CHAPTER 4

CIVIL CHARGES AND CIVIL PENALTIES

Introduction **1**
Consent Orders without Civil Charges 3
Consent Orders with Civil Charges 3
Potential for Harm Classification 4
Statutory Factors 5
Compliance History Category 5
Degree of Culpability 6
Economic Benefit 7
Ability to Pay 10
Adjustments in the Enforcement Recommendation and Plan 11
Civil Charge Reductions up to 30% 11
Civil Charge Reductions more than 30% 12
Air Program **13**
Potential for Harm Examples 13
Calculating the Civil Charge 14
Air Civil Charge/Penalty Worksheet 20
Animal Feeding Operations and Poultry Waste **21**
Animal Feeding Operation Civil Charge/Civil Penalty Worksheet 22
Poultry Waste Civil Charge/Civil Penalty Worksheet 23
Article 9 – Underground Storage Tank Program **24**
Potential for Harm Examples 24
Underground Storage Tank Civil Charge/Civil Penalty Worksheet 25
Article 11 – Oil Discharges and Aboveground Storage Tanks **26**
Harm Examples 27
Discharges to State Waters 27
Oil Discharges (State Waters) Civil Charge/Civil Penalty Worksheet 30
Oil Discharges (Lands or Storm Drain Systems) Civil Charge/Civil Penalty Worksheet 31
Article 11 – Other Violations 32
Article 11 – Other Violations Charge/Civil Penalty Worksheet 33
Aboveground Storage Tanks Charge/Civil Penalty Worksheet 34
Construction Stormwater **35**
Potential for Harm Examples 36
Calculating the Civil Charge 37
Construction Stormwater Civil Charge/Civil Penalty Worksheet 39
Groundwater Withdrawal Program **40**
Potential for Harm Examples 40
Calculating the Civil Charge 41
Groundwater Withdrawal Civil Charge/Civil Penalty Worksheet 42
Land Protection and Remediation Programs **43**
Potential for Harm Examples 43
Calculating the Civil Charge 45
Land Protection/Remediation Civil Charge/Civil Penalty Worksheet 48
Pollutant Discharge Elimination System and Pollution Abatement Program **49**

DRAFT

Potential for Harm Examples 49
Calculating the Civil Charge 50
VPDES Civil Charge/Civil Penalty Worksheet 52
Water Protection Permit Program 53
Wetland and Stream Impacts 53
Potential for Harm Examples 53
Calculating the Civil Charge 53
VWPP Civil Charge/Civil Penalty Worksheet 57
Surface water Withdrawal Program 58
Potential for Harm Examples 58
Civil Charge Calculations 59
Surface water Withdrawal Civil Charge/Civil Penalty Worksheet 60
Civil Charge/Civil Penalty Adjustment form 61

Introduction[1]

Civil charges and civil penalties are authorized by the Virginia Code to penalize noncompliance, to serve as an incentive against future noncompliance, 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."[2] This chapter sets out the specific procedure and criteria used by DEQ to calculate civil charges and civil penalties[3] in administrative enforcement actions, including: (1) orders issued by consent; (2) special orders issued after an informal fact finding proceeding; and (3) special orders issued after a formal hearing.[4] This chapter does not address civil charges and civil penalties assessed in the "Air Check Virginia" Program, which is under separate guidance. Nor does this chapter address the procedure to calculate civil penalties in judicial proceedings.

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. The DEQ's goal is to ensure that noncompliance with environmental requirements is more costly than compliance.

The Virginia Code requires the development of guidelines and procedures that contain specific criteria for calculating the appropriate penalty for each violation based on the following factors: [5]

DRAFT

---

[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 Manual; issued December 29, 2014*.

[2] Va. Code § 10.1-1183. The section also lists eleven 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."

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

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

[5] 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)(4) (Renewable Energy). Separate statutory factors are set out for violations of Article 11 of the State Water Control Law. Va. Code § 62.1-44.34:20(D).

- The severity of the violations; [6]
- The extent of any potential or actual environmental harm;
- The compliance history of the facility or person;
- Any economic benefit realized from the noncompliance; and
- The ability of the person to pay the penalty.

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.[7] DEQ exercises its enforcement discretion to mitigate most or all of the gravity portion of a civil charge or civil penalty, for violations that are discovered pursuant to a Voluntary Environmental Assessment and that are voluntarily and promptly self-reported and corrected.[8] Finally, the civil charge or civil penalty amount may be partially mitigated by a Supplemental Environmental Project.[9]

DEQ may depart from the recommended calculations in this guidance to seek civil charges and civil 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 significant cases of noncompliance such as but not limited to:

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

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

---

[6] 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).

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

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

[9] 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.[10]

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

Consent Orders without Civil Charges

Initially, staff establish whether the violation warrants a civil charge.[11] The following criteria may qualify for a consent order without civil charges:

- The severity of the violation is minimal. Consent orders without civil charges are not typically available when the alleged violation has been designated a High Priority Violation or Significant Noncompliance;
- The extent of the actual or potential harm results in little to no harm;
- The Responsible Party has not been in chronic noncompliance and is making a good-faith effort to comply;
- Municipal VPDES (major or minor) upgrade or expansion or collection system correction delayed due to the inability to secure funding;
- Interim limits needed pending connection to a municipal wastewater treatment system or a larger regional wastewater treatment system;
- Minor VPDES permittees, such as trailer courts operating lagoons or other antiquated systems, which will eventually shut down or be connected to a municipal sewer system;

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

Consent Orders with Civil Charges

Unless a violation results in a significant or substantial violation warranting a departure from these procedures, DEQ assesses civil charges or civil penalties using the appropriate Civil

---

[10] Va. Code § 62.1-44.34:20(C) also establishes minimum civil charges and civil penalties for certain violations involving the discharge of oil. Va. Code § 62.1-44.15(8f) establishes maximum civil charges for sanitary sewer overflows ("SSOs") in consent orders requiring SSO corrective action. If this guidance does not specifically reference a statute authorizing a civil charge or civil penalty, such charge or penalty may be calculated using the five statutory factors. Va. Code § 62.1-270 established a civil penalty shall not to exceed $25,000 for each violation of the Ground Water Management Act of 1992.

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

Charge/Civil Penalty Worksheet (Worksheet) unless no civil charge is warranted. In calculating the civil charge or civil penalty, staff first identifies the appropriate "Potential for Harm" classification and then work through the various categories on the Worksheet to calculate a Gravity Subtotal. The Worksheet Total may also be adjusted for appropriate reasons, by providing a reasoned analysis on the Civil Charge/Civil Penalty Adjustment Form. Both the Worksheet and the Adjustment Form are part of the Enforcement Recommendation and Plan (ERP). 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).[12]

Civil charges or civil penalties are generally appropriate if when one or more of the following criteria are met (the list is not exhaustive):

- Failure to adequately respond to compliance assistance efforts;
- Violation of a consent order or consent special order without mitigating circumstances;
- Violations that are avoidable or due to negligence;
- Violations of a fundamental part of the regulatory program;
- Noncompliance that is continuing or likely to recur absent a civil charge to serve as a deterrence;
- Knowing or willful violations;[13] or
- Violations resulting in harm to human health or the environment.

Potential for Harm Classification

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, in part, based on: (1) the severity of the violation, and (2) the extent of any potential or actual harm.

- **Severity of the violation:** This consideration examines 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 or the environment.
- **Potential or actual Harm:** Harm evaluations consider the potential harm as well as the actual effect the violation had on human health or the environment.[14]

---

[12] Va. Code § 2.2-3705.7(16). The rules for Formal Hearings are different. *See*, Chapter 6.

[13] Evidence of a deliberate act may be grounds for referral to criminal investigative authorities.

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

Serious Classification

A violation is classified as Serious if (1) the severity of the violation presents a *substantial risk* or an actual harm to the integrity of the regulatory program or (2) has or may have a *substantial adverse effect* to human health or the environment.

