PROGRAM

State Air Pollution Control Law (Air Law) at 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. Sections II A through II E below describe calculation of negotiated civil charges. The maximum Air Programs civil charge is $32,500 for each violation, with each day being a separate violation. Special considerations for pleading civil penalties in § 10.1-1186 Proceedings and Formal Hearings are discussed in Section II F.

A. CONSENT ORDERS WITHOUT CIVIL CHARGES

Initially, staff establish whether the violation warrants a civil charge. The following criteria should all be met for orders without civil charges:

- The severity of the violation is minimal. Consent orders without civil charges are not typically available in "High Priority Violator" (HPV) cases;
- The extent of the actual or potential environmental harm is negligible or minimal;
- The facility has not been in chronic noncompliance and is making a good-faith effort to comply; and
- The economic benefit of noncompliance is negligible or minimal.

The emphasis in all cases, but particularly in cases without civil charges or civil penalties, is on prompt and appropriate injunctive relief to bring facilities into compliance with applicable laws, regulations, orders, and permit conditions.[12]

B. CONSENT ORDERS WITH CIVIL CHARGES

Unless the violation is so unusual as to warrant an enhanced civil charge as described in the Introduction, DEQ assesses civil charges in consent orders using the Air

[11] *See* Sections IV I through IV K, below. Va. Code § 62.1-44.34:20 also establishes out minimum charges and penalties for certain violations involving the discharge of oil to state waters. 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 or civil penalty, such charge or penalty may be calculated using the five statutory factors.

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

Civil Charge/Civil Penalty Worksheet (Worksheet), which is found below. In calculating the appropriate civil charge, staff first identify the appropriate "Potential for Harm" classification and then work through the various categories on the Worksheet to calculate a Preliminary Subtotal. DEQ may adjust the Preliminary Subtotal upwards or downwards to reach a Total Civil Charge/Civil Penalty on the Worksheet. The Worksheet Total Civil Charge/Civil Penalty may also be adjusted for appropriate reasons, as documented on the Civil Charge/Civil Penalty Adjustment Form (*See* Section II E). Both the Worksheet and the Form are part of the Enforcement Recommendation and Plan (ERP). A blank Worksheet and Form may be made available to the Responsible Party (RP) at the beginning of negotiations; however, disclosure of the completed Worksheet and any Adjustment Form is discretionary, until the enforcement strategy exemption expires under the Virginia Freedom of Information Act (FOIA).[13]

C. POTENTIAL FOR HARM CLASSIFICATIONS[14]

Using best professional judgment, staff place violations into one of three "Potential for Harm" classifications – "Serious," "Moderate," or "Marginal" – that are listed near the top of the Worksheet. Staff classify the violations based on: (1) the potential for or actual human health or environmental harm; and (2) the effect on the regulatory program.

- **Human Health or Environmental Harm:** Human health or environmental harm considerations assume that, for violations that may cause excess emissions, the potential effect on human health or the environment is related to the potential to emit and/or the toxicity of the pollutant.[15]
- **Effect on the Regulatory Program:** This consideration examines whether the violation(s) or pattern of violations at issue are fundamental to the integrity of the regulatory program and DEQ's ability to monitor and protect human health and the environment.

The following sections define the three classifications and provide examples for each of the classification levels. The sections are not used to determine whether a violation warrants formal enforcement. Departures from the examples should be discussed with a representative of the Division of Enforcement (DE).

1. Serious Classification[16]

A violation is classified as Serious if: (1) the violation has resulted in *documented, substantial adverse impact or presents a substantial risk* of adverse impact to human health, welfare, or the environment; (2) the limit, standard, or other requirement violated is *significant to the viability or enforceability of*

[13] Va. Code § 2.2-3705.7(16). The rules for Formal Hearings are different. *See* Section II F, below.
[14] This criterion relates to the statutory factors of environmental harm and severity.
[15] While the violation must have occurred in Virginia, the assessment of environmental harm may consider impacts both within and beyond the boundaries of the Commonwealth (*e.g.*, impacts to a neighboring state's air quality).
[16] This criterion relates to the statutory factors of environmental harm and severity.

standards, the violation of which may result in substantial adverse impact or present a substantial risk of adverse impact to human health, welfare, or the environment; and/or (3) the violations have or may have *substantial adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program.

Examples include, but are not limited to:

- Emissions violations at a major source involving a pollutant for which that source is "major" (applies to Prevention of Significant Deterioration (PSD), Maximum Available Control Technology (MACT), and Title V);
- 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 synthetic minor (SM) sources where there is evidence that the failure may have caused emissions to exceed the applicable SM 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 or modification of an SM or state major source or a major modification under 9 Virginia Administrative Code (VAC) 5, Chapter 80, Article 6;
- 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 substantive consent order, administrative order, or judicial decree requirements (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).

2. Moderate Classification[17]

[17] This criterion relates to the statutory factors of environmental harm and severity.

A violation is classified as Moderate if: (1) the violation presents *some risk of adverse impact* to human health, welfare, or the environment; (2) the limit, standard, or other requirement violated is *significant to the viability or enforceability of standards*, the violation of which may cause some risk of adverse impact to human health, welfare, or the environment; and/or (3) the violations which have or may have *some adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program.

Examples include, but are not limited to:

- Emissions violations at a SM source that does not jeopardize the SM status of the source;
- Not maintaining control equipment or failure to use control equipment, for a pollutant, at a SM point source, in a manner consistent with good air pollution control practices (unless there is evidence that the failure resulted in emissions that jeopardize the SM status of the source);
- Failure to conduct emissions tests, monitor, or maintain records necessary to demonstrate compliance with standards involving a pollutant for which the source is an 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.

3. Marginal Classification[18]

A violation is classified as Marginal if: (1) The violation presents *little or no risk of environmental impact*; and/or (2) the actions have or may have *little or no adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program.

Examples include, but are not limited to:

- Not maintaining control equipment or failure to use control equipment for a pollutant at a true minor 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 true minor 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 SM sources are not Marginal); and

[18] This criterion relates to the statutory factors of environmental harm and severity.

- Opacity violations at a source that has been classified as either a True Minor or a SM.

D. CALCULATING THE WORKSHEET CIVIL CHARGE

The categories are the numbered items (Categories 1 through 11) that make up the rows of the Worksheet.

When using the Worksheet to address multiple violations discovered during the same compliance activity, staff calculate 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 use this procedure to determine the appropriate civil charge for each category listed and enter it on the Worksheet.

1. Statutory, Regulatory, or Permit Violation Category[19]

This category is general in nature and is intended to establish a minimum civil charge for all violations of statutory, regulatory, or permit requirements. 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.

a. Failure to Obtain Required Permit:[20] This civil charge applies to construction/modification/reconstruction without a new source permit and to the failure to obtain an operating permit.

b. Operating Without a Permit:[21] This civil charge applies to construction/modification/reconstruction without a new source permit where the source has begun operation of the source affected by the permit applicability determination. This civil charge is assessed in addition to Subcategory 1.a.

c. Statute/Regulation/Permit Violated (other than a. or b., above):[22] 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.

2. Order Violation Category[23]

[19] This criterion relates to the statutory factors of severity and environmental harm.
[20] This criterion relates to the statutory factors of severity and environmental harm.
[21] This criterion relates to the statutory factors of severity and environmental harm.
[22] This criterion relates to the statutory factors of severity and environmental harm.
[23] This criterion relates to the statutory factors of severity, environmental harm, and compliance history.

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.

3. Pollution Control Equipment Violation Category[24]

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.

a. **Failure to Install Required Equipment:**[25] 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.

b. **Failure to Properly Operate and Maintain Equipment:**[26] 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.

[24] This criterion relates to the statutory factors of severity and environmental harm.
[25] This criterion relates to the statutory factors of environmental harm and severity.
[26] This criterion relates to the statutory factors of environmental harm and severity.

4. Emissions, Reporting/Monitoring, and Toxics Violations Category [27]

a. Emissions Violations: [28] 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 opacity, 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.[29] 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 charge for the emissions violation is calculated as follows:

[27] This criterion relates to the statutory factors of severity and environmental harm.
[28] This criterion relates to the statutory factors of environmental harm and severity.
[29] 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.

- 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.

b. **Reporting/Monitoring Violations:**[30] Situations assessed under this category include other types of compliance assurance reporting/monitoring. Violations include, but are not limited to:

- ***Late Submittal of Reports:*** Add $650 to the base amount on Worksheet. The civil charge under this category is calculated on an emissions unit basis, *e.g.*, if the source must submit a quarterly report for three emissions units and two were late, the civil charge would be $1,300. This civil charge is assessed commencing with the second consecutive late submittal of a required periodic compliance assurance report (*e.g.*, Excess Emissions Report, Monitoring System Performance Report, Data Assessment Report, Fuel Certification Report, Emissions Report, *etc.*). Reporting requirements include those found in the applicable statute, regulation, order, and/or permit.
- ***Failure to Perform Required Audits:*** Add $1,950 to base amount in Worksheet. The civil charge under this category is calculated on a per monitoring system basis, *e.g.*, if the source must conduct a quarterly audit on three individual monitoring systems (excluding redundant back-up systems) and two were late, the civil charge would be $3,900.
- ***Excessive Monitoring Downtime:*** Add $2,600 to base amount on the Worksheet for each monitoring system for each monitoring period that does not meet the required monitor availability.

c. **Toxic Pollutant Violations:**[31] This civil charge is assessed for emissions and monitoring violations involving a toxic pollutant. A toxic pollutant is defined in the regulations as "any air pollutant listed in § 112(b) of the federal Clean Air Act, as revised by 40 [Code of Federal Regulations (CFR)] 63.60, or any other air pollutant that the board determines, through adoption of regulation, to present a 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)]." Staff are

[30] This criterion relates to the statutory factors of severity and environmental harm.
[31] This criterion relates to the statutory factors of environmental harm and severity.

reminded that, for "existing sources," the regulations establish significant ambient air concentration "guidelines" for toxic pollutants. If the existing source is found to be in excess of a guideline, the regulations provide specific alternatives to address the exceedance. Therefore, an existing source is not considered to be a toxic pollutant violator until or unless DEQ has notified it of the exceedance and the source has failed to respond as specified in 9 VAC 5-60-200. Where a violation involves exceedance of a permit limit for a toxic pollutant, a charge should be assessed for both the emission violation and the toxic pollutant.

5. Sensitivity of the Environment Category[32]

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. 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. [33]

6. Length of Time Factor Category[34]

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 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 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 charge based on a length of time

[32] This criterion relates to the statutory factor of environmental harm.
[33] 9 VAC 5-20-204 (nonattainment) and 9 VAC 5-20-205 (PSD).
[34] This criterion relates to the statutory factors of severity, environmental harm and compliance history.

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 complete 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 complete permit application for the affected process or equipment.
- For stack tests that occur prior to execution of an Order, the time span begins with the date the test was required (or date of the failed stack test) and ends when the test is completed and demonstrates compliance (must have a stack test report that indicates a return to compliance).

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 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.

7. Compliance History Category[35]

Staff use the Compliance History Category to adjust a civil charge or civil penalty for prior enforcement activities. When an RP has previously violated an environmental standard at the same or a different source or facility, it is usually clear evidence that the RP was not deterred by the previous enforcement response. In calculating the adjustment factor for compliance history, staff consider:

a. Consent, administrative or judicial orders or decrees in any other media program that became effective after the period beginning 36 months preceding the initial violation that is subject of the current

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

enforcement action (5% of the current gravity-based civil charge/civil penalty or $5,000, whichever is less); and

b. Consent, administrative or judicial orders or decrees, in the same media program that became effective after the period beginning 36 months preceding the initial violation that is subject of the current enforcement action (0.5 factor). If there has been more than one order, decree or agreement in the past 36 months, staff consider whether it is appropriate to depart from the recommended calculation, 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.

In this example, staff use Table 1 and take the following steps to calculate a compliance history charge:

- Review the source's compliance history to determine if any additional violations were noted during the previous 36 months. For example, assume the source had a previous consent order issued 14 months prior to the currently pending enforcement action (do not include additional violations which were discovered as part of the same inspection).
- Look up on the above table and determine the appropriate factor to adjust the civil charge. The current enforcement action represents a violation in the 36 months following execution of a consent order, so the Charge Factor is 0.5 (or 50%).
- Multiply the Preliminary Subtotal of the civil charge calculated on the Worksheet by the Charge Factor. From the example above the base charge is $1,300. Multiplying $1,300 by 0.5 yields $650.
- Write the calculated charge into the "Amount" column for Category 7 "Compliance History" on the Worksheet.

8. Extended Compliance Category[36]

Category 8 addresses a source's request to extend any date in a schedule by which it is required to come into compliance. The extended compliance civil charge applies where the proposed schedule is based upon limitations such as a reasonable construction or equipment delivery schedule. Compliance delays proposed for monetary considerations or for the sake of convenience (*e.g.*, to coordinate equipment installation with the routine annual maintenance shutdown) should only be accepted if the source demonstrates that the associated financial burden is beyond their "ability to pay."

[36] This criterion relates to the statutory factors of severity, environmental harm, and ability to pay.

DEQ factors in an "extended compliance" civil charge where the source proposes a schedule that will extend a compliance date. Consequently, for a consent order that includes a compliance schedule, DEQ increases the Preliminary Subtotal according to length of the extended compliance. In doing so, staff calculate the length of the extension, in months, and multiply the number by 2.78, which results in the percent increase due to the extended compliance. For compliance schedules of less than one month (30 days), staff are not required to calculate an extended compliance charge. DEQ assesses partial months (as determined on 30-day increments) as a full month when calculating the extended compliance charge. The consent order should include a schedule detailing important interim dates and the final date by which compliance will be achieved.

Federal regulations list specific procedures for processing "Delayed Compliance Orders." EPA maintains the authority to disapprove any Department-approved Delayed Compliance Order, subject to the public participation guidelines described in CFR. Regional staff should forward all proposed Delayed Compliance Orders to DE for review prior to entering into a consent order with that source.

The following is an example of how to calculate an "extended compliance" civil charge:

- Calculate the length of time, in months (on a 30-day basis); compliance will be extended by execution of the order. For example, the schedule in the consent order indicates a six-month (180-day) delay before compliance will be achieved.
- Multiply the number of months by 2.78. Take 6 and multiply it by 2.78 to get 16.68. Round this up to whole numbers to get 17%, or a factor of 0.17.
- Multiply the Preliminary Subtotal of the civil charge calculated on the Worksheet by the Extended Compliance Factor. Continuing with this example, the Preliminary Subtotal is $1,300. $1,300 times 0.17 yields $221.
- Write the calculated charge into the "Amount" column for Category 8 on the Worksheet.

9. Degree of Culpability Category[37]

DEQ staff assesses an RP's culpability based on the facts and circumstances of the case and may add a multiplying factor to the Amounts for one, a subset, or all violations, depending on the assessment. Staff rate the RP's culpability as low (0% addition), moderate (25%), serious (50%), or high (100%) based on the one or more of list of factors below (the ERP may document consideration of relevant factors only). It is not anticipated that culpability will

[37] This criterion relates to the statutory factors of severity and compliance history.

increase the civil charge in all cases. A simple violation without any further evidence of culpability is usually rated as low (but is still considered a violation, since RPs are strictly liability for noncompliance). Also, 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 factors may include one or more of the following:

a) the degree to which the violator knew or should have known of the legal requirement that was violated;
b) the degree of control the violator had over the events constituting the violation;
c) the foreseeability of the events constituting the violation;
d) whether the violator knew or should have known of the hazards associated with the conduct;
e) whether the RP took reasonable precautions against the events constituting the violation;
f) whether there is evidence of unjustified delay in preventing, mitigating or remedying the violation; and
g) whether the violator failed to comply with an administrative or judicial order;
h) whether there have been Notices of Violation (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;
i) whether there have been Warning Letters in the same media program for the same or similar violations;
j) commonality of ownership, management, and personnel with other RPs or facilities that have been subject of enforcement actions; and
k) 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.

Lack of knowledge of a legal requirement is not used as a basis to reduce a civil charge or penalty. To do so would encourage ignorance of the environmental requirement. The amount of control and promptness of the injunctive response and good faith efforts to comply may be considered in the Adjustments in the Enforcement Recommendation and Plan.

