



## Division of Enforcement

### Memorandum

**Subject:** Article 11 – Oil Discharge Civil Charge / Civil Penalty Worksheet and Text

**To:** Regional Enforcement Managers and Specialists, Regional Compliance Auditors, Central Office Enforcement Managers

**From:** Richard F. Weeks, Chief Deputy 

**Date:** May 2, 2011

**Copies:** James J. Golden, Regional Directors, Division Directors, Central Office Compliance Managers, Angela Jenkins, Jeff Reynolds, and Cindy Berndt

#### Summary:

This guidance updates and supersedes a portion of Enforcement Guidance Memorandum No. 2-2006, Revision 3 (December 15, 2009) addressing violations of Article 11 of State Water Control Law (Va. Code § 62.1-44.34:14 *et seq.*). This update provides the specific criteria used by DEQ to calculate appropriate civil charges and civil penalties in administrative actions for violations of Va. Code § 62.1-44.34:20(C)(1) - (C)(4):

- failure to obtain approval of an oil discharge contingency plan;
- failing to maintain evidence of financial responsibility;
- discharging or causing or permitting a discharge of oil into or upon state waters, lands, or storm drain systems within the Commonwealth, or owning or operating any facility, vessel or vehicle from which such discharge originates in violation of Va. Code § 62.1-44.34:18; and
- failing to cooperate in containment and clean-up of a discharge or failing to report a discharge

This update supersedes the worksheets on pages 63 - 64 of the existing guidance and related text. This update does not alter the worksheet on page 65, its related text, or the rest of the guidance.

#### Electronic Copy:

An electronic copy of this guidance is available on the Department's website at:  
<http://www.deq.virginia.gov/enforcement/manual.html>.

#### Contact Information:

Please contact Lee. M. Crowell at (804) 698-4450 or [Lee.Crowell@deq.virginia.gov](mailto:Lee.Crowell@deq.virginia.gov) with any questions regarding the application of this update.

## ARTICLE 11 - OIL DISCHARGE CIVIL CHARGE/CIVIL PENALTY WORKSHEET

*Va. Code §62.1-44.34:20 (C)*

*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. Use a separate Worksheet for each violation.*

<b>Facility/Responsible Party</b>	Reg./Id.#	NOV Date
	<b>Potential for Harm</b>	

**1. Statutory Factors** *Discuss each factor, circle the Potential for Harm and assign a dollar amount between \$0 and \$100 to each factor.*

				<b>Amount</b>
a. Nature/Degree of Injury to Health, Welfare and Property	Serious	Moderate	N/A or Marginal	\$
b. Damage/Injury to State Waters or Impairment of Beneficial Use	Serious	Moderate	N/A or Marginal	\$
c. History of Non-Compliance	> 1 Prior Enf. Action	1 Prior Enf. Action	No Prior Enf. Action	\$
d. Actions in Reporting/Containing/Cleaning Up the Discharge	Poor	Fair	Excellent	\$
e. Cost of Containment and Clean Up (Relative to Amount of Oil Spilled)	High	Medium	Low	\$
f. Willfulness of the Violation	High (Reckless, Knowing or Intentional)	Medium (Foreseeable/ Failed to Exercise Due Care)	Low (Basic Liability)	\$
g. Available Technology to Prevent/Contain/Reduce/Eliminate Discharge	Plentiful/ Inexpensive	Plentiful/ Costly	Scarce/ Expensive	\$

<b>Subtotal</b>		\$
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**2. Average Civil Charge Calculation**

Average Total Civil Charge [ <i>Subtotal divided by seven (7)</i> ]	\$
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*C (1) for failure to obtain approval of an oil discharge contingency plan, assign a dollar amount for each factor between \$1,000 and \$50,000 for the initial violation [for each subsequent day of violation the statutorily set penalty of \$5,000 per day is used]*