Moderate Classification

A violation is classified moderate if (1) the severity of the violation presents *some risk* or actual harm to the integrity of the regulatory program or (2) has or may have *some adverse effect* to human health or the environment.

Marginal Classification

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

For each violation, staff should provide a reasoned analysis in the Enforcement Recommendation and Plan for why a potential for harm classification was selected by documenting how the integrity of the regulatory program was affected and/or documenting the actual or potential harm to the environment.

Statutory Factors

Compliance History Category[15]

Staff evaluates the Responsible Party's history of noncompliance to determine if an increase to a civil charge or civil penalty is warranted. This factor is not used to reduce a civil charge or civil penalty when a Responsible Party has a history of compliance. When a Responsible Party has previously violated an environmental standard at the same or a different source or facility, it is usually clear evidence that the Responsible Party was not deterred by the DEQ's previous enforcement response. In calculating the adjustment factor for compliance history, staff considers:[16]

a. Consent orders, special orders, judicial orders, or federal consent decrees <u>in any other media program that became effective after the period beginning</u> 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

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

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

b. Consent orders, special orders, judicial orders, or federal consent 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 enforcement action in the past 36 months, staff consider whether it is appropriate to depart from the civil charge/civil penalty worksheet, as described in the Introduction.

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

For example, take the following steps to calculate a compliance history charge:

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

Degree of Culpability

DEQ staff assesses a Responsible Party's culpability based on the facts and circumstances of the case and may add a multiplying factor to the amounts for one, a subset, or all violations, depending on the assessment. Enforcement Staff rate the Responsible Party's culpability as low (0%), moderate (25%), serious (50%), or high (100%) based on the one or more of 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 violation without any further evidence of culpability is usually rated as low (but is still considered a violation, since Responsibly Parties are strictly liable for noncompliance). 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 determining the degree of culpability one or more of the following should be considered:

a) The degree to which the Responsible Party knew or should have known of the legal requirement that was violated;
b) The degree of control the Responsible Party had over the events constituting the violation;
c) The foreseeability of the events constituting the violation;
d) Whether the Responsible Party knew or should have known of the hazards associated with the conduct;
e) Whether the Responsible Party took reasonable precautions against the events constituting the violation;

f) Whether there is evidence of unjustified delay in preventing, mitigating or remedying the violation;
g) Whether the Responsible Party failed to comply with a consent order, special order, judicial order, or federal consent decree;
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) Commonality of ownership, management, and personnel with other RPs or facilities that have been subject of enforcement actions; and
j) 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 civil penalty. To do so would encourage ignorance of the legal requirement.

Economic Benefit

This economic benefit is included in a civil charge or civil penalty to ensure the enforcement action serves as a deterrent to future noncompliance and removes any illegal competitive advantage.[17] A civil charge or civil penalty should remove any (*i.e.*, greater than *de minimis*) economic benefit of noncompliance in addition to the gravity component.[18] An economic benefit is gained when the Responsible Party avoids or delays costs required to comply with a legal requirement or any profits generated from an illegal competitive advantage and is evaluated on a case-by-case basis. Staff should use best professional judgment when making the preliminary determination that an economic benefit exists. When there is evidence of an economic benefit based on delayed or avoided costs, or profits from an illegal competitive advantage, staff should estimate the value of the economic benefit and include this amount in the proposed civil charge.[19]

---

[17] 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.

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

[19] 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.

If the economic benefit is estimated to exceed $10,000, penalty and financial models produced by the U.S. EPA should be used to calculate the economic benefit.[20] The U.S. EPA's models compute the economic benefits of noncompliance with legal requirements and are a method for calculating economic benefit from delayed and avoided expenditures. The models use several data variables, most of which contain default values. The required variables include information about capital and non-capital costs, annual operation and maintenance costs, and the dates for the period of noncompliance. A Responsible Party may provide actual financial data that could affect the civil charge calculation. When the Responsible Party will not or cannot provide financial data in a timely manner, staff may make estimates based on available resources, including their best professional judgment.[21] Finally, penalty and financial models other than those used by the U.S. EPA may be used to calculate economic benefit of noncompliance, where staff concludes that an alternative method provides more meaningful results.

A necessary first step when making a preliminary determination of an economic benefit is understanding the costs delayed or avoided through noncompliance. Delayed costs can include capital investments in pollution control equipment, remediation of environmental damages (*e.g.*, removing unpermitted fill material and restoring wetlands), or one-time expenditures required to comply with environmental regulations (*e.g.*, establishing a reporting system, or purchasing land on which to site a wastewater treatment facility). Avoided costs typically include operation and maintenance costs and/or other annually recurring costs (*e.g.*, off-site disposal of fluids from injection wells), but can occasionally include capital investments or one-time expenditures.

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

- Sampling and analytical costs for groundwater and gas monitoring;
- Disposing of hazardous or universal wastes at a sanitary landfill as opposed to at a permitted disposal facility. The avoided cost would be the difference in the cost of disposal at the landfill compared to disposal at a permitted hazardous waste disposal facility;
- Disconnecting or failing to properly operate and maintain existing pollution control equipment; failure to employ a sufficient number of staff; failure to adequately train staff; failure to establish or follow precautionary methods required by regulations or permits; removal of pollution equipment resulting in process, operational, or

---

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

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

maintenance savings; disconnecting or failing to properly operate and maintain required monitoring equipment; and operation and maintenance of equipment that the party failed to install;

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

Examples of delayed costs include, but are not limited to:[22]

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

One distinction for the Virginia Water Protection Permit (VWPP) program lies in the calculation of economic benefit of noncompliance. While the BEN model may be used as appropriate, the BEN model often fails to capture adequately the illegal competitive advantage that may arise from wetlands and other surface water violations. It may be necessary to use other standard accounting practices to determine the level of revenues that would have been unattainable had the Responsible Party abided by the law. For example, if a Responsible Party

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

improperly filled wetlands and sold the property as sites for homes, the profit from the sale may be addressed as an element of the economic benefit of noncompliance. Such profits are not accounted for under the BEN model calculations. Here as elsewhere, the economic benefit should also include any costs avoided in failing to obtain a permit (*e.g.*, consultant fees, delayed mitigation costs, and E&S controls), permit fees and tax or revenue benefits.

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:

1. There are compelling public concerns that would not be served by taking a case to trial;
2. 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
3. The Responsible Party has successfully documented an inability to pay the total proposed civil charge.

Ability to Pay

Ability to pay is one of the five statutory factors. In general, DEQ will reduce civil charge or civil penalty assessments that are demonstrated to beyond the means of the Responsible 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 civil charges or civil penalties where a business has failed to allocate environmental compliance costs in their business operations. It is also unlikely that DEQ would reduce a civil charge or civil penalty where a Responsible Party refuses to correct a serious potential for harm, or where a party has a history of noncompliance, or where the violations are particularly egregious. A Responsible Party must claim and provide sufficient documentation of an inability to pay before a consent order or consent special order has been executed. Enforcement staff will not reduce or abate a civil charge or civil penalty after a case decision has been issued based on a claim of an inability to pay. The DEQ's Office of Financial Management may negotiate delinquent accounts in accordance with the Commonwealth Accounting Policies and Procedures (CAPP) Manual.

The burden to demonstrate an inability to pay rests on the Responsible Party. In order to be evaluating a Responsible Party's ability to pay a civil charge or civil penalty, the Responsible Party must provide information sufficient enough so that the Office of Financial Responsibility can calculate a potential ability to pay by using the U.S. EPA computer models ABEL, INDIPAY, or MUNIPAY. Failure of the Responsible Party to provide sufficient information to run the ability to pay models will result in a determination that the Responsible Party has the ability to pay the civil charge or civil penalty.

If the Office of Financial Responsibility determines that a Responsible Party is unable to pay the civil charge or civil penalty, or would be prevented from carrying out essential corrective action measures by doing so, DEQ should consider the following options:

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

Regardless of DEQ's determination of an appropriate civil charge or civil penalty to pursue based on ability to pay considerations, the Responsible Party is expected to comply with the applicable law, regulations, orders, permit conditions, and any corrective action.