10. Economic Benefit of Noncompliance[38]

Category 10 addresses the economic benefit component of the civil charge. This factor is included in a civil charge to ensure the charge acts as a

[38] This criterion relates to the statutory factor of economic benefit. *See* Clean Air Act § 113(e)

deterrent to noncompliance. At a minimum, a civil charge or civil penalty should remove any significant (*i.e.*, greater than *de minimis*) economic benefit of noncompliance in addition to a "gravity component." By developing a civil charge assessment structure that incorporates this deterrent effect, an enforcement action removes any economic gain that a source or facility accrues by avoiding or delaying costs necessary to achieve compliance, or from illegal competitive advantage (ICA).[39] The existence of a significant economic benefit gained from noncompliance is evaluated on a case-by-case basis. Staff 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 ICA, staff should estimate the value of the economic benefit and include this amount in the proposed civil charge.

EPA's BEN model is a method for calculating economic benefit from delayed and avoided expenditures. If the economic benefit exceeds $10,000, BEN should be used to calculate benefit. BEN uses 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. BEN allows a cooperative facility to provide actual financial data that may affect the civil charge calculation. For economic benefit calculations of less than $10,000 or where the facility will not or cannot provide financial data in a timely manner, staff may make estimates based on available resources, including their best professional judgment.[40] Finally, methods other than BEN may be used to calculate economic benefit of noncompliance, where DEQ concludes that an alternative method provides more meaningful results.

A necessary first step when making a preliminary determination of economic benefit is understanding the costs avoided or delayed through noncompliance. A delayed cost is an expenditure that, through current noncompliance, can be put off to sometime in the future. An avoided cost is an expenditure not made, resulting in noncompliance.

- Examples of delayed costs include, but are not limited to: 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.
- Examples of avoided costs include, but are not limited to: disconnecting or failing to properly operate and maintain existing pollution control

[39] 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 wetlands without appropriate permits.

[40] Staff may use the following "rule-of-thumb" in exercising their judgment: for delayed compliance, 6% per year of the delayed on-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.

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.

The intent is to document and recover the economic benefit of noncompliance in all cases where there is an economic benefit from noncompliance and the benefit can be reasonably calculated and is not *de minimis*. There are three general areas where settling the total civil charge amount for less than the economic benefit may be appropriate. The three exceptions are:

- There are compelling public concerns that would not be served by taking a case to trial;
- It is unlikely, based on the facts of the particular case as a whole, that DEQ will be able to recover the economic benefit in litigation; and
- The facility has successfully documented an inability to pay the total proposed civil charge.

11. Ability of the Person to Pay the Civil Charge[41]

Ability to pay is one of the five statutory factors. In general, DEQ will reduce penalty assessments that are clearly beyond the means of the party. 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 penalties where a business has failed to allocate environmental compliance costs in their business operations. It is also unlikely that DEQ would reduce a penalty where a facility refuses to correct a serious violation, or where a party has a long history of previous violations, or where the violations of the law are particularly egregious. DEQ does not reduce or abate a consent order civil charge after an order has been executed based on inability to pay. Inability to pay should be claimed before a RP agrees to a civil charge or civil penalty. The Office of Financial Management may negotiate delinquent accounts in accordance with the Commonwealth Accounting Policies and Procedures (CAPP) Manual.

The burden to demonstrate inability to pay rests on the RP, as it does with any mitigating circumstance. A party's inability to pay usually will reduce a civil charge only if the RP provides sufficient information to justify the adjustment, through the use of the EPA computer models ABEL, INDIPAY, or MUNIPAY.

[41] This criterion relates to the statutory factor of ability to pay.

The Office of Financial Responsibility receives and analyzes financial information regarding an RP's ability to pay.

If a facility is unable to pay the calculated civil charge or would be prevented from carrying out essential remedial measures by doing so, DEQ should consider the following options with the facility in the order presented:

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

Regardless of DEQ's determination of an appropriate penalty amount to pursue based on ability-to-pay considerations, the party is always expected to comply with the applicable law, regulations, orders, and permit conditions.

E. ADJUSTMENTS IN THE ENFORCEMENT RECOMMENDATION AND PLAN[42]

DEQ may adjust a civil charge downward in the ERP at several points in its calculation: (1) staff may adjust the gravity component of the civil charge before economic benefit is added; and (2) staff may also reduce the total civil charge for specific litigation and strategic considerations.

For all adjustments, staff should clearly document the adjustment calculation and its reasons for the adjustment either in the ERP itself, or on the Civil Charge/Civil Penalty Adjustment Form, which is attached to the ERP. A revised ERP and/or Adjustment Form may be required, depending on when DEQ makes the adjustments. The appropriate level of management should approve all adjustments. Decisions regarding adjustment are within DEQ's discretion.

1. Charge Adjustments Before Considering Economic Benefit[43]

DEQ may adjust the gravity component of a civil charge – excluding the economic benefit calculation – downward by up to 30% based on several factors where there are clearly documented, case-specific facts that support the adjustment as provided in this section. This adjustment is not appropriate in all cases.

The gravity component may be reduced by more than 30% if appropriate circumstances exist. Staff should document the basis for reducing a charge beyond 30% on the Civil Charge/Civil Penalty Adjustment Form. Regional staff must obtain concurrence from DE when considering an adjustment beyond 30%. DE staff evaluate the adjustment for appropriateness and consistency.

[42] This criterion relates to all of the statutory factors.
[43] This criterion relates to the statutory factors of compliance history, severity, environmental harm, and ability to pay.

- **Cooperativeness/Quick Settlement:** DEQ may adjust a charge where a facility is cooperative in resolving the case in a timely and appropriate manner and it 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. Owners who agree to expedited corrective action schedules may also qualify. Staff should consider institutional or legal limitations on corrective actions. For example, a municipality may be unable to institute corrective action immediately because of funding procedures.
- **Statutory Judicial Considerations:** 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.

2. Litigation and Strategic Considerations[44]

DEQ may also adjust a civil charge downward – including the economic benefit of noncompliance - for specific litigation and strategic considerations. Adjustments for litigation and strategic considerations should be carefully considered and documented. Staff may reduce the Total Civil Charge based on documented strategic considerations, including:

- **Problems of Proof:** Problems with proving the case may be due to inadequate information, conflicting evidence, 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.
- **Impacts or Threat of Impacts (or Lack Thereof) to Human Health or the Environment:** The impact or threat of impact is a factor used in conjunction with other strategic considerations. It could provide additional justification for a reduction if there is a lack of impact, or reason to reject a reduction if impacts are consequential. The evaluation should include a broad assessment of environmental impact and not be limited to just the media where the violation occurred.
- **The Precedential Value of the Case:** Resolution of certain cases may establish a valued endorsement of an agency program or regulatory or

[44] This criterion relates to all of the statutory factors.

enforcement initiative. A reduction to the proposed civil charge 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. Recognizing that a portion of the civil charge is intended to serve as deterrence, this factor may be appropriate for use with local governments and publicly funded service authorities. Also, in situations where the entity primarily responsible for the violation cannot be held accountable, it may not be appropriate to assess the full civil charge against those left responsible for correction.
- **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, in the ERP or Adjustment Form, to include authority to increase a civil charge or civil penalty for continuing or uncorrected violations, previously undiscovered violations, or for economic benefits from continuing delays in compliance, to provide additional incentives to resolve the action expeditiously.

F. CIVIL PENALTIES IN § 10.1-1186 PROCEEDINGS AND FORMAL HEARINGS

When an appropriate civil charge cannot be agreed upon with the consent of the party, DEQ may elect to use an adversarial administrative process. Civil penalties are available following § 10.1-1186 Proceedings[45] and following certain Formal Hearings.[46] In these actions, the penalty is pled and argued rather than established by consent. By statute, penalties are limited to a maximum of $10,000 in a § 10.1-1186 Proceeding. Following a Formal Hearing, penalties are limited to $32,500 for each violation, not to exceed $100,000 per order.

DE is generally the lead in adversarial administrative processes. Staff should use the Worksheet and specific criteria in Sections II B through II E[47] to determine the amount to be sought in a Formal Hearing, but in preparing the documents, staff should resolve any reasonable issues or questions in favor of DEQ. In Formal Hearings, staff should seek the highest penalty justified by all of the facts, up to $100,000 per order. The calculation is not limited to the amount that may have been offered in attempting to reach a settlement. Any adjustment for "cooperativeness" or for "promptness of injunctive response/good faith effort to comply" should be omitted in seeking a civil penalty in a Formal Hearing. By statute, the person must be provided with the calculation for the

[45] *See* Va. Code Va. Code § 10.1-1186(10) (special orders); § 10.1-1182 (special order defined, with limit of $10,000 and duration of not more than 12 months); and Va. Code § 2.2-4019 (informal fact finding proceedings under the APA). The informal fact-finding can be before the Director of DEQ or his designee; however, the Director may not delegate his authority to impose civil penalties in such proceedings.
[46] *See* Va. Code § 10.1-1309(A)(vi) and § 2.2-4020 (formal hearings; litigated issues under the APA). For Formal Hearings with civil penalties, the hearing must be before an officer appointed by the Virginia Supreme Court.
[47] The statutory factors are those noted in the referenced sections.

proposed penalty prior to any Formal Hearing conducted for an order that assesses penalties.[48] If the case is settled while the proceeding is still pending, the penalty can be modified and calculated as any civil charge, described above. Any adjustment should be documented in a revised Worksheet or the ERP. The development of a penalty amount to be pled in a judicial complaint is not covered in this guidance.[49]

[48] 2005 Acts. c. 706; Va. Code § 10.1-1309(A)(vi).
[49] Authority for civil penalties in judicial proceedings may be found at Va. Code §§ 10.1-1311, -1316(B).

AIR CIVIL CHARGE/CIVIL PENALTY WORKSHEET

Va. Code §§ 10.1-1316, -1309

Source/Responsible Party	Reg.#				NOV Date	
	Data		**Potential for Harm**			
			Serious	**Moderate**	**Marginal**	***Amount***
1. Statutory/Regulatory/Permit Violation						
a. Failure to obtain required permit.	Y	N	$ 7,800	$ 2,600	$ 1,300	
b. Operating without a permit	Y	N	$ 5,200	$ 2,600	$ 1,300	
c. Statute/regulation/permit violated *(other than a or b above)*	Y	N	$ 2,600	$ 1,300	$ 650	
(Multiply by 2 for violation of a substantive PSD, NESHAP, MACT, NSPS or TV requirement)	Y	N				
2. Order Violation						
a. Consent or Other Order condition violated.	Y	N	$ 5,200	$ 2,600	$ 1,300	
3. Pollution Control Equipment Violation						
a. Failure to install required equipment.	Y	N	$ 13,000	$ 7,800	$ 2,600	
b. Failure to properly operate or maintain equipment.	Y	N	$ 13,000	$ 7,800	$ 2,600	
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. Reporting/Monitoring Violation						
(1) Late submittal of reports (per emissions unit)	Y	N	$650 + $250/day after 10 days			
(2) Failure to perform required audits (per monitoring system)	Y	N	$1,950 + $250/day after 14 days			
(3) Excessive monitoring downtime (per monitoring system)	Y	N	$2,600 per monitoring system			
c. Toxic Pollutant Violations	Y	N	$ 2,600	$ 1,300	$ 800	
5. Sensitivity of the Environment						
a. Nonattainment Area	Y	N	$ 5,200	$ 2,600	$ 1,300	
b. Class I PSD area	Y	N	$ 2,600	$ 1,300	$ 800	
c. Class II and III PSD area	Y	N	$ 1,300	$ 500	$ 300	
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. Extended Compliance *(enter months)*			%			
9. 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	
10. Economic Benefit						
11. Ability to Pay *(based on information supplied by the source/party)*						( )
Total Civil Charge/Civil Penalty *(may not exceed $32,500 per day per violation)*						***$***

Comments:

III. LAND PROTECTION AND REMEDIATION PROGRAMS[50]

The Virginia Waste Management Act at Va. Code § 10.1-1455(F) provides for negotiated civil charges in a consent order for past violations of the Act, any regulation or order of the Board or Director, or any permit condition. Sections III A through III E below describe calculation of negotiated civil charges. The maximum civil charge is $32,500 for each violation, with each day being a separate violation. Special considerations for pleading civil penalties in § 10.1-1186 Proceedings and Formal Hearings are discussed in Section III F.

For this section, the Land Protection and Remediation Programs include the Solid Waste, the Hazardous Waste, and the Remediation Programs. Remedy Consent Orders (RCOs) under the Remediation Program are not enforcement orders, since they are not based on a violation, but on the authority of the Virginia Waste Management Board under Va. Code § 10.1-1402(19) through (21), which allows the Board to take actions to contain or clean up sites where substances within the jurisdiction of the Board have been improperly managed. The Board has authority to enforce RCOs as any other order.

A. CONSENT ORDERS WITHOUT CIVIL CHARGES

Initially, staff establish whether the violation warrants a civil charge. The following criteria should all be met for orders without civil charges:

- The severity of the violation is minimal. Consent orders without civil charges are not typically available for hazardous waste "Significant Non-Compliers" (SNCs);
- The extent of the actual or potential environmental harm is negligible or minimal;
- The facility has not been in chronic noncompliance and is making a good-faith effort to comply; and
- The economic benefit of noncompliance is negligible or minimal.

The emphasis in all cases, but particularly in cases without civil charges or civil penalties, is on prompt and appropriate injunctive relief to bring facilities into compliance with applicable laws, regulations, orders, and permit conditions.[51]

B. CONSENT ORDERS WITH CIVIL CHARGES

Unless the violation is so unusual as to warrant an enhanced civil charge as described in the Introduction, DEQ calculates civil charges for all Land Protection and Remediation Programs using the Land Protection/Remediation Civil Charge/Civil Penalty Worksheet (Worksheet), which is found below. In calculating a civil charge, staff first identify the appropriate "Potential for Harm" classification and then work through the various categories on the Worksheet to calculate a Total Civil Charge/Civil Penalty. The Worksheet Total Civil Charge/Civil Penalty may be adjusted for

[50] The Waste Programs and are coordinated by the DEQ Division of Land Protection and Revitalization.
[51] No civil charge can be assessed if a statute grants the party immunity from civil charges. *See* Va. Code §§ 10.1-1199, -1233. Civil charges may be mitigated by voluntary reporting and correction or by a SEP. *See* Chapter 5.

appropriate reasons, as documented on the Civil Charge/Civil Penalty Adjustment Form (*See* Section III E). Both the Worksheet and the Form are part of the ERP. A blank Worksheet and Form may be made available to the RP at the beginning of negotiations; however, disclosure of the completed Worksheet and any Adjustment Form is discretionary, until the enforcement strategy exemption expires under FOIA.[52]

C. POTENTIAL FOR HARM CLASSIFICATIONS[53]

Using best professional judgment, staff place violations into one of three "Potential for Harm" classifications - "Serious," "Moderate," or "Marginal" – that are listed near the top of each Worksheet. Staff classify the violations based on: (1) the extent of risk of exposure to humans or the environment; and/or (2) the effect on the regulatory program.

Risk of Exposure

The risk of exposure involves both the probability of exposure and the potential consequences that may result from exposure.[54] In considering the risk of exposure, emphasis is placed on the potential for harm posed by a violation as well as on whether harm actually occurred. The facility may have no control over the presence or absence of direct harm. Such facilities should not be rewarded with lower civil charges simply because the violations did not result in actual harm.

Where a violation involves the actual management of waste, a civil charge should reflect the probability that the violation could have or has resulted in a release of waste or waste constituents or could have or has resulted in a threat of exposure to waste or waste constituents. Staff determine the likelihood of a release based on whether the integrity and/or stability of the waste management unit is likely to have been compromised. Some factors to consider in making this determination are: evidence of release (*e.g.*, existing soil or groundwater contamination); evidence of waste mismanagement (*e.g.*, rusting drums); and adequacy of provisions for detecting and preventing a release (*e.g.*, monitoring equipment and inspection procedures). A larger civil charge is presumptively appropriate where the violation significantly impairs the ability of the waste management system to prevent and/or detect releases of waste and constituents.