*C (2) for failing to maintain evidence of financial responsibility, assign a dollar amount for each factor between \$1,000 and \$100,000 for the initial violation [for each subsequent day of violation the statutorily set penalty of \$5,000 per day is used]*

*C(4) for failing to cooperate in containment and clean-up of a discharge or failing to report a discharge, assign a dollar amount for each factor between \$1,000 and \$50,000 for the initial violation [for each subsequent day of violation the statutorily set penalty of \$10,000 per day is used]*

<b>3. Economic Benefit of Noncompliance</b>	0
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<b>4. Ability to Pay</b> ( <i>based on information supplied by the party</i> )	( N/A )
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<b>Total Civil Charge/Civil Penalty</b> [ <i>Gallons discharged times the Average Civil Charge, plus economic benefit less ability to pay, up to a maximum of \$100 per gallon</i> ]	\$
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The Enforcement Specialist must consider each of the statutory factors when calculating a civil charge or civil penalty. The following is provided as guidance; as the facts of each case will vary, the Enforcement Specialist should consider the statutory factors in conjunction with the circumstances of each occurrence.

In evaluating the potential for harm, consider the amount of the pollutant, the toxicity of the pollutant, the sensitivity of the environment, the sensitivity of the human population and the length of time of exposure.

*Suggested increments:-*

Marginal – 5, 10, 20

Moderate – 30, 45, 60

Serious – 70, 85, 100

**a. Nature/Degree of Injury to Health, Welfare and Property** The greater the damage to property or health, the higher the number. How long-term is the impact? Can the area be restored?

**Serious:** Substantial actual or potential threat to human health or an actual or potential drinking water supply; extensive damage to public and/or private property

**Moderate:** Moderate threat to human health or an actual or potential drinking water supply; moderate damage to public and/or private property

**Marginal:** Minor threat to human health or actual drinking water supply; minor damage to public and/or private property

**N/A:** No apparent threat to human health; no or negligible damage to public and/or private property

**b. Damage/Injury to State Waters or Impairment of Beneficial Use** The greater the damage or impairment, the higher the number.

**Serious:** Fish kill (consider the type and number of fish and the waters affected in determining whether to classify as serious, moderate or marginal); significant threat to sensitive ecosystem, beneficial use, or wildlife (especially endangered species) that can be corrected only after a substantial effort or period of time

**Moderate:** Moderate threat to State waters, adjoining shorelines, or vegetation (other than a sensitive ecosystem) that can be corrected after a period of time

**Marginal:** Spill created a visible sheen, film, sludge, or emulsion and damage was quickly corrected; violations of administrative requirements which tend to hamper or obstruct enforcement

**N/A:** No apparent damage to State waters or impairment of beneficial use

**c. History of noncompliance** NOVs for which DEQ pursued an enforcement action

- Serious:** More than one NOV within the preceding three years for same or substantially similar violation
- Moderate:** One NOV (or two or more Warning Letters) within the preceding three years for same or substantially similar violation
- Marginal:** Warning Letter within the preceding three years for same or substantially similar violation; NOV more than three, but less than five years preceding
- N/A:** No Warning Letters within the preceding three years (or NOVs within the preceding five years) for same or substantially similar violation

**d. Actions in Reporting/Containing/Cleaning Up the Discharge** Prompt action will result in a lower number.

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

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

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

**f. Willfulness of Violation** This number will be higher if the discharge is knowing or intentional than if due to failure to exercise ordinary care. Consider how much control the party had over the events resulting in the violation, the ability to foresee the violation, whether the party took reasonable precautions to prevent the violation, whether the party knew or should have known of the hazards associated with its conduct, the degree to which the party knew or should have known of the statute, regulation or permit condition that was violated and the extent of deviation from the statute, regulation or permit.

- Serious:** Intentional/deliberate act  
Reckless disregard
- Moderate:** Failure to exercise ordinary care; foreseeable
- Marginal:** Basic liability for an act or omission that resulted in the violation
- None:** Accidental; act of God or unrelated third party

**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