Adjustments in the Enforcement Recommendation and Plan

Civil Charge Reductions up to 30%

DEQ may adjust the gravity component of a civil charge – excluding the economic benefit calculation – downward by up to 30% based on several factors where there are clearly documented, case-specific facts that support the adjustment as provided in this section.[23] This adjustment is not appropriate in all cases. Enforcement staff should provide a rational basis for reducing a civil charge on the Civil Charge/Civil Penalty Adjustment Form.

- **Cooperativeness/Quick Settlement:** DEQ may adjust a civil charge where a Responsible Party is cooperative in resolving the case in a timely and appropriate manner and makes a good faith effort to settle the violations quickly.
- **Promptness of Injunctive Response/Good Faith Effort to Comply:** Good faith efforts to comply with regulatory requirements or permit conditions include prompt reporting of noncompliance, prompt initiation of corrective action, prompt correction of environmental problems, and cooperation during the investigation. Responsible Parties who agree to expedited corrective action schedules may also qualify. Enforcement staff should consider institutional or legal limitations on corrective actions. For example, a municipality may be unable to institute corrective action immediately because of a budget approval process or administrative procedures.
- **Size and Sophistication of the Violator:** When considering the size and sophistication of the Responsible Party, enforcement staff may presume, in the absence of information to the contrary, that entities such as small non-profit organizations and small municipalities do not possess the same level of sophistication as other regulated entities. The sophistication of the Responsible Party is also relevant in the case of a small business.

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

---

[23] 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.

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

Civil Charge Reductions more than 30%

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

- **Problems of Proof:** Challenges with proving the elements of a violation may be due to inadequate information, conflicting evidence, or contributory activity by DEQ. In many cases, problems of proof are considered as part of the Litigation Potential, but may also be considered independently.
- **Actual or potential harm (or Lack Thereof) to Human Health or the Environment:** The actual or potential harm to human health or environment should be considered in conjunction with other strategic considerations. Additional justification may be warranted if there is a lack of harm, or a reason to reject a reduction if the harm is substantial. The evaluation should include a broad assessment of the potential or actual harm to human health or the environment in all media regardless of whether or not there is a legal requirement.
- **The Precedential Value of the Case:** Resolution of certain cases may establish a valued endorsement of an agency program or regulatory or enforcement initiative. A reduction to the proposed civil charge or civil penalty may be appropriate to obtain such a precedent.
- **Probability of Meaningful Recovery of a Civil Charge:** In certain cases, information available to DEQ indicates that recovery of a meaningful civil charge is not possible, e.g. an inability to pay.
- **Litigation Potential.** Through negotiations it may become apparent that the case is destined for litigation based solely on factors not relevant to environmental protection.

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

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. A civil penalty can not to exceed $32,500 for each violation. Each day of violation constitutes a separate offense.

Potential for Harm Examples

Potential for harm classifications are not used to determine whether a violation warrants formal enforcement. Departures from the examples should be discussed with a Central Office enforcement manager and documented in the Enforcement Recommendation and Plan.

Serious Classification

Examples include, but are not limited to:

- Emissions violations at a major source involving a pollutant for which that source is "major" (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 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 synthetic minor source, failure to comply with standards critical to maintenance of that minor status or failure to maintain records sufficient to document continued minor status (applies to PSD, MACT, and Title V);
- Failure to obtain a permit prior to construction, modification, or operation of a synthetic minor or state major source or a major modification.
- Failure to obtain a permit prior to construction, reconstruction, or modification that triggers the requirements of 9 VAC 5-80-1605, *et seq.* or 9 VAC 5-80-2000, *et seq.*;
- Violation of a National Emission Standard for Hazardous Air Pollutants (NESHAP) or MACT standards that indicate excess emissions or substantially interfere with DEQ's ability to determine emissions compliance;
- Violation of a substantive requirement in a consent order, consent special order, or judicial decree (typically not for late reports or minor record keeping deficiencies); and

- Failure to submit a timely Title V permit application (more than 60 days late), or to timely submit a compliance certification, Excess Emissions Report, or other substantive report required by a Title V permit (more than 60 days late).

Moderate Classification

Examples include, but are not limited to:

- Emissions violations at a SM source that does not jeopardize the synthetic minor 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 synthetic minor 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 a synthetic minor (unless there is additional evidence to indicate that the source is not in compliance with the limits that establish synthetic minor status for that pollutant); and
- Opacity violations at a source that is subject to the PSD, MACT, or Title V Programs.

Marginal Classification

Examples include, but are not limited to:

- 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, synthetic minor, and New Source Performance Standard (NSPS) sources (see Serious and Moderate categories for additional information on when violations at major or synthetic minor sources are not Marginal); and
- Opacity violations at a source that has been classified as either a true minor or a synthetic minor.

Calculating the 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 calculates civil charges for each violation independently, with the

exception of Category 7, and then combine them to provide the total proposed civil charge. Applicable portions of the Worksheet may be copied to accommodate multiple violations. Staff uses this procedure to determine the appropriate civil charge for each category listed and enter it on the Worksheet.

Statutory, Regulatory, or Permit Violation Category

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

- Failure to obtain required permit: This civil charge applies to construction/modification/reconstruction without a new source permit and to the failure to obtain an operating permit.
- Operating without a permit: 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.
- Statute/regulation/permit violated (other than a. or b., above): This civil charge applies to violations of permit conditions and requirements of the Air Law or Regulations that are not already addressed by Subcategories 1.a or 1.b or Category 3 for the same violation.

Order Violation Category

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

Pollution Control Equipment Violation Category

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

Failure to install required equipment: This civil charge applies, but is not limited, to:

- Failure to install air pollution control equipment specifically required by permit, order, or regulation, or removal of such equipment;
- Failure to install equipment necessary to meet BACT, RACT, LAER, Best Achievable Retrofit Technology (BART), or similar mandatory control technology

requirements (in situations of construction/ modification/reconstruction without a permit) as may be determined through the permit review process; or

- Failure to install pollution control equipment capable of meeting emissions limits established by permit, order, or regulations where installation of control equipment is required by a permit, regulation, consent or administrative order, consent decree, or court order.

Failure to properly operate and maintain equipment: This civil charge applies where the source does not operate the equipment properly or is not operating or maintaining the equipment adequately. Staff should carefully consider the appropriateness of assessing a Category 3 charge if a charge is also being assessed under Category 4 of the Worksheet. A situation could exist where the pollution controls are maintained and operated properly but, nonetheless, an emission violation still occurs. In that situation, it is not appropriate to assess a civil charge for improperly operated pollution control equipment (Category 3). If emissions violation occurred even though pollution controls were maintained and operated properly, select a charge for the emissions violation under Category 4 instead.

Emissions, Reporting/Monitoring, and Toxics Violations Category

- Emissions violations: In Category 4, DEQ assesses a charge for documented violations of emissions standards in addition to charges applied in Subcategory 1.c, 2, or 3. A Category 4 emissions charge applies to the percent over a standard established by state or federal statutes, regulations, permits, or orders (including 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.[24] 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.

[24] 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.

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:

- 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.

Reporting/monitoring violations: 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.

Toxic pollutant violations: This civil charge is assessed for emissions and monitoring violations involving a toxic pollutant. A toxic air pollutant is defined in the 9 VAC 5-60-210 as "any air pollutant listed in § 112(b) of the federal Clean Air Act, as revised by 40 CFR 63.60, or any other air pollutant that the board determines, through adoption of regulation, to present a significant risk to public health. This term excludes asbestos, fine mineral fibers, radio nuclides, and any glycol ether that does not have a [threshold limit value (TLV)]." Where a violation involves exceedance of a permit limit for a toxic pollutant, a charge should be assessed for both the emission violation and the toxic pollutant.

Sensitivity of the Environment Category

Category 5 focuses on the geographic location of the violation. Civil charges associated with this category are dependent on the nonattainment/ attainment status or the PSD area classification and the classification of the violation. 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. [25]

Length of Time Factor Category

The longer a violation continues uncorrected, the greater the potential for harm to air quality and the more severe the violation. The Worksheet addresses this consideration in the category labeled "Length of Time Factor." Where separate 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 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).