In calculating risk of exposure, staff weigh the harm that would result if the waste or constituents were in fact released to the environment. Some factors to consider in making this determination are: quantity and toxicity of wastes (potentially) released; likelihood or fact of transport by way of environmental media (*e.g.*, air and groundwater); and 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 and aquifers).

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[52] Va. Code § 2.2-3705.7(16). The rules for Formal Hearings are different. *See* Section III.F, below.
[53] This criterion relates to the statutory factors of environmental harm and severity.
[54] While the violation must have occurred in Virginia, the assessment of environmental harm may consider impacts both within and beyond the boundaries of the Commonwealth (*e.g.*, impacts to a neighboring state's groundwater).

Effect on the Regulatory Program

There are some requirements of the Land Protection and Remediation Programs that, if violated, may not appear to give rise directly or immediately to a significant risk of contamination; nevertheless, the regulatory requirements work together to assure protection of human health and the environment. Examples of regulatory harm include, but are not limited to:

- Failure to notify as a generator or transporter of hazardous waste and/or owner of a hazardous waste facility;
- Failure to comply with financial assurance requirements;
- Failure to submit a timely/adequate solid waste Part B application;
- Failure to respond to an authorized information request;
- Operating without a permit;
- Failure to prepare or maintain a hazardous waste manifest;
- Failure to install or conduct adequate groundwater monitoring; and
- Certain failures to comply with record keeping that undermine DEQ's ability to determine compliance.

The following sections define the three potential for harm classifications (Serious, Moderate, and Marginal) and provide examples for each of the classification levels. The sections provide examples of violations for each classification only and are not used to determine whether a violation warrants formal enforcement. Departures from the examples should be discussed with a representative of the DE.

1. Serious Classification[55]

A violation is classified as serious if: (1) the violation has caused *actual exposure or presents a substantial risk* of exposure to humans or the environment, and/or (2) the actions have or may have a *substantial adverse effect* on the statutory or regulatory purposes or procedures for implementing the program.

As an example in hazardous waste, 9 VAC 20-60-265, incorporating 40 CFR § 265.143, requires that owners or operators of hazardous waste facilities establish financial assurance to ensure that funds will be available for proper closure of facilities. Under 9 VAC 20-60-265, incorporating 40 CFR § 265.143(a)(2), the wording of a trust agreement establishing financial assurance for closure must be identical to the wording specified in the incorporated 40 CFR § 264.151(a)(1). Even a slight alteration of the language could change the legal effect of the financial instrument so that it would no longer satisfy the intent of the regulation. When the language of the agreement differs from the requirement such that funds would not be available to close the facility properly, the lack of identical wording would have a substantial adverse effect on the regulatory

[55] This criterion relates to the statutory factors of environmental harm and severity.

scheme (and, to the extent the closure process is adversely affected, could pose a substantial risk of exposure). This violation would therefore be assigned to the serious potential for harm classification.

As an example in solid waste, under 9 VAC 20-81-140, solid waste management facilities are required to implement a control plan for unauthorized waste. If a facility failed to implement such a program, or implemented a program deficiently, so that unauthorized wastes, such as polychlorinated biphenyls (PCBs), may go undetected, these violations would be assigned a serious potential for harm classification.

2. Moderate Classification[56]

A violation is classified moderate if: (1) the violation presents or may present a *significant risk* of exposure to humans or the environment, and/or (2) the actions have or may have a *significant adverse effect* on the statutory or regulatory purposes or procedures for implementing the program.

As an example in hazardous waste, owners and operators of hazardous waste facilities that store containers must comply with the regulations found at 9 VAC 20-60-264, incorporating 40 CFR Part 264, Subpart I. One of the regulations found in this subpart requires owners/operators to inspect, at least weekly, container storage areas to ensure containers are not deteriorating or leaking (incorporated 40 CFR § 264.174). If a facility was inspecting storage areas twice monthly, this situation could present a significant risk of release of hazardous wastes to the environment. Because some inspections were occurring, it is unlikely that a leak would go completely undetected; however, the frequency of the inspections may allow a container to leak for up to two weeks unnoticed. The moderate potential for harm classification would be appropriate in this case.

As an example, in solid waste, 9 VAC 20-81-160(C) specifies the time allowed for closure of a solid waste management unit. If the time allowed were exceeded by a modest number of days and there was no evidence of other adverse environmental effects from the delay, the moderate potential for harm classification would be appropriate in this case.

3. Marginal Classification[57]

A violation is classified as marginal if: (1) the violation presents or may present a *relatively low risk* of exposure to humans or the environment, and/or (2) the actions have or may have a *small adverse effect* on the statutory or regulatory purposes or procedures for implementing the program.

[56] This criterion relates to the statutory factors of environmental harm and severity.
[57] This criterion relates to the statutory factors of environmental harm and severity.

As an example in hazardous waste, owners or operators of hazardous waste facilities must, under 9 VAC 20-60-262, incorporating 40 CFR § 262.23, sign each manifest certification by hand. If a facility was using manifests that had a type-written name where the signature should be, but the manifests were otherwise completed correctly and had other indicia that the information was correct, the likelihood of exposure and adverse effect on the implementation of the program may be relatively low. The marginal potential for harm classification could be appropriate for such a situation.

As an example in solid waste, under 9 VAC 20-81-140(B), requires measures to control blowing litter. If blowing litter were observed on the landfill and the problem was not chronic or continuing, the marginal potential for harm classification would be appropriate.

D. CALCULATING THE WORKSHEET CIVIL CHARGE

The categories are the numbered items (Categories 1 through 6) that make up the rows of the Worksheet. Because there is no listing of violations on the Worksheet, a separate Worksheet is completed for each violation; however, staff may consolidate multiple violations that arise out of a single act or omission into a single violation for purposes of calculating civil charges. Staff use the following procedures to determine the appropriate civil charge for each category listed on the Worksheet.

1. Extent of Deviation from Requirement Category[58]

The "extent of deviation" from Land Protection and Remediation Program requirements relates to the degree to which the violation departs from the requirement. In determining the extent of the deviation, the following categories should be used:

- MAJOR: Deviations from requirements of the statute, regulation, order, or permit to such an extent that most (or important aspects) of the requirements are not met, resulting in substantial noncompliance.
- MODERATE: Discernible deviations from the requirements of the statute, regulation, order, or permit, but some of the requirements are implemented as intended.
- MINOR: Deviations to a lesser extent from the statute, regulation, order, or permit, but most (or all important aspects) of the requirements are met.

As one example, 9 VAC 20-60-265, incorporating 40 CFR § 265.112, requires that owners or operators of treatment, storage, and disposal facilities have a written closure plan. This plan must identify the steps necessary to completely or partially close the facility at any point during its intended operating life. Possible violations of the requirements of this regulation range from having no closure plan at all to having

[58] This criterion relates to the statutory factors of severity and environmental harm.

a plan which is minimally inadequate (*e.g.*, it omits one minor step in the procedures for cleaning and decontaminating the equipment while complying with the other requirements). Such violations should be assigned to the "major" and "minor" categories, respectively. A violation between these extremes might involve failure to modify a plan for increased decontamination activities as a result of a spill on-site and would be assigned to the moderate category.

As another example, 9 VAC 20-60-265, incorporating 40 CFR § 265.14, requires that owners or operators of treatment, storage, and disposal facilities take reasonable care to keep unauthorized persons from entering the active portion of a facility where injury could occur. Generally, a physical barrier must be installed and any access routes controlled. The range of potential noncompliance with the security requirements is broad. Total noncompliance with regulatory requirements such as this would result in classification into the major category. In contrast, the violation may consist of a small oversight such as failing to lock an access route on a single occasion. With all other factors being equal, the less significant noncompliance should draw a smaller penalty assessment. In the matrix system this is achieved by choosing the minor category.

To determine the charge for a violation or consolidated violations, staff select the proper charge from the Worksheet corresponding to the Potential for Harm and the Extent of Deviation for the violation(s), and enter this number in the "Amount" column of the Worksheet.

2. Multi-Day Component Category[59]

A multi-day factor for continuing violations may be applied by multiplying the number of days of continuing violations by the factor in the appropriate Worksheet column based on the Potential for Harm classification and the Extent of Deviation designation. Where separate charges are not assessed for daily, documented violations, DEQ uses the Multi-Day Component Category for days 2 through 180 for continuing violations in appropriate cases. This factor is generally applied when there is solid evidence to support continuing, discrete violations over an extended period. For example, a multi-day component would normally be applied in cases where multiple, continuing releases occurred under the same circumstances. The multi-day factor would not routinely be used for violations not related to discrete, continuing violations (*e.g.*, operating without a permit). Use of a multi-day component is presumed for days 2 through 180 of all violations that cause a facility to be designated as SNC. For purposes of enforcing an RCO, each day of noncompliance with the RCO is considered a "discrete violation." A violation of an RCO that is also a violation of another statute, regulation, permit condition or order, should be assessed as an RCO violation and a violation of that standard.

Upon determining that a multi-day factor is appropriate, staff would then select the proper charge from the Worksheet, depending on the Potential for Harm

[59] This criterion relates to the statutory factors of severity, environmental harm, and compliance history.

and the Extent of Deviation. Staff then multiply the appropriate multi-day factor by the number of days of continuing violations, and enter the subtotal in the "Amount" column of the Worksheet. The multi-day component may be applied beyond 180 days in appropriate or egregious situations.

3. Degree of Culpability Category[60]

DEQ staff assesses an RP's culpability based on the facts and circumstances of the case and may add a multiplying factor to the Amounts for one, a subset, or all violations, depending on the assessment. Staff rate the RP's culpability as low (0% addition), moderate (25%), serious (50%), or high (100%) based on the one or more of list of factors below (the ERP may document consideration of relevant factors only). It is not anticipated that culpability will increase the civil charge in all cases. A simple violation without any further evidence of culpability is usually rated as low (but is still considered a violation, since RPs are strictly liability for noncompliance). Also, 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 factors may include one or more of the following:

a. the degree to which the violator knew or should have known of the legal requirement that was violated.
b. the degree of control the violator had over the events constituting the violation;
c. the foreseeability of the events constituting the violation;
d. whether the violator knew or should have known of the hazards associated with the conduct;
e. whether the RP took reasonable precautions against the events constituting the violation;
f. whether there is evidence of unjustified delay in preventing, mitigating or remedying the violation; and
g. whether the violator failed to comply with an administrative or judicial order;
h. whether 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;
i. whether there have been Warning Letters in the same media program for the same or similar violations;
j. commonality of ownership, management, and personnel with other RPs or facilities that have been subject of enforcement actions; and
k. the level of sophistication within the industry in dealing with compliance issues or the accessibility of appropriate control

[60] This criterion relates to the statutory factors of severity and compliance history.

technology. This should be balanced against the technology forcing nature of the statute, where applicable.

Lack of knowledge of a legal requirement is not used as a basis to reduce a civil charge or penalty. To do so would encourage ignorance of the environmental requirement. The amount of control and promptness of the injunctive response and good faith efforts to comply may be considered in the Adjustments in the Enforcement Recommendation and Plan.

4. Compliance History Category[61]

Staff use the Compliance History Category to adjust a civil charge or civil penalty for prior enforcement activities. When an RP has previously violated an environmental standard at the same or a different source or facility, it is usually clear evidence that the RP was not deterred by the previous enforcement response. In calculating the adjustment factor for compliance history, staff consider:

a. Consent, administrative or judicial orders or decrees in any other media program that became effective after the period beginning 36 months preceding the initial violation that is subject of the current enforcement action (5% of the current gravity-based civil charge/civil penalty or $5,000, whichever is less); and
b. Consent, administrative or judicial orders or decrees in the same media program that became effective after the period beginning 36 months preceding the initial violation that is subject of the current enforcement action (0.5 factor). If there has been more than one order, decree or agreement in the past 36 months, staff consider whether it is appropriate to depart from the recommended calculation, 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.

Because an RCO action is founded on noncompliance with the RCO itself, the Compliance History factor is usually limited to prior RCO non-compliance, but is not limited to 36 months, since RCOs can be effective over many years.

5. Economic Benefit of Noncompliance[62]

Category 5 addresses the economic benefit component of the civil charge. This factor is included in a civil charge to ensure the charge acts as a deterrent to noncompliance. At a minimum, a civil charge or civil penalty should remove any significant (*i.e.*, greater than *de minimis*) economic benefit of noncompliance in

[61] This criterion relates to the statutory factor of compliance history.
[62] This criterion relates to the statutory factor of economic benefit.

addition to a "gravity component." By developing a civil charge assessment structure that incorporates this deterrent effect, an enforcement action removes any economic gain that a source or facility accrues by avoiding or delaying costs necessary to achieve compliance, or from illegal competitive advantage (ICA).[63] The existence of a significant economic benefit gained from noncompliance is evaluated on a case-by-case basis. Staff 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 ICA, staff should estimate the value of the economic benefit and include this amount in the proposed civil charge.

EPA's BEN model is a method for calculating economic benefit from delayed and avoided expenditures. If the economic benefit exceeds $10,000, BEN should be used to calculate benefit. BEN uses 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. BEN allows a cooperative facility to provide actual financial data that may affect the civil charge calculation. For economic benefit calculations of less than $10,000 or where the facility will not or cannot provide financial data in a timely manner, staff may make estimates based on available resources, including their best professional judgment.[64] Finally, methods other than BEN may be used to calculate economic benefit of noncompliance, where DEQ 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 avoided or delayed through noncompliance. A delayed cost is an expenditure that, through current noncompliance, can be put off to sometime in the future. An avoided cost is an expenditure that will not be made due to noncompliance. Examples of avoided costs include, but are not limited to:

- Sampling and analytical costs for groundwater and gas monitoring; and
- Annual expenses associated with hazardous waste recordkeeping and personnel training;

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

[63] 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 wetlands without appropriate permits.

[64] Staff may use the following "rule-of-thumb" in exercising their judgment: for delayed compliance, 6% per year of the delayed on-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.

- Capital equipment improvement or repairs (including engineering design, purchase, installation, and replacement); and
- One-time acquisitions (such as equipment or real estate purchases).

The intent is to document and recover the economic benefit of noncompliance in all cases where there is an economic benefit from noncompliance and the benefit can be reasonably calculated and is not *de minimis*. There are three general areas where settling the total civil charge amount for less than the economic benefit may be appropriate. The three exceptions are:

- There are compelling public concerns that would not be served by taking a case to trial;
- It is unlikely, based on the facts of the particular case as a whole, that DEQ will be able to recover the economic benefit in litigation; and
- The facility has successfully documented an inability to pay the total proposed civil charge.

6. Ability of the Person to Pay the Civil Charge[65]

Ability to pay is one of the five statutory factors. In general, DEQ will reduce penalty assessments that are clearly beyond the means of the party. 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 penalties where a business has failed to allocate environmental compliance costs in their business operations. It is also unlikely that DEQ would reduce a penalty where a facility refuses to correct a serious violation, or where a party has a long history of previous violations, or where the violations of the law are particularly egregious. DEQ does not reduce or abate a consent order civil charge after an order has been executed based on inability to pay. Inability to pay should be claimed before a RP agrees to a civil charge or civil penalty. The Office of Financial Management may negotiate delinquent accounts in accordance with the Commonwealth Accounting Policies and Procedures (CAPP) Manual.

The burden to demonstrate inability to pay rests on the RP, as it does with any mitigating circumstance. A party's inability to pay usually will reduce a civil charge only if the RP provides sufficient information to justify the adjustment, through the use of the EPA computer models ABEL, INDIPAY, or MUNIPAY. The Office of Financial Responsibility receives and analyzes financial information regarding an RP's ability to pay.

[65] This criterion relates to the statutory factor of ability to pay.

If a facility is unable to pay the calculated civil charge or would be prevented from carrying out essential remedial measures by doing so, DEQ should consider the following options with the facility in the order presented:

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

Regardless of DEQ's determination of an appropriate penalty amount to pursue based on ability-to-pay considerations, the party is always expected to comply with the applicable law, regulations, orders, and permit conditions.

E. ADJUSTMENTS IN THE ENFORCEMENT RECOMMENDATION AND PLAN[66]

DEQ may adjust a civil charge downward in the ERP at several points in its calculation: (1) staff may adjust the gravity component of the civil charge before economic benefit is added; and (2) staff may also reduce the total civil charge for specific litigation and strategic considerations.

For all adjustments, staff should clearly document the adjustment calculation and its reasons for the adjustment either in the ERP itself, or on the Civil Charge/Civil Penalty Adjustment Form, which is attached to the ERP. A revised ERP and/or Adjustment Form may be required, depending on when DEQ makes the adjustments. The appropriate level of management should approve all adjustments. Decisions regarding adjustment are not subject to administrative appeal or judicial review.

1. Charge Adjustments Before Considering Economic Benefit[67]

DEQ may adjust the gravity component of a civil charge – excluding the economic benefit calculation – downward by up to 30% based on several factors where there are clearly documented, case-specific facts that support the adjustment as provided in this section. This adjustment is not appropriate in all cases.

The gravity component may be reduced by more than 30% if appropriate circumstances exist. Staff should document the basis for reducing a charge beyond 30% on the Civil Charge/Civil Penalty Adjustment Form. Regional staff must obtain concurrence from DE when considering an adjustment beyond 30%. DE staff evaluate the adjustment for appropriateness and consistency.

[66] This criterion relates to all of the statutory factors.
[67] This criterion relates to the statutory factors of compliance history, severity, environmental harm, and ability to pay.

- **Cooperativeness/Quick Settlement:** DEQ may adjust a charge where a facility is cooperative in resolving the case in a timely and appropriate manner and it 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. Owners who agree to expedited corrective action schedules may also qualify. Staff should consider institutional or legal limitations on corrective actions. For example, a municipality may be unable to institute corrective action immediately because of funding procedures.
- **Size and Sophistication of the Violator:** In adjusting the civil charge/civil penalty amount, enforcement staff may consider the size and sophistication of the violator. When considering the sophistication of the violator, 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 violator is also relevant in the case of a small business.

2. Litigation and Strategic Considerations[68]

DEQ may also adjust a civil charge downward – including the economic benefit of noncompliance - for specific litigation and strategic considerations. Adjustments for litigation and strategic considerations should be carefully considered and documented. Staff may reduce the Total Civil Charge based on documented strategic considerations, including:

- **Problems of Proof:** Problems with proving the case may be due to inadequate information, conflicting evidence, 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.
- **Impacts or Threat of Impacts (or Lack Thereof) to Human Health or the Environment:** The impact or threat of impact is a factor used in conjunction with other strategic considerations. It could provide additional justification for a reduction if there is a lack of impact, or reason to reject a reduction if impacts are consequential. The evaluation should include a broad assessment of environmental impact and not be limited to just the media where the violation occurred.
- **The Precedential Value of the Case:** Resolution of certain cases may establish a valued endorsement of an agency program or regulatory or enforcement initiative. A reduction to the proposed civil charge may be appropriate to obtain such a precedent.

[68] This criterion relates to all of the statutory factors.

- **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. Recognizing that a portion of the civil charge is intended to serve as deterrence, this factor may be appropriate for use with local governments and publicly funded service authorities. Also, in situations where the entity primarily responsible for the violation cannot be held accountable, it may not be appropriate to assess the full civil charge against those left responsible for correction..
- **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, in the ERP or Adjustment Form, to include authority to increase a civil charge or civil penalty for continuing or uncorrected violations, previously undiscovered violations, or for economic benefits from continuing delays in compliance, to provide additional incentives to resolve the action expeditiously.

F. CIVIL PENALTIES IN § 10.1-1186 PROCEEDINGS AND FORMAL HEARINGS

When an appropriate civil charge cannot be agreed upon with the consent of the party, the Department may elect to use an adversarial administrative process. Civil penalties are available following §10.1-1186 Proceedings[69] and following certain Formal Hearings.[70] In these actions, the penalty is pled and argued rather than established by consent. By statute, penalties are limited to a maximum of $10,000 in a §10.1-1186 Proceeding. Following a Formal Hearing, penalties are limited to $32,500 for each violation, not to exceed $100,000 per order.

DE is generally the lead in adversarial administrative processes. Staff should use the Worksheet and specific criteria in Sections III B through III E[71] to determine the amount to be sought in a Formal Hearing, but in preparing the documents, staff should resolve any reasonable issues or questions in favor of the Department. In Formal Hearings, staff should seek the highest penalty justified by all of the facts, up to $100,000 per order. The calculation is not limited to the amount that may have been offered in attempting to reach a settlement. Any adjustment for "cooperativeness" or for "promptness of injunctive response/good faith effort to comply" should be omitted in seeking a civil penalty in a Formal Hearing. By statute, the person must be provided with the calculation for the proposed penalty prior to any Formal Hearing conducted for an

[69] *See* Va. Code § 10.1-1186(10) (special orders); § 10.1-1182 (special order defined, with limit of $10,000 and duration of not more than 12 months); and Va. Code § 2.2-4019 (informal fact finding proceedings under the Administrative Process Act). The informal fact-finding can be before the Director of the Department or his designee; however, the Director may not delegate his authority to impose civil penalties in such proceedings.
[70] *See* Va. Code § 10.1-1455(G) and § 2.2-4020 (formal hearings; litigated issues under the Administrative Process Act). For Formal Hearings with civil penalties, the hearing must be before an officer appointed by the Virginia Supreme Court.
[71] The statutory factors are those noted in the referenced sections.

order that assesses penalties.[72] If the case is settled while the proceeding is still pending, the penalty can be modified and calculated as any civil charge, described above. Any adjustment should be documented in a revised Worksheet or the ERP. The development of a penalty amount to be pled in a judicial complaint is not covered in this guidance.[73]

[72] 2005 Acts. c. 706; Va. Code § 10.1-1455(G).
[73] Authority for civil penalties in judicial proceedings may be found at Va. Code §§ 10.1-1418.1, -1455(A) and (E).

LAND PROTECTION/REMEDIATION CIVIL CHARGE/CIVIL PENALTY WORKSHEET

Va. Code § 10.1-1455

Permittee/Responsible Party	Permit/ID No.				NOV Date	
			Potential For Harm			
Violation No. _____	Data		**Serious**	**Moderate**	**Marginal**	***Amount***
1. Extent of Deviation from Requirement						
a. Major	Y	N	$ 26,000	$ 9,000	$ 2,600	
b. Moderate	Y	N	$ 13,000	$ 6,000	$ 1,300	
c. Minor	Y	N	$ 8,000	$ 3,500	$ 300	
d. Subtotal						
2. Multi-Day Component *(n = number of days of continuing, discrete violations)*						
a. Does the multi-day component apply? If no, go to #3.	Y	N				
b. Major	Y	N	$1,300 (x) n =	$700 (x) n =	$200 (x) n =	
c. Moderate	Y	N	$1,000 (x) n =	$400 (x) n =	$150 (x) n =	
d. Minor	Y	N	$700 (x) n =	$200 (x) n =	$100 (x) n =	
e. Remedy Consent Order	Y	N	$250 (x) n =	$100 (x) n =	$50 (x) n =	
e. Multi-day subtotal						
3. Degree of Culpability						
Culpability subtotal *(apply to violation(s)' Amount or to the sum of 1 and 2.)*	Low = (x) 0		Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
4. 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.)			
RCO Compliance History	Y	N	If yes, add 0.15 (x) sum of 1 and 2			
5. Economic Benefit of Noncompliance						
6. Ability to Pay *(based on information supplied by the owner/operator)*						( )
Total Civil Charge/Civil Penalty *(may not exceed $32,500 per day per violation)*						***$***

Comments:

IV. WATER PROGRAMS

The procedures in Section IV are used to calculate civil charges and civil penalties for the Water Programs.[74]

The State Water Control Law (Water Law) at Va. Code § 62.1-44.15(8d) provides for the payment of civil charges in consent orders for past violations of the Water Law, regulations, orders, and permit conditions. This statutory section is the basis for negotiated civil charges in most Water Programs, including the Virginia Pollutant Discharge Elimination System (VPDES) Program, the Virginia Pollution Abatement (VPA) Permit Program, and the Industrial Storm Water Program. Sections IV A through IV E below describe calculations of negotiated civil charges. With the exception of consent orders to prevent or minimize sanitary sewer overflows (SSOs),[75] the maximum civil charge is $32,500 for each violation, with each day being a separate violation.[76] Special considerations for pleading civil penalties in § 10.1-1186 Proceedings and Formal Hearings are discussed in Section IV F.

The same section of the Virginia Code (Va. Code § 62.1-44.15(8d)), is also the basis for negotiated civil charges for the Virginia Water Protection Permit (VWPP) Program[77] and the Regulated Underground Storage Tank Program (Article 9 of the Water Law).[78] Separate criteria and Worksheets are set out for these programs in Section IV G and Section IV H, below. Sections 62.1-44.15:25 and -44.15:48 are the basis for negotiated civil charges of up to $32,500 in the Construction Stormwater Program. Separate criteria and a worksheet for that program are set out in Section IV L, below.

In addition, there are separate authorities for negotiated civil charges and civil penalties, and different penalty limits, for Water Programs violations regarding the following programs:

- the discharge of oil and Aboveground Storage Tanks (ASTs) (Article 11 of the Water Law) (Va. Code § 62.1-44.34:20(C) and (D));
- ground water management areas (Va. Code § 62.1-270(A));
- surface water management areas (Va. Code § 62.1-252(B));
- animal feeding operations (AFOs) (Va. Code § 62.1-44.17:1(J)); and
- poultry waste management (Va. Code § 62.1-44.17:1.1(F)).

Criteria and worksheets are set out for these programs in Sections IV I through IV K, below.

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[74] For purposes of the guidance, the Water Program includes all programs authorized under State Water Control Law, Va. Code § 62.1-44.2, *et seq.*

[75] Va. Code § 62.1-44.15(8f) establishes maximum civil charges for SSO violations in consent orders requiring SSO corrective action. Currently, maximum civil charges for SSO violations in such consent orders are $16,000 per violation, with a maximum civil charge limit of $187,500. These limits correspond to those found in 33 U.S.C. § 1319(g), as modified by the Debt Collection Improvement Act of 1996, Pub. L. 104-134. *See* 40 CFR § 19.4, Table 1 (2013). These limits are subject to change based on the act, and the CFR Table should be consulted.

[76] The maximum amounts for consent civil charges are incorporated by reference from Va. Code § 62.1-44.32(a).

[77] Va. Code § 62.1-44.15:20

[78] Va. Code §§ 62.1-44.34:8 and -44.34:9

A. CONSENT ORDERS WITHOUT CIVIL CHARGES

Initially, staff establish whether the violation warrants a civil charge. The following basic criteria should all be met for all cases without civil charges:

- The severity of the violation is minimal;
- The extent of the actual or potential environmental harm is negligible or minimal;
- The RP has not been in chronic noncompliance and is making a good-faith effort to comply; and
- The economic benefit of noncompliance is negligible or minimal.

The emphasis in all cases, but particularly in cases without civil charges or civil penalties, is on prompt and appropriate injunctive relief to bring RPs into compliance with applicable laws, regulations, orders, and permit conditions.[79]

Assuming the basic criteria are met, the following types of cases may qualify as ones where a civil charge is not appropriate. This list is illustrative and not intended to be exhaustive.

- 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 shut down or be connected to a municipal sewer system; and
- Violations resulting from unavoidable or unforeseeable events, of short duration, with little or no environmental impact, but not including violations of reporting requirements.

B. CONSENT ORDERS WITH CIVIL CHARGES

Unless the violation is so unusual as to warrant an enhanced civil charge as described in the Introduction, DEQ calculates civil charges for violations of most Water Programs using the Water Civil Charge/Civil Penalty Worksheet (Worksheet), which is found following Section IV F of this guidance.

Civil charges are generally appropriate in consent orders when one or more of the following criteria are met (the list is not exhaustive):

- Failure to respond to technical assistance efforts;
- Violation of enforcement orders without mitigating circumstances;
- Violations that are avoidable;

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

- Noncompliance that is continuing or likely to recur absent a civil charge;
- Knowing violations;[80] or
- Violations resulting in environmental damage.

In calculating the appropriate civil charge, staff first identify the appropriate "Potential for Harm" classification and then work through the various categories on the appropriate Worksheet to calculate a Total Civil Charge/Civil Penalty. The Worksheet Total Civil Charge/Civil Penalty may be adjusted for appropriate reasons, as documented on the Civil Charge/Civil Penalty Adjustment Form (*See* Section IV E). Both the Worksheet and the Form are part of the Enforcement Recommendation and Plan (ERP). A blank Worksheet and Form may be made available to the RP at the beginning of negotiations; however, disclosure of the completed Worksheet and any Adjustment Form is discretionary, at least until the enforcement strategy exemption expires under FOIA.[81]

C. POTENTIAL FOR HARM CLASSIFICATIONS[82]

Using best professional judgment, staff place each violation into one of three "Potential for Harm" classifications – "Serious," "Moderate," or "Marginal" – that are listed near the top of each Worksheet. Staff classify the violation based on: (1) potential for or actual human health or environmental impact;[83] and (2) effect on the regulatory program. The "effect on the regulatory program" consideration examines whether the violation(s) or pattern of violations at issue are of requirements fundamental to the continued integrity of the regulatory program and may undermine the statutory or regulatory purposes or procedures for implementing the regulatory program.

The following sections define the three classifications and provide examples for each of the levels. The sections provide examples of violations for each classification only and are not used to determine whether a violation warrants formal enforcement. Departures from the examples should be discussed with a representative of DE.

1. Serious Classification[84]

A violation is classified as Serious if: (1) the violation *has impacted* or presents an *imminent and substantial risk of impacting* human health and/or the environment such that serious damage has resulted or is likely to result; and/or (2) the actions have or may have a *substantial adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program.

Examples include, but are not limited to: fish kills; effluent violations resulting in loss of beneficial uses; failure to report an unpermitted discharge;

[80] Evidence of a deliberate act may be grounds for referral to criminal investigative authorities.
[81] Va. Code § 2.2-3705.7(16). The rules for Formal Hearings are different. *See* Section IV F, below.
[82] This criterion relates to the statutory factors of environmental harm and severity.
[83] While the violation must have occurred in Virginia, the assessment of environmental harm may consider impacts both within and beyond the boundaries of the Commonwealth (*e.g.*, impacts to a neighboring state's waters).
[84] This criterion relates to the statutory factors of environmental harm and severity.

chronic refusal to apply for a permit; or perform a Toxics Management Plan (TMP).

2. Moderate Classification[85]

A violation is classified as Moderate if: (1) the violation presents or may present *some risk* of impacting the environment, but those impacts would be moderate and correctable in a reasonable period of time; and/or (2) the actions have or may have a *noticeable adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program.

Examples include, but are not limited to: failure to perform annual or quarterly inspections as required by a VPDES general permit; failure to observe Best Management Practices (BMPs) in VPDES permits; chronic late submission of monitoring reports or permit application.

3. Marginal Classification[86]

A violation is classified as Marginal if: (1) the violation presents *little or no risk* of environmental impact; and/or (2) the actions have or may have a *little or no adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program.

Examples include, but are not limited to: an improperly completed Discharge Monitoring Report (DMR) that does not result in a Serious or Moderate classification; minor exceedances of VPDES permit effluent limits and of land application rates with no impact to ground or surface water.

D. CALCULATING THE WORKSHEET CIVIL CHARGE

1. Gravity Based Component[87]

Staff identify all of the violations being addressed in the gravity-based component section of the Worksheet and calculate the charge separately for each violation. The gravity-based component covers two areas: (a) violations and frequency; and (b) aggravating factors as multipliers. Staff categorize the charges in the first area (violations and frequency) based on their Potential for Harm classification.