[25] 9 VAC 5-20-204 (nonattainment) and 9 VAC 5-20-205 (PSD).

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

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

Air Civil Charge/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	$780			
(2) Failure to perform required audits (per monitoring system)	Y	N	$2,330			
(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.)			
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 $32,500 per day per violation)*						***$***

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. Va. Code § 62.1-44.17:l(J) states that persons violating the provisions of § 62.1-44.17:1 may not be assessed civil charges that exceed $2,500 for any AFO covered by 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 assesses 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 a civil charge for each violation category, staff adds the civil charges to arrive at a subtotal. The noncompliance period considered should generally be limited to six months. Aggravating factors, including threats to human health and safety and environmental damage caused by the violation are then considered. If an aggravating factor is present, staff multiplies the civil charge subtotal by the aggravating factor multiplier of 1.5 and adds it to the Subtotal to arrive at the civil charge.

Adjustments may be made in the ERP, as they are for general Water Programs charges. 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 appropriate Civil Charge/Civil Penalty Worksheet.

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

Both the AFO and the Poultry Waste Worksheets may apply to operations where both activities take place. Adjustments may be made in the ERP, as they are for general Water Programs charges. The justification for applying an adjustment should be reasonable and documented in the ERP.

Animal Feeding Operation 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	1000 (x) ___	500 (x) ___	200 (x) ___	
(b) Failure to maintain records	Y	N	1000 (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	1000 (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	1000 (x) ___	500 (x) ___	200 (x) ___	
(f) NMP Violations (per incident)	Y	N	1000 (x) __	500 (x)___	200 (x) ___	
(g) Evidence of breached buffers or runoff (per incident)	Y	N	1000 (x) __	500 (x) ___	200 (x) ___	
(h) Operator training requirements not met	Y	N	500 (x) __	500 (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	1000 (x) __	500 (x) ___	200 (x) ___	
(k) Other violations	Y	N	1000 (x) __	500 (x) ___	200 (x) ___	
	Violations and Frequency Subtotal					
2. Adjustment Factors: If there is a threat to human health or safety, or environmental damage *multiply the Subtotal by 1.5 (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 $2500 when covered by a VPA permit)*						**$**

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)*		***Amount***
			Serious	**Moderate**	**Marginal**
1. Violations and Frequency (per occurrence per inspection unless otherwise noted) *(Severity and Environmental Harm)*			**$ (x) occurrences**	**$ (x) occurrences**	**$ (x) occurrences**	
(a) Failure to monitor soils, waste or groundwater	Y	N	1000 (x) ___	500 (x) ___	200 (x) ___	
(b) Failure to maintain records	Y	N	1000 (x) ___	500 (x) ___	200 (x) ___	
(c) Transfer of more than 10 tons of poultry waste without providing the nutrient analysis or fact sheet to recipient	Y	N	500 (x) ___	300 (x) ___	100 (x) ___	
(d) Improper disposal of mortalities	Y	N	1000 (x) ___	500 (x) ___	200 (x) ___	
(e) Improper storage of poultry waste	Y	N	1000 (x) ___	500 (x) ___	200 (x) ___	
(f) Improper operation and maintenance of waste storage facility (per incident)	Y	N	1000 (x) ___	500 (x) ___	200 (x) ___	
(g) Nutrient Management Plan (NMP) Violations (per incident)	Y	N	1000 (x) ___	500 (x) ___	200 (x) ___	
(h) Improper winter land application of poultry waste or land application to soils that are saturated	Y	N	1000 (x) ____	500 (x) ___	200 (x) ___	
(i) Evidence of breached buffers or runoff (per incident)	Y	N	1000 (x) ___	500 (x) ___	200 (x) ___	
(j) Improper closure of poultry waste storage facility	Y	N	1000 (x) ___	500 (x) ___	200 (x) ___	
(k) Operator training requirements not met	Y	N	500 (x) ___	300 (x) ___	100 (x) ___	
(l) Other violations	Y	N	1000 (x) ___	500 (x) ___	200 (x) ___	
	Violations and Frequency Subtotal					
2. Adjustment Factors: If there is a threat to human health or safety, or environmental damage *multiply the Subtotal by 1.5 (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 $2,500 when covered by a VPA permit)*						***$***

Article 9 – Underground Storage Tank Program

The Underground Storage Tank (UST) Program is authorized under Article 9 of the State Water Control Law, Va. Code §§ 62-1-44.34:8 and 62.1-44.34:9. Article 9 typically addresses USTs for petroleum products, but also includes USTs for other "regulated substances," as defined by statute. Authority for negotiated civil charges for violations of Regulated UST Program laws, regulations, orders is found in the Water Law at Va. Code § 62.1-44.15(8d). The maximum civil charge is $32,500 per day for each violation.[26]

Potential for Harm Examples

In evaluating the Potential for Harm, issues to consider include the volume of the product, characteristics of the product, population density where the discharge/release occurred, skill set/training of employees, time of exposure, distance from a drinking water source, sensitivity of the environment, or any other criteria that may be appropriate. The criteria established in the Storage Tank Program Compliance Manual, specifically Appendix-C Underground Tank Delivery Prohibition Decision Matrix, should provide additional guidance on determining the Potential for Harm.

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

[26] Va. Code § 62.1-44.15 incorporates by reference the penalty amounts from Va. Code § 62.1-44.32.

Underground Storage Tank Civil Charge/Civil Penalty Worksheet

Va. Code § 62.1-44.15

Facility/Responsible Party	Reg./Id. #		NOV Date			
	Data		**Potential for Harm** *(Environmental Harm and Severity)*			***Amount***
			Serious	**Moderate**	**Marginal**	
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. 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 $32,500 per day per violation)*						***$***

Article 11 – Oil Discharges and Aboveground Storage Tanks

Article 11 of the State Water Control Law[27] 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,** or owning or operating any facility, vessel or vehicle from which such discharge originates in violation of § 62.1-44.34:18;
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.[28] Va. Code § 62.1-44.34:23 sets out exceptions to Article 11 generally.

Pursuant to VA Code § 62.1-44.34:20(D), in determining the amount of any civil charge or penalty pursuant to violations of Article 11, consideration must be given to each of the following seven factors:

1) The willfulness of the violation;
2) Any history of noncompliance;
3) The actions of the person in reporting, containing and cleaning up any discharge or threat of discharge;
4) The damage or injury to state waters or the impairment of their beneficial use;[29]

---

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

[28] 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)).

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

5) The cost of containment and cleanup;
6) The nature and degree of injury to or interference with general health, welfare and property; and
7) The available technology for preventing, containing, reducing or eliminating the discharge.

Harm Examples

In evaluating the seven factors, issues to consider include the volume of the product, characteristics of the product, population density where the discharge/release occurred, skill set/training of employees, time of exposure, distance from a drinking water source, sensitivity of the environment, or any other criteria that may be appropriate.

Discharges to State Waters

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

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

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

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

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

- Serious: Fish kill (consider the type and number of fish and the waters affected), significant threat to sensitive ecosystem, loss of beneficial use, or harm to wildlife (especially endangered species), or other impacts that can only be corrected after a substantial effort or period of time.
- Moderate: Moderate threat to State waters, adjoining shorelines, or vegetation (other than a sensitive ecosystem) that can be corrected after a period of time
- Marginal: Spill created a visible sheen, film, sludge, or emulsion and damage was quickly corrected
- N/A: No apparent damage to State waters or impairment of beneficial use

Line 1(c): History of Noncompliance

- History of noncompliance should be analyzed as in all other programs.

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

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

Line 1(e): Cost of Containment and Cleanup - The higher the cost, the lower this 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

Line 1(f): Culpability

- Culpability should be analyzed as in all other programs.