The noncompliance period considered should generally be limited to six months prior to the date of referral. Charges generally should not exceed $50,000 per month of noncompliance. Under the gravity-based component staff mark "Y" or "N" for each violation that applies and determine the civil charge per violation

[85] This criterion relates to the statutory factors of environmental harm and severity.
[86] This criterion relates to the statutory factors of environmental harm and severity.
[87] This criterion relates to the statutory factors of severity and environmental harm.

based on the number of occurrences and the Potential for Harm classification. The charge is then entered into the "Amount" column of the Worksheet.

a. Violations and Frequency:[88] The violations generally fall into one of the following categories and the frequency is per month, unless otherwise noted:

(1) Effluent Limits (per parameter per month, or longer, specified interval)[89]
(2) Operational Deficiencies
(3) Monitoring/Submissions
(4) Spills/Unpermitted discharges (per day or per event)
(5) Compliance/Construction/Payment Schedules
(6) No Permit
(7) Failure to Report (per event per month)
(8) BMPs not installed or maintained
(9) Failure to record inspections (storm water)
(10) No storm water pollution prevention plan (SWPPP) (storm water)
(11) Incomplete SWPPP or SWPPP not on site (per event) (storm water)
(12) Biosolids transport violation (per vehicle or per event)[90]
(13) Other

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 Serious, Moderate, or Marginal. The charge is then entered into the "Amount" column of the Worksheet.

b. Aggravating Factors as Multipliers: 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. Aggravating factors are:

- **Major Facility:**[91] If a VPDES facility is classified as "major" using EPA criteria, this factor applies.

- **Compliance History Category:**[92] Staff use the Compliance History Category to adjust a civil charge or civil penalty for prior enforcement activities. When an RP has previously violated an

[88] This criterion relates to the statutory factors of severity and environmental harm.
[89] For purposes of penalty calculation, permit conditions with the same limits for daily, weekly, and monthly concentrations of the same pollutant are considered one parameter.
[90] If the biosolids transport violation also causes a discharge to state waters, use both items (4) and (12).
[91] This criterion relates to the statutory factor of severity and environmental harm.
[92] This criterion relates to the statutory factor of compliance history.

environmental standard at the same or a different source or facility, it is usually clear evidence that the RP was not deterred by the previous enforcement response. In calculating the adjustment factor for compliance history, staff consider:

a) Consent, administrative or judicial orders or decrees in any other media program that became effective after the period beginning 36 months preceding the initial violation that is subject of the current enforcement action (5% of the current gravity-based civil charge/civil penalty or $5,000, whichever is less); and
b) Consent, administrative or judicial orders or decrees, in the same media program that became effective after the period beginning 36 months preceding the initial violation that is subject of the current enforcement action (0.5 factor). If there has been more than one order, decree or agreement in the past 36 months, staff consider whether it is appropriate to depart from the recommended calculation, 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.

- **Degree of Culpability Category:**[93] DEQ staff assesses an RP's culpability based on the facts and circumstances of the case and may add a multiplying factor to the Amounts for one, a subset, or all violations, depending on the assessment. Staff rate the RP's culpability as low (0% addition), moderate (25%), serious (50%), or high (100%) based on the one or more of list of factors below (the ERP may document consideration of relevant factors only). It is not anticipated that culpability will increase the civil charge in all cases. A simple violation without any further evidence of culpability is usually rated as low (but is still considered a violation, since RPs are strictly liability for noncompliance). Also, 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 factors may include one or more of the following:

  a) the degree to which the violator knew or should have known of the legal requirement that was violated.

[93] This criterion relates to the statutory factors of severity and compliance history.

b) the degree of control the violator had over the events constituting the violation;
c) the foreseeability of the events constituting the violation;
d) whether the violator knew or should have known of the hazards associated with the conduct;
e) whether the RP took reasonable precautions against the events constituting the violation;
f) whether there is evidence of unjustified delay in preventing, mitigating or remedying the violation; and
g) whether the violator failed to comply with an administrative or judicial order;
h) whether 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;
i) whether there have been Warning Letters in the same media program for the same or similar violations;
j) commonality of ownership, management, and personnel with other RPs or facilities that have been subject of enforcement actions; and
k) 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.

Lack of knowledge of a legal requirement is not used as a basis to reduce a civil charge or penalty. To do so would encourage ignorance of the environmental requirement. The amount of control and promptness of the injunctive response and good faith efforts to comply may be considered in the Adjustments in the Enforcement Recommendation and Plan.

c. Flow Reduction Factor:[94] The gravity-based component total may be reduced for small sewage treatment plants (STPs). The reduction is discretionary and is based on good faith efforts to comply. The factor relies on actual average daily STP flow[95], as follows:

FLOW REDUCTION FACTOR	
Average Daily Flow (gpd)	Percent Reduction
9,999 or less	50
10,000 – 29,999	30
30,000 – 99,999	10
100,000 and above	No Reduction

[94] This criterion relates to the statutory factor of environmental harm.
[95] "Flow" means monthly average daily flow from the facility for the month in which the violation(s) occurred.

If the reduction is being considered for a non-municipal STP, staff should ensure that the facility or parent company employs less 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 gpd average daily flow, the reduction is 50%) to obtain the reduction amount. If the permit flow is monthly, divide by 30.4 to get the gpd. Using the appropriate Worksheet, staff subtract the reduction amount from the gravity-based component total to obtain the flow-adjusted gravity-based component total.

2. Economic Benefit of Noncompliance[96]

In assessing civil penalties the "economic benefit of noncompliance" should be taken into consideration. This factor is included in a civil charge to ensure the charge acts as a deterrent to noncompliance. At a minimum, a civil charge or civil penalty should remove any significant (*i.e.*, greater than *de minimis*) economic benefit of noncompliance in addition to a "gravity component." By developing a civil charge assessment structure that incorporates this deterrent effect, an enforcement action removes any economic gain that a source or facility accrues by avoiding or delaying costs necessary to achieve compliance, or from illegal competitive advantage (ICA).[97] The existence of a significant economic benefit gained from noncompliance is evaluated on a case-by-case basis. Staff use professional judgment when making the preliminary determination that economic benefit exists. When there is evidence of economic benefit based on delayed or avoided costs, or ICA, staff should estimate the value of the economic benefit and include this amount on the Worksheet. [98]

EPA's BEN model is a method for calculating economic benefit from delayed and avoided expenditures. If the economic benefit exceeds $10,000, BEN should be used. BEN uses 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. BEN allows a cooperative facility to provide actual financial data that may affect the civil charge calculation. For economic benefit

[96] This criterion relates to the statutory factor of economic benefit.

[97] 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 wetlands without appropriate permits.

[98] 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 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.

calculations of less than $10,000 or where the facility will not or cannot provide financial data in a timely manner, staff may make estimates based on available resources, including their best professional judgment.[99] Finally, methods other than BEN may be used to calculate economic benefit of noncompliance, where DEQ 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 avoided or delayed through noncompliance. A delayed cost is an expenditure that, through current noncompliance, can be put off to sometime in the future. An avoided cost is an expenditure that will not be made due to noncompliance. Examples of avoided costs include, but are not limited to:

- Monitoring and reporting (including costs of the sampling and proper laboratory analysis); and
- Operation and maintenance expenses (*e.g.*, labor, power, chemicals) and other annual expenses.

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

- Capital equipment improvement or repairs (including engineering design, purchase, installation, and replacement);
- One-time acquisitions (such as equipment or real estate purchases); and
- Costs associated with providing required compensatory mitigation for surface water/wetland impacts (such as creation/restoration of wetlands, purchase or mitigation bank credits, *etc.*).
- 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.*

The intent is to document and recover the economic benefit of noncompliance in all cases where there is an economic benefit from noncompliance and the benefit can be reasonably calculated and is not *de minimis*. There are three general areas where settling the total civil charge amount for less than the economic benefit may be appropriate. The three exceptions are:

- There are compelling public concerns that would not be served by taking a case to trial;
- It is unlikely, based on the facts of the particular case as a whole, that DEQ will be able to recover the economic benefit in litigation; and

[99] Staff may use the following "rule-of-thumb" in exercising their judgment: for delayed compliance, 6% per year of the delayed on-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.

- The facility has successfully documented an inability to pay the total proposed civil charge.

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 facilities 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 facility fails or ceases to make a timely, diligent, and good faith effort to comply, while doing all it can to assure high quality treatment.

3. Ability of the Person to Pay the Civil Charge[100]

Ability to pay is one of the five statutory factors. In general, DEQ will reduce penalty assessments that are clearly beyond the means of the party. 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 penalties where a business has failed to allocate environmental compliance costs in their business operations. It is also unlikely that DEQ would reduce a penalty where a facility refuses to correct a serious violation, or where a party has a long history of previous violations, or where the violations of the law are particularly egregious. DEQ does not reduce or abate a consent order civil charge after an order has been executed based on inability to pay. Inability to pay should be claimed before a RP agrees to a civil charge or civil penalty. The Office of Financial Management may negotiate delinquent accounts in accordance with the Commonwealth Accounting Policies and Procedures (CAPP) Manual.

The burden to demonstrate inability to pay rests on the RP, as it does with any mitigating circumstance. A party's inability to pay usually will reduce a civil charge only if the RP provides sufficient information to justify the adjustment, through the use of the EPA computer models ABEL, INDIPAY, or MUNIPAY. The Office of Financial Responsibility receives and analyzes financial information regarding an RP's ability to pay.

If a facility is unable to pay the calculated civil charge or would be prevented from carrying out essential remedial measures by doing so, DEQ should consider the following options with the facility in the order presented:

[100] This criterion relates to the statutory factor of ability to pay.

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

Regardless of DEQ's determination of an appropriate penalty amount to pursue based on ability-to-pay considerations, the party is always expected to comply with the applicable law, regulations, orders, and permit conditions.

E. ADJUSTMENTS IN THE ENFORCEMENT RECOMMENDATION AND PLAN[101]

DEQ may adjust a civil charge downward in the ERP at several points in its calculation: (1) staff may adjust the gravity component of the civil charge before economic benefit is added; and (2) staff may also reduce the total civil charge for specific litigation and strategic considerations.

For all adjustments, staff should clearly document the adjustment calculation and its reasons for the adjustment either in the ERP itself, or on the Civil Charge/Civil Penalty Adjustment Form, which is attached to the ERP. A revised ERP and/or Adjustment Form may be required, depending on when DEQ makes the adjustments. The appropriate level of management should approve all adjustments. Decisions regarding adjustment are not subject to administrative appeal or judicial review.

1. Charge Adjustments Before Considering Economic Benefit[102]

DEQ may adjust the gravity component of a civil charge – excluding the economic benefit calculation – downward by up to 30% based on several factors where there are clearly documented, case-specific facts that support the adjustment as provided in this section. This adjustment is not appropriate in all cases.

The gravity component may be reduced by more than 30% if appropriate circumstances exist. Staff should document the basis for reducing a charge beyond 30% on the Civil Charge/Civil Penalty Adjustment Form. Regional staff must obtain concurrence from DE when considering an adjustment beyond 30%. DE staff evaluate the adjustment for appropriateness and consistency.

- **Cooperativeness/quick settlement:** DEQ may adjust a charge where a facility is cooperative in resolving the case in a timely and appropriate manner and it 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

[101] This criterion relates to all of the statutory factors.
[102] This criterion relates to the statutory factors of compliance history, severity, environmental harm, and ability to pay.

include prompt reporting of noncompliance, prompt initiation of corrective action, prompt correction of environmental problems, and cooperation during the investigation. Owners who agree to expedited corrective action schedules may also qualify. Staff should consider institutional or legal limitations on corrective actions. For example, a municipality may be unable to institute corrective action immediately because of funding procedures.

- **Size and type of facility/owner:** Reductions may be appropriate for small facilities. Such a reduction, however, may not be appropriate for a small facility owned by a large corporation. Facilities providing a critical community service (*e.g.*, municipal plants in isolated or economically distressed areas, hospitals, and schools) may be appropriate for this reduction.

2. Litigation and Strategic Considerations[103]

DEQ may also adjust a civil charge downward – including the economic benefit of noncompliance - for specific litigation and strategic considerations. Adjustments for litigation and strategic considerations should be carefully considered and documented. Adjustments for litigation and strategic considerations should be carefully considered and documented. Staff may reduce the Total Civil Charge based on documented strategic considerations, including:

- **Problems of Proof:** Problems with proving the case may be due to inadequate information, conflicting evidence, 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.
- **Impacts or Threat of Impacts (or Lack Thereof) to Human Health or the Environment:** The impact or threat of impact is a factor used in conjunction with other strategic considerations. It could provide additional justification for a reduction if there is a lack of impact, or reason to reject a reduction if impacts are consequential. The evaluation should include a broad assessment of environmental impact and not be limited to just the media where the violation occurred.
- **The Precedential Value of the Case:** Resolution of certain cases may establish a valued endorsement of an agency program or regulatory or enforcement initiative. A reduction to the proposed civil charge 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. Recognizing that a portion of the civil charge is intended to serve as deterrence, this factor may be appropriate for use with local governments and publicly funded service authorities. Also, in situations where the entity primarily responsible for

[103] This criterion relates to all of the statutory factors.

the violation cannot be held accountable, it may not be appropriate to assess the full civil charge against those left responsible for correction.

- **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, in the ERP or Adjustment Form, to include authority to increase a civil charge or civil penalty for continuing or uncorrected violations, previously undiscovered violations, or for economic benefits from continuing delays in compliance, to provide additional incentives to resolve the action expeditiously.

F. CIVIL PENALTIES IN § 10.1-1186 PROCEEDINGS AND FORMAL HEARINGS

When an appropriate civil charge cannot be agreed upon with the consent of the party, the Department may elect to use an adversarial administrative process. Civil penalties are available following §10.1-1186 Proceedings[104] and following certain Formal Hearings.[105] In these actions, the penalty is pled and argued rather than established by consent. By statute, penalties are limited to a maximum of $10,000 in a §10.1-1186 Proceeding. Following a Formal Hearing, penalties are limited to $32,500 for each violation, not to exceed $100,000 per order.

DE is generally the lead in adversarial administrative processes. Staff should use the Worksheet and specific criteria in Sections IV B through IV E[106] to determine the amount to be sought in a Formal Hearing, but in preparing the documents, staff should resolve any reasonable issues or questions in favor of the Department. In Formal Hearings, staff should seek the highest penalty justified by all of the facts, up to $100,000 per order. The calculation is not limited to the amount that may have been offered in attempting to reach a settlement. Any adjustment for "cooperativeness" or for "promptness of injunctive response/good faith effort to comply" should be omitted in seeking a civil penalty in a Formal Hearing. By statute, the person must be provided with the calculation for the proposed penalty prior to any Formal Hearing conducted for an order that assesses penalties.[107] If the case is settled while the proceeding is still pending, the penalty can be modified and calculated as any civil charge, described above. Any adjustment should be documented in a revised Worksheet or the ERP. The development of a penalty amount to be pled in a judicial complaint is not covered in this guidance.[108]

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[104] *See* Va. Code § 10.1-1186(10) (special orders); § 10.1-1182 (special order defined, with limit of $10,000 and duration of not more than 12 months); and Va. Code § 2.2-4019 (informal fact finding proceedings under the Administrative Process Act). The informal fact-finding can be before the Director of the Department or his designee; however, the Director may not delegate his authority to impose civil penalties in such proceedings.

[105] *See* Va. Code § 62.1-44.15(8a) and § 2.2-4020 (formal hearings; litigated issues under the Administrative Process Act). For Formal Hearings with civil penalties, the hearing must be before an officer appointed by the Virginia Supreme Court.

[106] The statutory factors are those noted in the referenced sections, or in subsequent Water Program worksheets.

[107] 2005 Acts. c. 706; Va. Code § 62.1-44.15(8a).

[108] Authority for civil penalties in judicial proceedings may be found at Va. Code § 62.1-44.32(a).

WATER CIVIL CHARGE/CIVIL PENALTY 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	
	Data		**Potential for Harm**			
			Serious	**Moderate**	**Marginal**	***Amount***
1. Gravity-based Component						
a. Violations and Frequency (per month unless otherwise noted)			$ (x) occurrences	$ (x) occurrences	$ (x) occurrences	
(1) Effluent Limits (per parameter per month, or longer, specified interval)	Y	N	1,300 (x) ___	700 (x) ___	300 (x) ___	
(2) Operational Deficiencies	Y	N	1,300 (x) ___	700 (x) ___	300 (x) ___	
(3) Monitoring/Submissions	Y	N	1,300 (x) ___	700 (x) ___	300 (x) ___	
(4) Spills/Unpermitted Discharge (per day or per event)	Y	N	13,000 (x) ___	6,500 (x) ___	1,300 (x) ___	
(5) Compliance/Construction/Payment Schedules	Y	N	1,300 (x) ___	700 (x) ___	300 (x) ___	
(6) No Permit	Y	N	5,200 (x) ___	2,600 (x) ___	900 (x) ___	
(7) Failure to Report (per event per month)	Y	N	13,000 (x) ___	6,500 (x) ___	1,300 (x) ___	
(8) BMPs not installed or maintained (storm water)	Y	N	6,500 (x) ___	2,600 (x) ___	1,300 (x) ___	
(9) Failure to record inspections (storm water)	Y	N	1,300 (x) ___	650 (x) ___	260 (x) ___	
(10) No SWPPP (per event) (storm water)	Y	N	9,100 (x) ___	5,200 (x) ___	1,300 (x) ___	
(11) Incomplete SWPPP or SWPPP not on site (per event) (storm water)	Y	N	2,600 (x) ___	1,300 (x) ___	650 (x) ___	
(12)Biosolids transport violation (per vehicle or per event)	Y	N	6,500 (x) ___	2,600 (x) ___	1,300 (x) ___	
(13) Other	Y	N	2,600 (x) ___	1,300 (x) ___	700 (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	
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 *(may not exceed $32,500 per day per violation) (as of January 12, 2009, may not exceed $16,000 per violation, with a maximum limit of $177,500, for SSO violations in consent orders requiring SSO corrective action, subject to change in the CFR).*						***$***

Comments:

G. VIRGINIA WATER PROTECTION PERMIT (VWPP) PROGRAM

The VWPP Program is authorized under Va. Code §§ 62.1-44.15:20 through -44.15:23. The first section addresses 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. Section 62.1-44.15:22 states that conditions contained in a VWPP may include the volume of water which may be withdrawn from surface waters as a part of the permitted activity and conditions necessary to protect beneficial uses. Negotiated civil charges for VWPP violations are authorized by Va. Code § 62.1-44.15(8d). The maximum penalty is $32,500 per day for each violation.[109]

Civil charges for the VWPP Program are calculated using the Worksheet at the end of this section. The specific criteria for calculating the civil charge or civil penalty are listed in the Worksheet, along with the associated statutory factors (in parentheses).

Civil charges and 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 usually assessed: (1) for total impacts to streams and (2) for total impacts to wetlands, based on the potential for harm to the environment and the extent of deviation from regulatory program. However, each separate NOV marks a new occurrence for purposes of determining wetlands and streams violations. Wetland type is not considered when determining the number of occurrences, unless the different wetland types were subject to separate discharges of pollutants in a new NOV. 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 a new NOV.

In assessing a civil charge for the unauthorized discharge of pollutants to state waters, three elements will be considered and evaluated individually:

- Discharges to wetlands
- Discharges to streams
- New NOVs alleging: (1) discharges discovered since a prior inspection; (2) continuing and ongoing discharges that took place over days, weeks, or months; or (3) erosion and sediment (E&S) control violations that have not been abated.

One distinction for VWPP permits lies in the calculation of economic benefit of noncompliance. While the BEN model may be used as appropriate, BEN often fails to capture adequately the "illegal competitive advantage" (ICA) that may arise from wetlands violations. It may be necessary to use other standard accounting practices to determine the level of revenues that would have been unattainable had the RP abided by the law. For example, if a party improperly filled wetlands and sold the property as sites

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

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 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 E&S controls), permit fees and tax or revenue benefits.

Staff should mark the data column for each violation and apply the appropriate multiplier in the Worksheet. The charge is then entered into the "Amount" column. Except as specified, the considerations in Sections IV A, B, E, and F apply, including the ERP adjustment factors. Except as noted, the potential for harm for each line in the Worksheet is assessed case by case.

1. <u>Gravity Factors – Discharge of Pollutants</u>

a. <u>Failure to obtain coverage under an Individual Permit (IP) or a General Permit (GP) prior to commencing activity</u> - 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.

In assessing the potential for harm for this line (and associated charges on line 1(i)), 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.

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

If staff believe that these thresholds should be adjusted based on case-specific factors, staff should provide additional justification by considering such factors as: classification of a wetland type (*e.g.*, PFO, PSS, PEM)[110]; surrounding land use and cover types; nutrient, sediment, and pollutant trapping ability; flood

[110] 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).

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. [111]

b. Exceeding coverage authorized under an IP or GP – This line should be used when in an RP 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 (and associated charges on line 1(i)) is assessed as follows:

Description	Serious	Moderate	Marginal
Exceedances that: 1) 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 2) Exceed permitted impacts by 2 or more acres of wetlands or open water, or 1,500 or more LF of stream.	X		
Exceedances that: 1) 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 2) Require a major modification of an individual permit (*i.e.*, changes that cumulatively exceed 0.25 acre but less than 2.0 acres of wetlands/open water, or that cumulatively exceed 100 LF but less than 1,500 LF of stream); or 3) 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.		X	
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

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

c. Failure to perform or complete compensatory mitigation - This line should be used to capture the failure to perform or complete compensation requirements in any form required by the permit, *e.g.* purchase of wetland or stream credits, preservation, restoration or enhancement, or wetland creation.

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 RP fails to implement corrective action to ensure compensation meets no net loss.

e. Failure to conduct compensation monitoring or water quality monitoring - This line should be used when the RP 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.

f. Failure to conduct construction monitoring - *See,* 1(e) above.

g. Failure to submit preconstruction notice

h. Failure to submit plans and specifications prior to commencing construction

i. Unauthorized impacts to wetlands and/or streams (wetlands and streams will be assessed separately)

   a) This line should be used when the RP has discharged pollutants to state waters (wetlands or streams) per occurrence, and should be used in conjunction with 1(a) or 1(b).
   b) 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 1(a) or 1(b). E&S violations are not assessed if the Department of Conservation and Recreation is actively pursuing overlapping violations.

j. Failure to comply with permit special conditions - This line should be used when the RP has failed to comply with permit special conditions such as, but not limited to, storm water management; E&S control; 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.*

k. Failure to submit a complete, final compensation plan –Not to be used with 1(h) or 1(l).

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*.

2. Gravity Factors – Surface Water Withdrawal

The violations listed in 2(a) through 2(k) are self explanatory and require little additional guidance. In determining the potential for harm of each violation, the effect on and the extent of the deviation from the regulatory program and/or permit requirement should be assessed as well as the potential for harm to human health and the environment.

3. Aggravating factors

a. History of Noncompliance

The history of noncompliance is calculated as it is for other Water Programs.

b. Degree of Culpability

The degree of culpability is calculated as it is for other Water Programs.

4. Ability to Pay

The ability to pay is assessed as it is for other Water Programs.

5. Civil penalties in § 10.1-1186 Proceedings and Formal Hearings

Civil penalties in § 10.1-1186 Proceedings and Formal Hearings are assessed as they are for other Water Programs, but using VWP Program authorities and criteria.

VA WATER PROTECTION PROGRAM CIVIL CHARGE/CIVIL PENALTY WORKSHEET Va. Code §§ 62.1-44.15:20 through -44.15:23						
Permittee/Responsible Party			**Reg. No.**		**Date**	
			Potential for Harm *(Environmental Harm and Severity)*			
	Data		**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	Y	N	6,500 (x) ___	2,600 (x) ___	1,300 (x) ___	
b. Exceeding coverage authorized under an IP or GP	Y	N	6,500(x) ___	2,600 (x) ___	1,300 (x) ___	
c. Failure to perform or complete compensatory mitigation	Y	N	26,000 (x) ___	13,000 (x) ___	6,500 (x) ___	
d. Failure to perform or complete corrective action relative to unsuccessful compensation.	Y	N	13,000 (x) ___	6,500 (x) ___	2,600 (x) ___	
e. Failure to conduct compensation monitoring or water quality monitoring	Y	N	6,500 (x) ___	2,600 (x) ___	1,300 (x) ___	
f. Failure to conduct construction monitoring	Y	N	6,500 (x) ___	2,600 (x) ___	1,300 (x) ___	
g. Failure to submit preconstruction notice	Y	N	13,000 (x) ___	6,500 (x) ___	2,600 (x) ___	
h. Failure to submit plans and specifications prior to commencing construction	Y	N	6,500 (x) ___	2,600 (x) ___	1,300 (x) ___	
i. Unauthorized impacts to wetlands and/or streams (wetlands and streams will be assessed separately)	Y	N	26,000 (x) ___	13,000 (x) ___	6,500 (x) ___	
j. Failure to comply with permit special conditions	Y	N	6,500 (x) ___	2,600 (x) ___	1,300 (x) ___	
k. Failure to submit a complete, final compensation plan	Y	N	6,500 (x) ___	2,600 (x) ___	1,300 (x) ___	
l. Record or reporting violations (not otherwise specified)	Y	N	2,600 (x) ___	1,300 (x) ___	700 (x) ___	

2. Gravity Factors – Surface Water Withdrawal *(Severity and Environmental Harm)*						
Violations and Frequency			$ (x) occurrences	$ (x) occurrences	$ (x) occurrences	
a. Exceedance of daily withdrawal limits (per day)	Y	N	1,300 (x) ___	700 (x) ___	100 (x) ___	
b. Exceedance of monthly withdrawal limits (per month)	Y	N	2,600 (x) ___	1,300 (x) ___	700 (x) ___	
c. Exceedance of annual withdrawal limits	Y	N	5,200 (x) ___	2,600 (x) ___	1,300 (x) ___	
d. Failure to submit annual monitoring reports (per report)	Y	N	1,300 (x) ___	700 (x) ___	300 (x) ___	
e. Unpermitted withdrawal (per day or per event)	Y	N	13,000 (x) __	6,500 (x) ___	1,300 (x) ___	
f. Failure to submit appropriate permit application	Y	N	5,200 (x) ___	2,600 (x) ___	1,300 (x) ___	
g. Failure to report (requested application, water audit, new well, etc) (per event)	Y	N	2,600 (x) ___	1,300 (x) ___	700 (x) ___	
h. Failure to mitigate	Y	N	13,000 (x) __	6,500 (x) ___	1,300 (x) ___	
i. Failure to install and/or maintain equipment or other operational deficiencies	Y	N	2,600 (x) ___	1,300 (x) ___	700 (x) ___	
j. Incomplete or improper reporting	Y	N	2,600 (x) ___	1,300 (x) ___	700 (x) ___	
k. Other, Violation of Permit, Special Exceptions, or Special Conditions NOT listed above (*e.g.*, time of year, minimum instream flow requirements) (per event)	Y	N	2,600 (x) ___	1,300 (x) ___	700 (x) ___	
	Violations and Frequency Subtotal					
3. Aggravating Factors *(Severity and Compliance History)*						
a History of Noncompliance						
	Order or decree <u>in another media program</u> 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 <u>in same media program</u> 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 $32,500 per day per violation)*						***$***

Comments:

H. REGULATED UNDERGROUND STORAGE TANK PROGRAM. (ART. 9)

The Regulated 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.[112]

Civil charges and civil penalties for the Regulated UST Program are calculated much as they are for other Water Programs. The specific criteria for calculating the civil charge or civil penalty are listed in the following Worksheet, along with the associated statutory factors (in parentheses). Note that separate violations found in an inspection (*e.g.*, release detection, corrosion protection, spill prevention, or overfill prevention) are ordinarily assessed separately on the Worksheet, even if they fall under the same Worksheet row. The Degree of Culpability,[113] History of Noncompliance,[114] Economic Benefit[115] and Ability to Pay[116] and are calculated as in other Water Programs.

Staff should mark the data column for each type of violation and apply the appropriate multiplier in the Worksheet. The charge is then entered into the "Amount" column. Except as noted, the considerations in Sections IV A through E apply, including the ERP adjustment factors. Special considerations for pleading civil penalties in § 10.1-1186 Proceedings or in Formal Hearings are discussed in Section IV F.

[112] Va. Code § 62.1-44.15 incorporates by reference the penalty amounts from Va. Code § 62.1-44.32.
[113] This criterion relates to the statutory factors of compliance history and severity.
[114] This criterion relates to the statutory factor of compliance history.
[115] This criterion relates to the statutory factor of economic benefit.
[116] This criterion relates to the statutory factor of ability to pay.

ARTICLE 9 – REGULATED UST PROGRAM CIVIL CHARGE/CIVIL PENALTY WORKSHEET

Va. Code § 62.1-44.15

Facility/Responsible Party	Reg./Id. #				NOV Date	
			Potential for Harm *(Environmental Harm and Severity)*			
	Data		**Serious**	**Moderate**	**Marginal**	***Amount***
1. Violations and Frequency* *(Severity and Environmental Harm)*						
a. Failure to Report a Release or a Suspected Release	Y	N	$ 13,000	$ 6,500	$ 1,300	
b. Corrective Action /Monitoring/Closure Report Not Submitted	Y	N	$1,300 per phase	$700 per phase	$300 per phase	
c. Failure to Investigate, Abate, or Remediate a Release	Y	N	$ 5,200	$ 2,600	$ 1,300	
d. Tank system Installed, Upgraded, Equipped, or Closed Improperly (per violation)	Y	N	$2,600 per tank *	$1,300 per tank *	$700 per tank *	
e. Tank System Operated Improperly (per violation)	Y	N	$1,300 per tank *	$700 per tank *	$300 per tank *	
f. No CAP or Failure to Execute a CAP	Y	N	$ 2,600	$ 1,300	$ 700	
g. Failure to Demonstrate Financial Assurance	Y	N	$ 1,300	$ 700	$ 300	
h. Compliance Records not Available	Y	N	$ 1,300	$ 700	$ 300	
i. Improper/No Registration	Y	N	$1,300 per tank *	$700 per tank *	$300 per tank *	
j. Other Violation Component	Y	N	$ 1,300	$ 700	$ 300	
* per tank or, if compartments, per tank compartment						
Violations and Frequency Subtotal						
2. 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	
3. 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 *(Subtotal 1+2+3)*						
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/Civil Penalty *(may not exceed $32,500 per day per violation)*						***$***

Comments:

I. OIL DISCHARGE AND ABOVEGROUND STORAGE TANKS (ART. 11)

Article 11 of the State Water Control Law[117] establishes a unique civil charge scheme 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:

1. For **failing to obtain approval of an oil discharge contingency plan** as required by § 62.1-44.34:15;
2. For **failing to maintain evidence of financial responsibility** as required by § 62.1-44.34:16;
3. For **discharging or causing or permitting a discharge of oil into or upon state waters, lands, or storm drain systems** within the Commonwealth, or owning or operating any facility, vessel or vehicle from which such discharge originates in violation of § 62.1-44.34:18;[118]
4. 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
5. 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.[119] Va. Code § 62.1-44.34:23 sets out exceptions to Article 11 generally.

Va. Code § 62.1-44.34:20(D) sets out separate statutory factors that must be considered in Article 11 civil charges and penalties:

- the willfulness of the violation;
- any history of noncompliance;
- the actions of the person in reporting, containing and cleaning up any discharge or threat of discharge;
- the damage or injury to state waters or the impairment of their beneficial use;
- the cost of containment and cleanup;
- the nature and degree of injury to or interference with general health, welfare and property; and
- the available technology for preventing, containing, reducing or eliminating the discharge.

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[117] Va. Code § 62.1-44.34:14, *et seq*.

[118] Violations addressed under Va. Code § 62.1-44.34:20(C)(3) include "[t]he discharge of oil into or upon state waters, lands, or storm drain systems within the Commonwealth." *See* Va. Code § 62.1-44.34:18(A)

[119] The exemptions and exceptions include (but are not limited 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)).

There are two Worksheets to address civil charges and civil penalties under Article 11: the first is for violations enumerated in C(1) through C(4);[120] and the second is for civil charges under C(5), including most AST violations. Civil charge or civil penalty ranges for each violation are shown on the Worksheets.

Enforcement staff must consider each of the statutory factors when calculating a civil charge or civil penalty in conjunction with the circumstances of each case. The facts of each case will vary.