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

- Serious: Technology available on site or readily accessible, but not utilized

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

Oil Discharges (State Waters) Civil Charge/Civil Penalty Worksheet

Va. Code § 62.1-44.34:20(C)(3)

Responsible Party/Facility	Reg./Id.#		NOV Date	
	Nature and degree of Harm			
	Serious	**Moderate**	**Marginal, NA or None**	***Amount***
C (3) for discharging or causing or permitting a discharge of oil into or upon state waters, or owning or operating any facility, vessel or vehicle from which such discharge originates in violation of § 62.1-44.34:18.				
1. Statutory Factors *Discuss each factor, circle the Potential for Harm and assign a dollar amount between $0 and $100 to each factor.*				
a. Nature/Degree of Injury to Health, Welfare and Property	70, 85, 100	30, 45, 60	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	$
Gravity Subtotal				$
Gravity Subtotal Average *[Gravity Subtotal divided by seven (7)]*				$
Number of gallons of oil discharged				
Number of gallons discharged multiplied by the Gravity Subtotal Average				
Economic Benefit of Noncompliance				$
Ability to Pay *(based on information supplied by the party)*				( )
Total Civil Charge/Civil Penalty *(cannot exceed statutory maximum amounts)*				*$*

Oil Discharges (Lands or Storm Drain Systems) Civil Charge/Civil Penalty Worksheet

Va. Code § 62.1-44.34:20(C)(5)

Responsible Party/Facility	Reg./Id.#		NOV Date	
	Nature and degree of Harm[30]			
	Serious	**Moderate**	**Marginal, NA or None**	***Amount***
C (5) for discharging or causing or permitting a discharge of oil into or upon lands or storm drain systems in violation of § 62.1-44.34:18.				
1. Nature and Degree of the Violation				
a. Nature/Degree of Injury to Health, Welfare and Property	$4,060	$2,030	$1,020	$
b. Actions in Reporting/Containing/Cleaning Up the Discharge	$4,060	$2,030	$1,020	$
c. Cost of Containment and Clean Up (Relative to Amount of Oil Spilled)	$4,060	$2,030	$1,020	$
d. Available Technology to Prevent/Contain/Reduce/Eliminate Discharge	$4,060	$2,030	$1,020	$
Gravity 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 $32,500 per day per violation)*					***$***

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

Article 11 – Other Violations

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

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

- In assessing C(1), failing to submit and obtain approval of an oil discharge contingency plan (ODCP) would be at the higher end of the spectrum compared to an incomplete ODCP. In addition, failing to have an ODCP for a product with a high toxicity and requires a special type of emergency response would fall into the higher end of the spectrum compared to failing to have an ODCP when a less toxic product is involved.
  - Assign a dollar amount of not less than $1,000 nor more than $50,000 for the initial violation, and $5,000 per day for each day of violation thereafter

- In assessing C(2), for failing to maintain evidence of financial responsibility, a Responsible Party whose storage capacity is 25,000 gallons or less would be at the lower end of the spectrum compared to an RP whose storage capacity is over 1 million gallons. In assessing the potential for harm to the environment, an Responsible Party whose product requires a more expensive response cost would be at the higher end of the spectrum compared to an Responsible Party whose product requires a minimal response cost, which would be at the lower end of the spectrum.
  - Assign a dollar amount of not less than $1,000 nor more than $100,000 for the initial violation, and $5,000 per day for each day of violation thereafter.

- In assessing Line C(4) for failing to cooperate in the containment and clean-up, or failing to report: For example, failing to report a discharge of a highly toxic product would be at the high end of the spectrum, whereas failing to report a discharge of a low toxicity product would be at the low end of the spectrum. In addition, a Responsible Party failing to provide information about the product (*i.e.*, amount, type, characteristics) which would hinder the clean-up process would fall at the higher end of the spectrum, compared to a Responsible Party who provides necessary information about their product. Furthermore, failing to report a discharge for a week would fall into the high end of the spectrum, whereas failing to report a discharge for a few hours would fall into the low end of the spectrum.
  - Assign a dollar amount of not less than $1,000 nor more than $50,000 for the initial violation, and $10,000 for each day of violation thereafter.

Article 11 – Other Violations Charge/Civil Penalty Worksheet

Va. Code § 62.1-44.34:20(C)(1,2,&4))

Facility/Responsible Party	Reg./Id. #				NOV Date	
	Data		Nature and degree of Harm			
			Serious	**Moderate**	**Marginal**	***Amount***
1. Violations and Frequency						
a. Failure to obtain approval of an oil discharge contingency plan.	Y	N	$8,500	$4,500	$1,000	$
	Y	N	*Each subsequent day of violation is subject to a penalty of $5,000 per day.*			$
b. Failing to maintain evidence of financial responsibility.	Y	N	$32,500	$20,000	$1,000	$
	Y	N	*Each subsequent day of violation is subject to a penalty of $5,000 per day.*			$
c. Failing to cooperate in containment and clean-up of a discharge.	Y	N	$8,500	$4,500	$1,000	$
	Y	N	*Each subsequent day of violation is subject to a penalty of $10,000 per day.*			$
d. Failing to report a discharge	Y	N	$8,500	$4,500	$1,000	$
	Y	N	*Each subsequent day of violation is subject to a penalty of $10,000 per day.*			$
2.Violations and Frequency Total						
a. Nature/Degree of Injury to Health, Welfare and Property			$4,060	$2,030	$1,020	$
b. Actions in Reporting/Containing/Cleaning Up the Discharge			$4,060	$2,030	$1,020	$
c. Cost of Containment and Clean Up (Relative to Amount of Oil Spilled)			$4,060	$2,030	$1,020	$
d. Available Technology to Prevent/Contain/Reduce/Eliminate Discharge			$4,060	$2,030	$1,020	$
Gravity Subtotal						$
3. Degree of Culpability *(Severity and Compliance History) (apply to violation(s)' Amount or to the Violations and Frequency Subtotal)*	Low = (x) 0		Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	$
4. History of Noncompliance *(Compliance History)*						
Order or decree in another media program within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or $5,000			$
Order or decree in same media program within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)			$
Subtotal *(Subtotal 1+2+3)*						$
5. Economic Benefit of Noncompliance *(Economic Benefit)*						$
6. Ability to Pay *(based on information supplied by the responsible party) (Ability to Pay)*						( )
Total Civil Charge/Civil Penalty						***$***

Aboveground Storage Tanks Charge/Civil Penalty Worksheet

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

Facility/Responsible Party	Reg./Id. #				NOV Date	
	Data		Nature and Degree of Harm			
			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. AST, pipeline, or facility: Installed, Upgraded, Equipped, or Closed Improperly (per violation)	Y	N	$2,600 per tank	$1,300 per tank	$700 per tank	
c. AST, pipeline, or facility Operated Improperly (per violation)	Y	N	$1,300 per tank	$700 per tank	$300 per tank	
d. Failure to implement any applicable oil spill contingency plan or Failure to Execute an approved CAP	Y	N	$2,600	$1,300	$700	
e. Records not Available	Y	N	$1,300	$700	$300	
f. No Registration or inventory of ASTs	Y	N	$1,300 per tank	$ 700 per tank	$300 per tank	
g. Other Violation Component	Y	N	$1,300	$700	$300	
2.Violations and Frequency Total						
a. Nature/Degree of Injury to Health, Welfare and Property			$4,060	$2,030	$1,020	$
b. Actions in Reporting/Containing/Cleaning Up the Discharge			$4,060	$2,030	$1,020	$
c. Cost of Containment and Clean Up (Relative to Amount of Oil Spilled)			$4,060	$2,030	$1,020	$
d. Available Technology to Prevent/Contain/Reduce/Eliminate Discharge			$4,060	$2,030	$1,020	$
Gravity Subtotal						$
3. Degree of Culpability *(Severity and Compliance History) (apply to violation(s)' Amount or to the Violations and Frequency Subtotal)*	Low = (x) 0		Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	$
4. History of Noncompliance *(Compliance History)*						
Order or decree in another media program within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or $5,000			$
Order or decree in same media program within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)			$
Subtotal *(Subtotal 1+2+3)*						$
5. Economic Benefit of Noncompliance *(Economic Benefit)*						$
6. Ability to Pay *(based on information supplied by the responsible party) (Ability to Pay)*						( )
Total Civil Charge/Civil Penalty *(may not exceed $32,500 per day per violation)*						***$***

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.[31] 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.[32] The maximum civil charge or civil penalty is $32,500 per day for each violation.[33]

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, History of Noncompliance, Economic Benefit, and Ability to Pay 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). When VWPP violations result from unauthorized discharges of stormwater from land-disturbing activities, the VA Water Protection Program Civil Charge/Civil Penalty Worksheet should be used to calculate the appropriate civil charge or civil penalty for the VWPP violations,[34] and the Construction

---

[31] Effective July 1, 2017, HB 1250/SB 673 (2016) consolidates the stormwater and erosion and sediment control programs into the Virginia Erosion and Stormwater Management Act, Article 2.3 of the State Water Control Law. Code citations referenced in this guidance are those effective prior to that date. Some authorities will be located at different sections of the Code beginning July 1, 2017.