In evaluating the Potential for Harm from a discharge of oil under C(3), consider the amount of the pollutant, the characteristics of the pollutant, the sensitivity of the environment, the sensitivity of the human population and the length of time of exposure. The following are the suggested increments for each category of Potential for Harm:

Marginal – 5, 10, 20
Moderate – 30, 45, 60
Serious – 70, 85, 100

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

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.

[120] Failure to have an oil discharge contingency plan is addressed under Section C(1), as part of a failure to have the plan approved, as required.

Serious:	Fish kill (consider the type and number of fish and the waters affected), significant threat to sensitive ecosystem, beneficial use, or wildlife (especially endangered species) that can be corrected only 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
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

c. **History of Noncompliance -** (NOVs for which DEQ pursued an enforcement action)

Serious:	A consent, administrative, or judicial order or decree in the same media program during the past 36 months for the same or substantially related violation(s);
Moderate:	An NOV or LOA in the same media program during the past 36 months for the same or substantially related violations.
Marginal:	A Warning Letter or Tanks Compliance Agreement (TCA) in the same media program during the past 36 months for the same or substantially related violations.
N/A:	No order, decree, NOV, LOA, Warning Letter, or TCA within the preceding 36 months in the same media program.

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 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

e. **Cost of Containment and Cleanup -** The higher the cost, the lower this number 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

Culpability (Willfulness of Violation) - DEQ staff assesses an RP's culpability based on the facts and circumstances of the case and may apply it to one, a subset, or all violations, depending on the assessment. Culpability is assigned a category and amount using the factors listed below (the ERP may document consideration of relevant factors only). It is not anticipated that culpability will increase the civil charge in all cases. A simple violation without any further evidence of culpability is usually rated as "Marginal, NA or None" (but is still considered a violation, since RPs are strictly liability for noncompliance). Also, 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 factors may include one or more of the following:

a) the degree to which the violator knew or should have known of the legal requirement that was violated;
b) the degree of control the violator had over the events constituting the violation;
c) the foreseeability of the events constituting the violation;
d) whether the violator knew or should have known of the hazards associated with the conduct;
e) whether the RP took reasonable precautions against the events constituting the violation;
f) whether there is evidence of unjustified delay in preventing, mitigating or remedying the violation; and
g) whether the violator failed to comply with an administrative or judicial order;
h) whether there have been Notices of Violation (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;
i) Whether there have been Warning Letters in the same media program for the same or similar violations;
j) Commonality of ownership, management, and personnel with other RPs or facilities that have been subject of enforcement actions; and
k) 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.

Lack of knowledge of a legal requirement is not used as a basis to reduce a civil charge or penalty. To do so would encourage ignorance of the environmental requirement. The amount of control and promptness of the

injunctive response and good faith efforts to comply may be considered in the Adjustments in the Enforcement Recommendation and Plan.

f. 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 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

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.

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

1) In assessing the potential for harm to the environment and the extent of deviation from the regulatory requirements for C(1), failure to obtain approval of an oil discharge contingency plan, the following factors should be considered: volume of the product, characteristics of the product, population density, skill set/training of employees, time of exposure, and distance from a drinking water source. For example, failure to have 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 when a product with a high toxicity which requires a special type of emergency response is involved, that would fall into the higher end of the spectrum compared to failing to have an ODCP when a less toxic product is involved.

2) In assessing the potential for harm to the environment and the extent of deviation from the regulatory requirements for C(2), failing to maintain evidence of financial responsibility, the following factors should be considered: facility storage capacity, characteristics of the product, type of product, tank volume, population density, time of exposure, and distance from a drinking water source. For example, an RP whose storage capacity is 25,000 gallons or less would be at the lower end of the spectrum compared to an RP whose storage capacity is over 1 million gallons. In assessing the potential for harm to the environment, an RP whose product requires a more expensive response cost would be at the higher

end of the spectrum compared to an RP whose product requires a minimal response cost, which would be at the lower end of the spectrum.

3) Line C(4) should not be used in conjunction with line 1(d). Line C(4) is applied for failing to cooperate in the containment and clean-up, or failing to report: (i) a discharge from a facility not exempt under Va. Code § 62.1-44.34:17 or a tank vessel; or (ii) a discharge from any facility, vehicle, or vessel that results in a serious "Potential for Harm" and that significantly impacts human health, habitation, natural resources, or the Article 11 program. In assessing the potential for harm to the environment and the extent of deviation from the regulatory requirements for C(4), for failing to cooperate in containment and clean-up of a discharge or failing to report a discharge, the following factors should be considered: volume of the product, characteristics of the product, type of product, population density, skill set/training of employees, time of exposure, and distance from a drinking water source. 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, an RP 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 an RP who provides necessary information about their product. In assessing the potential for harm to the environment, 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.

The second Worksheet (for C(5) and most AST violations) is used to calculate a civil charge in a similar fashion as other civil charge worksheets in this guidance. The Worksheet is set up and used much as the Worksheet for Regulated USTs; however, the statutory factors for Article 11 violations must be considered. If there is a specific violation of C(1) through C(4), then that violation should be addressed separately on the first Worksheet. The Compliance History category is calculated is for other Water Programs.

Adjustments may be made in the ERP, as they are for general Water Programs charges. These adjustment factors are discussed above in Section IV E. The justification for applying an adjustment should be reasonable and documented in the ERP. Note that the governing statute prescribes minimum penalties for violations of C(1), C(2), and C(4). Civil charges should not be mitigated or waived below the statutory minimum amounts.

Civil penalties in § 10.1-1186 Proceedings and Formal Hearings are calculated using the methods described for the Water Programs, but using the criteria of the Oil Discharge and AST Programs.

ARTICLE 11 - OIL DISCHARGE CIVIL CHARGE/CIVIL PENALTY WORKSHEET

Va. Code § 62.1-44.34:20(C)

Responsible Party/Facility	Reg./Id.#		NOV Date	
	Potential for 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, lands or storm drains, 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	5, 10, 20	$
b. Damage/Injury to State Waters or Impairment of Beneficial Use	70, 85, 100	30, 45, 60	5, 10, 20	$
c. History of Non-Compliance	70, 85, 100	30, 45, 60	5, 10, 20	$
d. Actions in Reporting/Containing/Cleaning Up the Discharge	70, 85, 100	30, 45, 60	5, 10, 20	$
e. Cost of Containment and Clean Up (Relative to Amount of Oil Spilled)	70, 85, 100	30, 45, 60	5, 10, 20	$
f. Culpability (Willfulness)	70, 85, 100	30, 45, 60	5, 10, 20	$
g. Available Technology to Prevent/Contain/Reduce/Eliminate Discharge	70, 85, 100	30, 45, 60	5, 10, 20	$
Subtotal				$
2. Average Civil Charge Calculation				
Average Total Civil Charge *[Subtotal divided by seven (7)]*				$
3. Subtotal C(3) Civil Charge (gallons times average civil charge)				
C (1) for failure to obtain approval of an oil discharge contingency plan in violation of § 62.1-62.1-44.34:15, assign a dollar amount between $1,000 and $50,000 for the initial violation [each subsequent day of violation is subject to a penalty of $10,000 per day] *(consider statutory factors)*				**$**
C (2) for failing to maintain evidence of financial responsibility in violation of § 62.1-62.1-44.34:16, assign a dollar amount between $1,000 and $100,000 for the initial violation [each subsequent day of violation is subject to a penalty of $10,000 per day] *(consider statutory factors)*				**$**
C(4) for failing to cooperate in containment and clean-up of a discharge or failing to report a discharge in violation of § 62.1-62.1-44.34:18,assign a dollar amount between $1,000 and $50,000 for the initial violation [each subsequent day of violation is subject to a penalty of $10,000 per day] *(consider statutory factors)*				$
Economic Benefit of Noncompliance				$
Ability to Pay *(based on information supplied by the party)*				( )
Total Civil Charge/Civil Penalty *(cannot exceed statutory maximum amounts)*				*$*

ARTICLE 11 – OTHER CIVIL CHARGE/CIVIL PENALTY WORKSHEET

Va. Code § 62.1-44.34:20(C)(5) –oil violations not otherwise specified, including most AST violations. Each day of violation of each requirement constitutes a separate offense.

Facility/Responsible Party	Reg./Id. #				NOV Date	
			Potential for Harm			
	Data		**Serious**	**Moderate**	**Marginal**	***Amount***
1. Violations and Frequency*						
a. Corrective Action /Monitoring/Closure Report Not Submitted	Y	N	$1,300 per phase	$ 700 per phase	$ 300 per phase	
b. Tank system Installed, Upgraded, Equipped, or Closed Improperly (per violation)	Y	N	$2,600 per tank *	$1,300 per tank *	$ 700 per tank *	
c. Tank System Operated Improperly (per violation)	Y	N	$1,300 per tank *	$ 700 per tank *	$ 300 per tank *	
d. No CAP or Failure to Execute a CAP	Y	N	$ 2,600	$ 1,300	$ 700	
e. Compliance Records not Available	Y	N	$ 1,300	$ 700	$ 300	
f. Improper/No Registration	Y	N	$1,300 per tank *	$ 700 per tank *	$ 300 per tank *	
g. Other Violation Component	Y	N	$ 1,300	$ 700	$ 300	
* per tank or, if compartments, per tank compartment, unless otherwise noted						
Violations and Frequency Subtotal						
2. Adjustments *(each adjustment applied to Violations and Frequency Subtotal)*						
a. 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	
b. 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.)			
c. Actions of the person in reporting, containing and cleaning up any discharge or threat of discharge						
d. Damage or injury to state waters or the impairment of their beneficial use						
e. Cost of containment and cleanup						
f. Nature and degree of injury to or interference with general health, welfare and property						
g. Available technology for preventing, containing, reducing or eliminating the discharge.						
Adjustments Subtotal						
3. Economic Benefit of Noncompliance						
4. Ability to Pay *(based on information supplied by the party)*						( )
Total Civil Charge/Civil Penalty *(may not exceed $32,500 per day per violation)*						$

Note: Charges for failure to obtain approval of an oil discharge contingency plan or for failing to maintain evidence of financial responsibility are assessed on the preceding worksheet.

Comments:

J. GROUND WATER AND SURFACE WATER

With the consent of any person in violation of the chapter on Ground Water Management, Va. Code § 62.1-254, *et seq.*, or its associated regulations, orders, or permits, the Board may provide, in an order issued by the Board against the person, for the payment of civil charges of $25,000 for each violation.[121] Staff should calculate an appropriate civil charge or civil penalty using the following Worksheet.

Serious, Moderate, and Marginal rankings are based on the annual water withdrawals of the facility and the environmental harm (*e.g.*, ground water management areas, saltwater intrusion, populated areas dependent on the resource, *etc.*). In the absence of specific environmental harm or areas more sensitive to excess withdrawal, a Marginal ranking is to be used for facilities permitted to withdraw 10 million gallons or less annually, Moderate for facilities permitted to withdraw less than 1 billion gallons but more than 10 million gallons annually, and Serious for facilities permitted to withdraw 1 billion gallons or more annually. In the case of unpermitted withdrawals, best professional judgment is to be used to estimate the annual withdrawal where withdrawals were not metered or readings may be suspect. Charges for the category of violations "Other, Violations of Special Conditions NOT listed above, *etc.*" is based upon the impact or potential impact to the resource and the regulatory program.

The Ground Water Withdrawal Civil Charge Worksheet further discusses the appropriate classification for violations. The violations are generally per occurrence. The Compliance History[122], Degree of Culpability,[123] Economic Benefit,[124] and Ability to Pay categories are calculated as they are for other Water Programs.

With the consent of any person in violation of the chapter on Surface Water Management Areas, Va. Code § 62.1-242, *et seq.*, the Board may provide, in an order issued by the Board against the person, for the payment of civil charges $1,000 for each violation.[125] Although not required by statute, staff should calculate an appropriate civil charge or civil penalty for each violation using the five statutory factors cited in the Introduction of this guidance.

If the surface water withdrawal is subject to a VWPP Permit, the civil charge or civil penalty should be calculated as described in Section IV G.

The Compliance History, Culpability, and Ability to Pay are calculated as they are for the Groundwater Programs. Adjustments may be made in the ERP, as they are for general Water Programs charges. These adjustment factors are discussed above in Section IV E. The justification for applying an adjustment should be reasonable and documented in the ERP.

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[121] Va. Code § 62.1-270
[122] This criterion relates to the statutory factor of compliance history.
[123] This criterion relates to the statutory factors of compliance history and severity.
[124] This criterion relates to the statutory factor of economic benefit.
[125] Va. Code § 62.1-252

GROUND WATER WITHDRAWAL CIVIL CHARGE/CIVIL PENALTY WORKSHEET

Va. Code § 62.1-270(A)

Facility/Responsible Party			Reg./Id. #		NOV Date	
			Potential for Harm (Potential for Harm and Severity)			
	Data		**Serious**	**Moderate**	**Marginal**	***Amount***
1. Violations and Frequency *(Severity and Environmental Harm)*			$ (x) occurrences	$ (x) occurrences	$ (x) occurrences	
a. Daily withdrawal limits (per day)	Y	N	1,000 (x) ____	500 (x) ____	100 (x) ____	
b. Monthly withdrawal limits (per month)	Y	N	2,000 (x) ____	1,000 (x) ____	500 (x) ____	
c. Annual withdrawal limits	Y	N	4,000 (x) ____	2,000 (x) ___	1,000 (x) ____	
d. Failure to submit quarterly monitoring reports (per quarter)	Y	N	1,000 (x) ____	500 (x) ___	200 (x) ____	
e. Unpermitted withdrawal	Y	N	10,000 (x) ____	5,000 (x) ____	1,000 (x) ____	
f. Failure to submit appropriate permit application	Y	N	4,000 (x) ____	2,000 (x) ____	1,000 (x) ____	
g. Failure to report/incomplete or improper reporting (requested application, water audit, new well, etc) (per event)	Y	N	2,000 (x) ____	1,000 (x) ____	500 (x) ____	
h. Failure to mitigate	Y	N	10,000 (x) ____	5,000 (x) ____	1,000 (x) ___-	
i. Failure to install and/or maintain equipment or other operational deficiencies	Y	N	2,000 (x) ____	1,000 (x) ____	500 (x) ____	
j. Other, Violation of Permit, Special Exceptions or Special Conditions NOT listed above (per event)	Y	N	2,000 (x) ____	1,000 (x) ____	500 (x) ____	
Violations and Frequency Subtotal						
2. Adjustment Factors *(applied to Violations and Frequency Subtotal)*						
a. 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.)			
b. 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/Civil Penalty *(may not exceed $25,000 per day per violation)*						***$***

Comments:

K. ANIMAL FEEDING OPERATIONS AND POULTRY WASTE

Va. Code § 62.1-44.17:1, provides specific statutory authority for the Department's General VPA Permit for Animal Feeding Operations (AFO) and outlines certain design and operational criteria for AFO owners and operators. Section 62.1-44.17:l(J) of the Code 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 the permit.. Using the AFO Civil Charge/Civil Penalty Worksheet, staff assess appropriate civil charges on a per settlement action basis.

In calculating the appropriate civil charge, staff assess the gravity-based component of the charge by selecting the appropriate violation category and multiplying the individual charge noted by the number of occurrences of the violation. After calculating charges for each violation category, staff add the 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 multiply the charge subtotal by the aggravating factor multiplier of 1.5 and add it to the Subtotal to arrive at the civil charge. Compliance History and Culpability are calculated as in other Water Programs.

Adjustments may be made in the ERP, as they are for general Water Programs charges. These adjustment factors are discussed above in Section IV E. The justification for applying an adjustment should be reasonable and documented.

The Total Civil Charge minus adjustments results in the Final Recommended Civil Charge in the ERP. 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 general Water 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. Adjustments may be made in the ERP, as they are for general Water Programs charges. These adjustment factors are discussed above in Section IV E. The justification for applying an adjustment should be reasonable and documented in the ERP.

AFO CIVIL CHARGE/CIVIL PENALTY WORKSHEET

Va. Code § 62.1-44.17:1(J)

Facility/Responsible Party	Reg./Id. #				NOV Date	
			Potential For Harm (Environmental Harm and Severity)			
	Data		**Serious**	**Moderate**	**Marginal**	***Amount***
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	Y	N	1,000 (x) ___	500 (x) ___	200 (x) ___	
(b) Failure to maintain records	Y	N	1,000 (x) ___	500 (x) ___	200 (x) ___	
(c) Improper documentation of liner, seasonal high water table, siting, design and construction	Y	N	500 (x) ___	300 (x) ___	100 (x) ___	
(d) Improper operation and maintenance of waste storage facility (per incident)	Y	N	1,000 (x) ___	500 (x) ___	200 (x) ___	
(e) Improper operation and maintenance of equipment (per incident) (including but not limited to checking for leaks, calibrations, having manufacturer's manuals on site)	Y	N	1,000 (x) ___	500 (x) ___	200 (x) ___	
(f) NMP Violations (per incident)	Y	N	1,000 (x) __	500 (x)___	200 (x) ___	
(g) Evidence of breached buffers or runoff (per incident)	Y	N	1,000 (x) __	500 (x) ___	200 (x) ___	
(h) Operator training requirements not met	Y	N	500 (x) __	300 (x) ___	100 (x) ___	
(i) Insufficient notice prior to animal placement or utilization of new waste storage facilities	Y	N	500 (x) __	300 (x) ___	100 (x) ___	
(j) Improper closure of waste storage facility	Y	N	1,000 (x) __	500 (x) ___	200 (x) ___	
(k) Other violations	Y	N	1,000 (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 (Environmental Harm, History of Non Compliance, and Severity)*.						
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/Civil Penalty *(not to exceed $2500 when covered by a VPA permit)*						**$**

Comments:

POULTRY WASTE CIVIL CHARGE/CIVIL PENALTY 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		
	Data		**Potential For Harm** *(Environmental Harm and Severity)* **Serious**	**Moderate**	**Marginal**	***Amount***
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	Y	N	1,000 (x) ___	500 (x) ___	200 (x) ___	
(b) Failure to maintain records	Y	N	1,000 (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	Y	N	500 (x) ___	300 (x) ___	100 (x) ___	
(d) Improper disposal of mortalities	Y	N	1,000 (x) ___	500 (x) ___	200 (x) ___	
(e) Improper storage of poultry waste	Y	N	1,000 (x) ___	500 (x) ___	200 (x) ___	
(f) Improper operation and maintenance of waste storage facility (per incident)	Y	N	1,000 (x) ___	500 (x) ___	200 (x) ___	
(g) Nutrient Management Plan (NMP) Violations (per incident)	Y	N	1,000 (x) ___	500 (x) ___	200 (x) ___	
(h) Improper winter land application of poultry waste or land application to soils that are saturated	Y	N	1,000 (x) ____	500 (x) ___	200 (x) ___	
(i) Evidence of breached buffers or runoff (per incident)	Y	N	1,000 (x) ___	500 (x) ___	200 (x) ___	
(j) Improper closure of poultry waste storage facility	Y	N	1,000 (x) ___	500 (x) ___	200 (x) ___	
(k) Operator training requirements not met	Y	N	500 (x) ___	300 (x) ___	100 (x) ___	
(l) Other violations	Y	N	1,000 (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 (Environmental Harm, History of Non Compliance, and Severity)*.						
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		
	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/Civil Penalty *(not to exceed $2,500 when covered by a VPA permit)*						***$***

L. 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 through -44.15:50. This guidance addresses civil charges and penalties for DEQ enforcement actions for violations of state requirements. Negotiated civil charges and civil penalties 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 of the Water Board or DEQ. The maximum civil charge or civil penalty is $32,500 per day for each violation.[126]

Staff should calculate an appropriate civil charge or civil penalty 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 charge noted by the number of occurrences of the violation. Each month of violation is treated as a separate occurrence unless otherwise noted. The Degree of Culpability,[127] History of Noncompliance,[128] Economic Benefit,[129] and Ability to Pay[130] categories are calculated as they are for other Water Programs.

Violations of Construction Stormwater requirements often accompany violations of VWPP Program requirements (unauthorized impacts to wetlands and/or streams). *See* Section IV.G. The penalty worksheet for Construction Stormwater is designed to incorporate VWPP violations when they result from discharge of stormwater from land-disturbing activities.[131]

Except as noted, the considerations in Sections IV A through E apply, including the ERP adjustment factors. Civil penalties in § 10.1-1186 Proceedings and Formal Hearings are assessed as for other Water Programs, but use Construction Stormwater Program authorities and criteria.

1. Potential for Harm Assessment

For each violation cited on the Construction Stormwater Worksheet, staff uses best professional judgment to assign a Serious, Moderate, or Marginal potential for harm ranking based on: (1) the potential for or actual human health or environmental harm; and (2) the effect on the regulatory program.

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

[126] Va. Code §§ 62.1-44.15:25(6) and 62.1-44.15:48(D)(2) incorporate by reference the civil penalty amount from Va. Code § 62.1-44.15:48(A).
[127] This criterion relates to the statutory factors of compliance history and severity.
[128] This criterion relates to the statutory factor of compliance history.
[129] This criterion relates to the statutory factor of economic benefit.
[130] This criterion relates to the statutory factor of ability to pay.
[131] See discussion in part 2.b below regarding when the Construction Stormwater Worksheet and VWPP Worksheet should be used.

DEQ staff follow the guidance in Section IV C 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)). The following categories apply:

- A violation is classified as Serious if: (1) the violation *has impacted* or presents an *imminent and substantial risk of impacting* human health and/or the environment such that serious damage has resulted or is likely to result; and/or (2) the actions have or may have a *substantial adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program. 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.
- A violation is classified as Moderate if: (1) the violation presents or may present *some risk* of impacting the environment, but those impacts would be moderate and correctable in a reasonable period of time; and/or (2) the actions have or may have a *noticeable adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program.
- A violation is classified as Marginal if: (1) the violation presents *little or no risk* of environmental impact; and/or (2) the actions have or may have a *little or no adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program.

b. Potential for Harm for Unauthorized Impacts to Wetlands and/or Streams

In assessing the potential for harm for unauthorized impacts to wetlands and/or streams on the Worksheet (line 1.a.(3)), DEQ staff first consider the relative level of impacts reflected by the VWP permitting thresholds as follows:[132]

- Impacts to more than two (2) acres of wetlands or open water or more than 1,500 linear feet (LF) of stream, which would have required an individual VWP permit, are considered serious.
- Impacts from 1/10 to two (2) acres of wetlands or open water or from 301 to 1,500 LF of stream, which would have required a full VWP general permit requiring compensation, are considered moderate.
- Impacts to less than 1/10 acre of wetlands or open water or up to 300 LF of stream, which would have required VWP reporting-only, are considered marginal.

If staff believe that these thresholds should be adjusted based on case-specific factors, staff, in consultation with VWPP program staff, should provide additional justification by considering such factors as: classification of a wetland type (e.g., PFO, PSS, PEM)[133]; surrounding land use

[132] These standards for assessing potential for harm for unauthorized impacts to wetlands and/or streams are used for assessing the same violation on the Virginia Water Protection Program Civil Charge/Civil Penalty Worksheet. *See* Section IV.G 1.a.

[133] 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).

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.[134]

c. Potential for Harm for Failure to Install or to Properly Install Post-Construction Stormwater Management BMPs and for Failure to Install or To Properly Install or Maintain E&S Controls or other Pollution Prevention Measures

In assessing the potential for harm for failure to install or to properly install post-construction stormwater management BMPs (line 1.a(9)) and for failure to install or to properly install or maintain E&S controls or other pollution prevention measures (line 1.a(10)), DEQ staff should first consider the acreage treated by the BMP, control, or measure at issue as follows:

- A Serious ranking generally should be used if the BMP, control, or measure treats an area greater than or equal to three acres.
- A Moderate ranking generally should be used if the BMP, control, or measure treats an area greater than or equal to one acre and less than three acres.
- A Marginal ranking generally should be used if the BMP, control, or measure treats an area less than one acre.

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; impacts to aquatic and wildlife habitat; fish kills and other impacts to wildlife; 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.

d. Potential for Harm for all other Violations

In assessing the potential for harm for all violations other than (a) unpermitted discharge to state waters or discharge to state waters not in compliance with a permit (line 1.a(2)), (b) unauthorized impacts to wetlands and/or streams (line 1.a(3)), (c) failure to install or to properly install post-construction stormwater management BMPs (line 1.a(9)), and (d) failure to install or to properly install or maintain E&S controls or other pollution prevention measures (line 1.a(10)), 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 five acres of total land area.

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

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

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; impacts to aquatic and wildlife habitat; fish kills and other impacts to wildlife; 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.

2. <u>Violations</u>

a. 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 water (in which case use line 1.a(3) for unauthorized impacts to wetlands and/or streams).

b. Unauthorized Impacts to Wetlands and/or Streams (Wetlands and Streams Will Be Assessed Separately)

The line for unauthorized impacts to wetlands and/or streams (line 1.a(3)) should be used when the unauthorized discharge of stormwater from land-disturbing activities results in a measurable volume of sediment accumulation on the bed of the receiving wetland and/or stream. Unauthorized impacts to other surface waters can also be assessed with this line. Unauthorized discharge of stormwater from land-disturbing activities includes both discharge without a required construction stormwater permit and discharge in violation of a construction stormwater permit. This line should not be used when an unauthorized stormwater discharge results in turbidity in the receiving water without a measurable volume of sediment accumulation on the bed of the receiving water.

The Construction Stormwater Worksheet, and not the VWPP Worksheet, should be used to calculate civil charges and penalties when the only VWPP violations at a site are unauthorized impacts to wetlands and/or streams resulting from discharge of stormwater from land-disturbing activities. If a site has other VWPP violations in addition to construction stormwater violations, both the Construction Stormwater Worksheet and the VWPP Worksheet should be used. The VWPP Worksheet should be used for all VWPP violations not associated with discharge of stormwater from land-disturbing activities. It is not intended that penalties for the same unauthorized impacts to wetlands and/or streams be assessed on both the Construction Stormwater Worksheet and the VWPP Worksheet. The following examples illustrate when the Construction Stormwater Worksheet and VWPP Worksheet should be used:

- Example 1—Construction Stormwater Worksheet Alone: The RP Fails to install erosion and sediment controls in violation of the Construction General Permit, which results in a stormwater discharge causing a measurable volume of sediment to accumulate in a state water. No other VWPP violations occur. In this scenario, only the Construction Stormwater Worksheet should be used, and the impacts to state waters should be addressed on line 1.a(3).
- Example 2—Both Construction Stormwater Worksheet and VWPP Worksheet: The RP both (1) fails to install erosion and sediment controls in violation of the Construction General Permit, which results in a stormwater discharge causing a measurable volume of sediment to accumulate in a state water, and (2) separately uses a bulldozer to fill a second state water without obtaining a VWPP permit or in violation of a VWPP permit. In this scenario, both the Construction Stormwater Worksheet and the VWPP Worksheet should be used. The Construction Stormwater Worksheet should be used to calculate civil charges and penalties for the violation of the Construction General Permit and the resulting impacts to state waters. The VWPP worksheet should be used to calculate civil charges and penalties for the RP's separate action in filling the second state water with a bulldozer.
- Example 3—VWPP Worksheet Alone: The RP uses a bulldozer to fill a state water without obtaining a VWPP permit or in violation of a VWPP permit. No construction stormwater violations occur. In this scenario, only the VWPP Worksheet should be used.

Civil charges and 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 usually assessed: (1) for total impacts to streams and (2) for total impacts to wetlands, based on the potential for harm to the environment and the extent of deviation from regulatory program. However, each separate NOV marks a new occurrence for purposes of determining wetlands and streams violations. Wetland type is not considered when determining the number of occurrences, unless the different wetland types were subject to separate discharges of pollutants in a new NOV. 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 a new NOV.

CONSTRUCTION STORMWATER CIVIL CHARGE/CIVIL PENALTY WORKSHEET

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

Facility/Responsible Party	EA No.		Per./Reg. No.		NOV Date	
	Data		**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	Y	N	5,200 (x) ___	2,600 (x) ___	900 (x) ___	
(2) Unpermitted discharge to state waters or discharge to state waters not in compliance with a permit (per day or per event)	Y	N	13,000 (x) ___	6,500 (x) ___	1,300 (x) ___	
(3) Unauthorized impacts to wetlands and/or streams (wetlands and streams will be assessed separately) (per occurrence)	Y	N	26,000 (x) ___	13,000 (x) ___	6,500 (x) ___	
(4) Failure to develop a stormwater pollution prevention plan (SWPPP)	Y	N	5,200 (x) ___	2,600 (x) ___	900 (x) ___	
(5) Incomplete SWPPP other than E&S plan requirements (e.g., lack of approved stormwater management (SWM) plan (or agreement in lieu of SWM plan) or pollution prevention plan)	Y	N	2,600 (x) ___	1,300 (x) ___	650 (x) ___	
(6) Failure to maintain SWPPP on site (per event)	Y	N	1,300 (x) ___	700 (x) ___	300 (x) ___	
(7) Failure to have approved annual standards and specifications when required	Y	N	5,200 (x) ___	2,600 (x) ___	900 (x) ___	
(8) Failure to have an approved Erosion and Sediment Control (E&S) Plan or agreement in lieu of a plan	Y	N	3,900 (x) ___	1,900 (x) ___	700 (x) ___	
(9) Failure to install or to properly install post-construction stormwater management BMPs (per BMP)	Y	N	9,200 (x) ___	4,600 (x) ___	900 (x) ___	
(10) Failure to install or to properly install or maintain E&S controls or other pollution prevention measures (per control or measure, per month)	Y	N	5,200 (x) ___	2,600 (x) ___	900 (x) ___	
(11) Failure to comply with approved annual standards and specifications	Y	N	5,200 (x) ___	2,600 (x) ___	900 (x) ___	
(12) Failure to conduct or record inspections, or incomplete inspections	Y	N	2,600 (x) ___	1,300 (x) ___	650 (x) ___	
(13) Other record or reporting violations	Y	N	1,300 (x) ___	650 (x) ___	260 (x) ___	
(14) Failure to implement permit and/or SWPPP requirements or to comply with SWM plan, E&S plan, or other requirement, not otherwise specifically listed	Y	N	2,600 (x) ___	1,300 (x) ___	700 (x) ___	
(15) Failure to submit notice of permit termination	Y	N	5,200 (x) ___	2,600 (x) ___	900 (x) ___	
Subtotal 1.a – Violations and Frequency						
b. Aggravating Factors						
(1) Compliance History						
Order or decree <u>in another media program</u> 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 <u>in same media program</u> 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	
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/Civil Penalty *(may not exceed $32,500 per day per violation)*						***$***

CIVIL CHARGE/CIVIL PENALTY 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 (Water or Waste) or presentation for DEQ execution (Air))

Facility/RP	**Per./Reg. No.**	**Enforcement Action No.**	**NOV Date**

		Data		**Amount**
Total Civil Charge/Civil Penalty from Worksheet(s)				
1. Adjustments before Economic Benefit of Noncompliance				
a.	Cooperativeness/Quick Settlement	Y	N	
b.	Promptness of Injunctive Response/Good Faith Effort to Comply	Y	N	
c.	**(Air Programs only) – Statutory Judicial Considerations (from Chapter 4)**	Y	N	
d.	**(Water and Land Protection/Remediation Programs only) – Size/Type/Sophistication of the Owner/Operator**	Y	N	
2. Adjustments to Worksheet Total				
a.	Problems of Proof	Y	N	
b.	Impacts or Threat of Impacts (or Lack Thereof) to Human Health or the Environment	Y	N	
c.	Precedential Value of the Case	Y	N	
d.	Probability of Meaningful Recovery of a Civil Charge/Civil Penalty	Y	N	
e.	Litigation Potential	Y	N	
3. Total Adjustments				
4. Increase for continuing or uncorrected violations, economic benefit from delay		Y	N	
5. Adjusted Total Civil Charge/Civil Penalty				

Justification:

Prepared by: _____ Date _____

DE Concurrence: _____ Date _____
(signature, email, or ECM Workflow)
(needed only if reduction >30% of gravity-based amount)

Approved by: _____ Date _____