[32] Note that this guidance is only applicable to land disturbing activities subject to regulation under the Stormwater Management Act. Sites with land disturbances between 10,000 square feet and an acre, not part of a larger common plan of development or sale, are subject to different penalty authorities under the Erosion and Sediment Control Law (ESCL). The Construction Stormwater Civil Charge/Civil Penalty Worksheet should not be used for violations at such sites. For violations of the ESCL, Regulations, and orders of the Board, the ESCL limits penalties to $1,000 per violation, up to $10,000 for a series of specified violations arising from the same operative set of facts. Va. Code §§ 62.1-44.15:54, 62.1-44.15:63. For violations of court orders, the ESCL authorizes penalties up to $2,000 per violation. Va. Code § 62.1-44.15:63. Effective July 1, 2017, these penalty authorities will be amended by HB 1250/SB 673 (2016). Note that for land disturbing activities subject to regulation under the Stormwater Management Act, erosion and sediment (E&S) control deficiencies typically constitute violations under both the Stormwater Management Act and the ESCL. DEQ addresses such deficiencies with its greater penalty authority under the Stormwater Management Act, and staff should calculate the appropriate civil charge or civil penalty using the Worksheet at the end of this section.

[33] 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).

[34] The line for unauthorized impacts to wetlands and/or streams (line 1(i)) on the VA Water Protection Program Civil Charge/Civil Penalty Worksheet 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,

Stormwater Civil Charge/Civil Penalty Worksheet should be used to calculate the appropriate civil charge or civil penalty for the Construction Stormwater Violations.

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.

Potential for Harm Examples

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

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

b. Potential for Harm for all other Violations

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

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

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

---

stream, or other surface waters. 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. The VWPP Worksheet should not be used when an unauthorized stormwater discharge results in turbidity of the receiving surface water without a measurable volume of sediment accumulation on the bed of the receiving water. See, discussion below regarding use of line 1.a(2) on the Construction Stormwater Civil Charge/Civil Penalty Worksheet to address turbidity and other harm to state waters not amounting to a VWPP impact.

and/or permit requirement. In assessing potential for harm for failure to install or to properly install post construction stormwater management BMPs (line 1(a)(8)) and failure to install or to properly install or maintain E&S controls or other pollution prevention measures (line 1(a)(9)), additional factors that may impact the potential for harm ranking include the number of deficient BMPs, controls, or measures; drainage area of deficient BMPs or controls; and severity of deficiencies.

Calculating the Civil Charge

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(i) on the VA Water Protection Program Civil Charge/Civil Penalty Worksheet for unauthorized impacts to wetlands and/or streams).

b. Failure to Develop a SWPPP, Incomplete SWPPP, and Failure to Have an Approved E&S Control Plan or Agreement in Lieu of a E& S Control Plan

In addressing stormwater pollution prevention plan (SWPPP) violations, failure to have an approved E&S control plan or agreement in lieu is addressed separately from the other SWPPP components as follows:

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

In applying line 1(a)(4) (Incomplete SWPPP), the SWPPP should be considered as a whole, rather than assessing a separate occurrence for each SWPPP component that is missing.

c. Failure to Maintain SWPPP on site

Line 1(a)(5) should be used when a Site has a SWPPP but it is not on site and notice of the SWPPP's location is not posted. This line should not be used in conjunction with line 1(a)(3) (failure to develop a SWPPP). If the SWPPP is not on site because no SWPPP has been developed, line 1(a)(3) should be used, and not line 1(a)(5). Line 1(a)(5) should be used if there is no SWPPP onsite, and DEQ staff have insufficient evidence to support a finding of failure to develop a SWPPP.

d. Failure to Install or to Properly Install Post-Construction Stormwater Management BMPs, and Failure to Install or to Properly Install or Maintain E&S Controls or Other Pollution Prevention Measures

In determining the number of occurrences for Line 1(a)(8) and Line 1(a)(9), deficiencies with post construction management BMPs, E&S controls, and pollution prevention measures should each be assessed cumulatively for the entire site (rather than assessing a separate occurrence for each BMP, control, or measure). For Line 1(a)(9), a separate occurrence should be assessed for each month of documented noncompliance. Deficiencies with E&S controls and deficiencies with pollution prevention measures should be assessed separately.

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)*			***Amount***
			Serious	**Moderate**	**Marginal**	
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) Failure to develop a stormwater pollution prevention plan (SWPPP)	Y	N	5,200 (x) ___	2,600 (x) ___	900 (x) ___	
(4) Incomplete SWPPP other than E&S control plan requirements (e.g., lack of approved stormwater management (SWM) plan (or agreement in lieu of SWM plan) or pollution prevention plan)	Y	N	2,600 (x) ___	1,300 (x) ___	650 (x) ___	
(5) Failure to maintain SWPPP on site (per event)	Y	N	1,300 (x) ___	700 (x) ___	300 (x) ___	
(6) Failure to have approved annual standards and specifications when required	Y	N	5,200 (x) ___	2,600 (x) ___	900 (x) ___	
(7) Failure to have an approved E&S control plan or agreement in lieu of a plan	Y	N	3,900 (x) ___	1,900 (x) ___	700 (x) ___	
(8) Failure to install or to properly install post-construction stormwater management BMPs (per site)	Y	N	9,200 (x) ___	4,600 (x) ___	900 (x) ___	
(9) Failure to install or to properly install or maintain E&SC controls or other pollution prevention measures (per month)	Y	N	5,200 (x) ___	2,600 (x) ___	900 (x) ___	
(10) Failure to comply with approved annual standards and specifications	Y	N	5,200 (x) ___	2,600 (x) ___	900 (x) ___	
(11) Failure to conduct or record inspections, or incomplete inspections	Y	N	2,600 (x) ___	1,300 (x) ___	650 (x) ___	
(12) Other record or reporting violations	Y	N	1,300 (x) ___	650 (x) ___	260 (x) ___	
(13) Failure to implement permit and/or SWPPP requirements or to comply with SWM plan, E&S control plan, or other requirement, not otherwise specifically listed	Y	N	2,600 (x) ___	1,300 (x) ___	700 (x) ___	
(14) 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 in another media program within 36 months before initial NOV	Y	N	If yes, add lesser of 0.05 * *subtotal line 1.a*, or $5,000			
Order or decree in same media program within 36 months before initial NOV	Y	N	If yes, add 0.5 * *subtotal 1.a*			
(2) Degree of Culpability *(applied to specific line amount(s) or subtotal line 1.a)*	Low = (x)*0		Moderate = (x)*0.25	Serious = (x)*0.5	High = (x)*1.0	
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 $32,500 per day per violation)*						***$***

Groundwater Withdrawal Program

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

For the purposes of calculating an occurrence for an unpermitted withdrawal, each month of a withdrawal of 300,000 gallons or more should be considered a separate occurrence.

Potential for Harm Examples

Volume of Withdrawals

Serious, Moderate, and Marginal rankings are based on the annual water withdrawals of the withdrawal system and adjusted based on any specific environmental harm assessment.

In the absence of specific environmental harm or areas more sensitive to excess withdrawal, a Marginal ranking is to be used for withdrawal systems permitted to withdraw 10 million gallons or less annually, Moderate for withdrawal systems permitted to withdraw less than 1 billion gallons but more than 10 million gallons annually, and Serious for withdrawal systems permitted to withdraw 1 billion gallons or more annually.

In the case of unpermitted withdrawals, best professional judgment should be used to estimate the annual withdrawal amount where withdrawals were not metered or readings may be suspect.

Environmental Harms

When determining the Potential for Harm, staff should consider such factors as:

- loss of beneficial use;
- subsidence and/or loss of aquifer capacity
- whether the aquifer has been identified as stressed based upon State Water Resources Plan/ USGS Data, or other scientific resource;
- incidents/reports of well interference;
- saltwater intrusion/increased chloride zones;
- periods of drought conditions as declared by local water use restrictions or emergency draught declaration; or
- one or more well pump intakes set below aquifer top.

Calculating the Civil Charge

Line 1(c) through 1(e): When assessing a civil charge or civil penalty for these line items, chose the line item that corresponds with the longest reporting period only. In the event that one or more of these line items is violated, staff should evaluate the potential for harm to determine whether its potential for harm should be increased.

Groundwater 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. Unpermitted withdrawal	Y	N	12,500 (x) ____	6,250 (x) ____	3,125 (x) ____	
b. Failure to mitigate	Y	N	12,500 (x) ____	6,250 (x) ____	3,125 (x) ___	
c. Daily withdrawal limits (per day)	Y	N	1,680 (x) ____	840(x) ____	170 (x) ____	
d. Monthly withdrawal limits (per month)	Y	N	3,360 (x) ____	1,680 (x) ____	840 (x) ____	
e. Annual withdrawal limits	Y	N	6,710 (x) ____	3,360 (x) ___	1,680 (x) ____	
f. *Failure to submit, complete Record or reporting);* (per reporting period)	Y	N	3,100 (x) ___	1,550 (x) ___	840 (x) ___	
g. Failure to install and/or maintain equipment or other operational deficiencies	Y	N	3,360 (x) ____	1,680 (x) ____	840 (x) ____	
h. Other, Violation of Permit, Special Exceptions or Special Conditions NOT listed above (per event)	Y	N	3,360 (x) ____	1,680 (x) ____	840 (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 $25,000 per day per violation)*						***$***

Land Protection and Remediation Programs

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. The maximum civil charge is $32,500 for each violation, with each day being a separate violation.

For this section, the Land Protection and Remediation Programs include the Solid Waste, the Hazardous Waste, and the Remediation Programs. Remediation Consent Orders (RCOs) under the Remediation Program are not enforcement orders, but are based on the authority of the Virginia Waste Management Board under Va. Code § 10.1-1402(19) through (21) 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.

Potential for Harm Examples

Risk of Exposure

The risk of exposure involves both the probability of exposure and the potential consequences that may result from exposure.[35] 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 improper 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 allow detection of 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

[35] 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).

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).

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, they are necessary 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
- Failure to maintain records required to verify compliance.

The following section provides examples for each of the classification levels. The examples of violations for each classification are not used to determine whether a violation warrants formal enforcement. Departures from the examples should be discussed with Central Office and documented in the Enforcement Recommendation and Plan.

Serious Classification

- In Hazardous Waste, failure to make a waste determination. 9 VAC 20-60-262, incorporating 40 CFR § 262.11. It is possible that the waste is in fact hazardous, which could lead to improper management and disposal of the waste.
- In Solid Waste, failure to take immediate steps to minimize, control, or eliminate a leachate seep, and to contain and properly manage the leachate at the source of the seep. 9 VAC 20-81-210(F). Additionally, they are required to properly collect and dispose of any leachate outside the lined area permitted for waste disposal. If a Responsible Party fails to properly address its leachate seeps as required by the regulation and does not control the seep or properly dispose of leachate outside the lined area there is a substantial likelihood that this leachate will adversely affect human health and the environment through potential soil, surface water and groundwater contamination, thus substantially increasing the likelihood of exposure.

Moderate Classification

- In Hazardous Waste, failure of 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 Responsible Party 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. 9 VAC 20-60-264, incorporating 40 CFR Part 264, Subpart I.

- In Solid Waste, 9 VAC 20-81-140(B)(2) requires that the active working face of a sanitary landfill shall be kept as small as practicable. If the Responsible Party fails to keep the working face as small as practicable, there is an increased risk that vectors, fires, odors, blowing litter, and scavenging will not be controlled.

Marginal Classification

- In Hazardous Waste, failure of owners or operators of hazardous waste facilities to 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. 9 VAC 20-60-262, incorporating 40 CFR § 262.23.
- IN Solid Waste, failure to control blowing litter. If blowing litter was observed on the landfill and the violation was not chronic or continuing, the marginal potential for harm classification would be appropriate. 9 VAC 20-81-140(B).

Calculating the 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.

Extent of Deviation from Requirement Category

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 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.

Multi-Day Component Category

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 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.

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 $32,500 per day per violation)*						***$***

Pollutant Discharge Elimination System and Pollution Abatement Program

The State Water Control Law at Va. Code § 62.1-44.15(8d) provides for the payment of civil charges in consent orders for past violations. This statutory section is the basis for negotiated civil charges in the Virginia Pollutant Discharge Elimination System (VPDES) Program, and Virginia Pollution Abatement (VPA) Permit Program. With the exception of consent orders to prevent or minimize sanitary sewer overflows (SSOs),[36] the maximum civil charge is $32,500 for each violation, with each day being a separate violation.[37]

Potential for Harm Examples

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

Serious Classification

Examples include, but are not limited to: fish kills, effluent violations resulting in loss of beneficial uses, failure to report an unpermitted discharge, chronic refusal to apply for a permit, or perform a Toxics Management Plan (TMP).

Moderate Classification

Examples include, but are not limited to: failure to 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, or failure to follow an operation & maintenance manual.

Marginal Classification

Examples include, but are not limited to: an improperly completed Discharge Monitoring Report (DMR) in any case where the DMR does not report permit violations that would be classified as Serious or Moderate; minor exceedence of VPDES permit effluent limits and of land application rates with no impact to ground or surface water.

---

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

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

Calculating the Civil Charge

Gravity Based Component

Staff identifies all of the violations being addressed in the gravity-based component section of the Worksheet and calculates the civil charge separately for each violation. The gravity-based component covers two areas: (a) violations and frequency; and (b) aggravating factors as multipliers. Staff 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. Civil 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 based on the number of occurrences and the Potential for Harm classification. The charge is then entered into the "Amount" column of the Worksheet.

Violations and Frequency: 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)[38]
(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)[39]
(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.

---

[38] 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.

[39] If the biosolids transport violation also causes a discharge to state waters, use both items (4) and (12).

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*: If a VPDES facility is classified as "major" using EPA criteria, this factor applies.

Flow Reduction Factor: 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[40], 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

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.

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

VPDES 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). Discharges of oil must be assessed using the Article 11 worksheet.	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 (stormwater)	Y	N	6,500 (x) ___	2,600 (x) ___	1,300 (x) ___	
(9) Failure to record inspections (stormwater)	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 $32,500 per day per violation) (SSO maximum civil subject to change. Refer to the CFR).*						***$***

Water Protection Permit Program

Wetland and Stream Impacts

Potential for Harm Examples

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

If staff believe that these thresholds should be adjusted staff should provide additional justification by considering the following factors: classification of a wetland type (*e.g.*, PFO, PSS, PEM)[41]; surrounding land use and cover types; nutrient, sediment, and pollutant trapping ability; flood control and flood storage capacity, and flood flow synchronization; erosion control and shoreline stabilization; groundwater recharge and discharge; aquatic and wildlife habitat; unique aspects or critical habitats; water quality; and recreation, education, aesthetics, or other beneficial uses. [42]

Calculating the Civil Charge

The Virginia Water Protection Permit (VWPP) Program is authorized under Va. Code §§ 62.1-44.15:20 through -44.15:23. Negotiated civil charges for Virginia Water Protection Permit (VWPP) violations are authorized by Va. Code § 62.1-44.15(8d). The maximum penalty is $32,500 per day for each violation.[43]

This 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.

Civil charges and civil penalties for VWPP violations are assessed per occurrence. An occurrence is defined as a separate, identifiable, discrete act that results in a discharge of a pollutant to state waters. Separate civil charges are 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

---

[41] 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).

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

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

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.

Line 1(a): Failure to obtain coverage under an Individual Permit (IP) or a General Permit (GP) prior to commencing activity - This line should be used to assess the effect on, and the extent of the deviation from, the regulatory requirements, *e.g*. avoiding and circumventing the permitting and evaluative process which ensures the appropriate avoidance and minimization options and alternative sites were fully explored, and any areas that could not be avoided were fully compensated for in a consistent and manner to ensure no net loss.

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

Line 1(b): Exceeding coverage authorized under an IP or GP – This line should be used when a Responsible Party has exceeded the impacts covered by the type of permit or registration it holds. This line should be used to assess the extent of the deviation from the regulatory requirements. The potential for harm for this line is assessed as follows:

Description	Serious	Moderate	Marginal
Exceedances that: 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		

Exceedences 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

Line 1(c): Failure to perform or complete compensatory mitigation - This line should be used to capture the failure to perform or complete compensation requirements required by the permit, *e.g.* purchase of wetland or stream credits, preservation, restoration or enhancement, or wetland creation.

Line 1(d): Failure to perform or complete corrective action relative to unsuccessful compensation (after the monitoring period has begun) - This line should be used when the Responsible Party fails to implement corrective action to ensure compensation meets no net loss.

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

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

Line 1(g): Failure to submit preconstruction notice.

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

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

ii) This line should be used when the Responsible Party has discharged pollutants to state waters (wetlands or streams) per occurrence, and should be used in conjunction with 1(a) or 1(b).
iii) Where the discharge of pollutants is a result of, but not limited to, the failure of E&S controls and unattenuated stormwater, failure to stabilize disturbed lands, or the failure and/or inadequate use of BMP's, this violation should be used without assessing line 1(a) or line 1(b).

Line 1(j): Failure to comply with permit special conditions - This line should be used when the Responsible Party has failed to comply with permit special conditions including, but not limited to, storm water management; E&S controls; flagging non-impact areas; restoring temporary impacts; working in the dry time-of-year restrictions; maintain minimum instream flow; operating equipment in streams; discharge of concrete to waters; *etc*.

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

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

VWPP Civil Charge/Civil Penalty Worksheet

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

Permittee/Responsible Party	Data		Reg. No.		Date	
			Potential for Harm *(Environmental Harm and Severity)*			
			Serious	**Moderate**	**Marginal**	***Amount***
1. Gravity Factors – Surface Water and Wetlands *(Severity and Environmental Harm)*						
Violations and Frequency			$ (x) occurrences	$ (x) occurrences	$ (x) occurrences	(Comments)
a. Failure to obtain coverage under an Individual Permit (IP) or a General Permit (GP) prior to commencing activity	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) ___	
	Violations and Frequency Subtotal					
3. Aggravating Factors *(Severity and Compliance History)*						
a History of Noncompliance						
Order or decree in another media program within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or $5,000			
Order or decree in same media program within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)			
b Degree of Culpability*(apply to violation(s)' Amount or to the Violations and Frequency Subtotal))*	Low = (x) 0		Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
	Aggravating Factor Subtotal					
	Gravity-Based Component Subtotal (1+2)					
4. Economic Benefit of Noncompliance *(Economic Benefit)*						
5. Ability to Pay *(Ability to Pay)*						( )
Total Civil Charge/Civil Penalty *(may not exceed $32,500 per day per violation)*						***$***

Surface water Withdrawal Program[44]

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

Potential for Harm Examples

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

Serious Classification

- exceeding(daily, monthly, or annual) permitted or excluded water withdrawal limits greater than 25%;
- unauthorized Withdrawal comprises greater than 25% of instream flow at the intake;
- failure to implement a Water Conservation Management Plan or mandatory conservation measures during a declared drought emergency; or
- exceeding withdrawal limits or failing to meet instream flow requirements or impoundment releases in streams resulting in impacts to wildlife.

Moderate Classification

- exceeding (daily, monthly, or annual) permitted or excluded water withdrawal limits between 10% and 25%
- Unauthorized Withdrawal comprises between 10% and 25% percent of instream flow at the intake
- Failing to implement a drought management plan
- Chronic late submission of monitoring reports or permit application, or failure to follow an operation & maintenance manual.

Marginal Classification

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

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

Civil Charge Calculations

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

Line 1(e) through 1(g): Exceeding a Withdrawal Limit: When assessing a civil charge or civil penalty for these line items, chose the line item that corresponds with the longest reporting period only. In the event that one or more of these line items is violated, staff should evaluate the potential for harm to determine whether its potential for harm should be increased.

Surface water Withdrawal 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 Withdrawal *(Severity and Environmental Harm)*						
Violations and Frequency			*$ (x) occurrences*	*$ (x) occurrences*	*$ (x) occurrences*	
a. Unpermitted withdrawal	*Y*	*N*	*13,000 (x) __*	*6,500 (x) ___*	*3,250 (x) ___*	
b. Failure to mitigate	*Y*	*N*	*13,000 (x) __*	*6,500 (x) ___*	*3,250 (x) ___*	
c. Failure to implement a Water Conservation Management Plan	*Y*	*N*	*5,200 (x) ___*	*2,600 (x) ___*	*1,300 (x) ___*	
d. Failure to submit a permit application	*Y*	*N*	*5,200 (x) ___*	*2,600 (x) ___*	*1,300 (x) ___*	
e. Exceedence of withdrawal limit (Daily)	*Y*	*N*	*1,300 (x) ___*	*700 (x) ___*	*100 (x) ___*	
f. Exceedence of withdrawal limit (Monthly)	*Y*	*N*	*2,600 (x) ___*	*1,300 (x) ___*	*700 (x) ___*	
g. Exceedence of withdrawal limit (Annual)	*Y*	*N*	*5,200 (x) ___*	*2,600 (x) ___*	*1,300 (x) ___*	
h. Failure to submit, complete Record or reporting); (Failure to maintain and/or submit are separate occurrences)	*Y*	*N*	*2,600 (x) ___*	*1,300 (x) ___*	*700 (x) ___*	
i. Failure to report (requested application, water audit, new well, etc) (per event)	*Y*	*N*	*2,600 (x) ___*	*1,300 (x) ___*	*700 (x) ___*	
j. Failure to install and/or maintain equipment or other operational deficiencies	*Y*	*N*	*2,600 (x) ___*	*1,300 (x) ___*	*700 (x) ___*	
k. Other Violations; Permit, Special Exceptions, or Special Conditions NOT listed above (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 in another media program within 36 mo. before initial NOV	*Y*	*N*	*If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or $5,000*		
	Order or decree in same media program within 36 mo. before initial NOV	*Y*	*N*	*If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)*		
b Degree of Culpability(apply to violation(s)' Amount or to the Violations and Frequency Subtotal))		*Low = (x) 0*	*Moderate = (x) 0.25*	*Serious = (x) 0.5*	*High = (x) 1.0*	
	Aggravating Factor Subtotal					
	Gravity-Based Component Subtotal (1+2)					
4. Economic Benefit of Noncompliance *(Economic Benefit)*						
5. Ability to Pay *(Ability to Pay)*						*( )*
Total Civil Charge/Civil Penalty *(may not exceed $32,500 per day per violation);* a civil penalty not to exceed $1,000 for each violation in a designated Surface Water Management Area.						***$***

Appendix A

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 _____