

Subject: Civil Enforcement Manual- Chapters 2 through 4 and Chapter 6 (CEM-01, CEM-04, CEM-05, CEM-06, CEM-07, CEM-10, CEM-11, CEM-11A, and CEM-11B)

To: Central Office Enforcement Managers, Regional Enforcement Managers, and Regional Enforcement Specialists (electronic distribution)

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Date: October 1, 2021

Copies: Jeffery Steers, James J. Golden, Regional Directors, Division Directors, Central Office Compliance Managers, Angela Jenkins, Cindy Berndt (electronic distribution)

Summary:

This guidance will delete the Civil Enforcement Manual Introduction and supersedes Chapters 2 through 4 (last updated in November 2016) and Chapter 6 (various portions last updated 1999, 2007, and 2016) of the DEQ Civil Enforcement Manual on Virginia Regulatory Town Hall (ID: 4012, CEM-01, CEM-04, CEM-05, CEM-06, CEM-07, CEM-10, CEM-11, CEM-11A, and CEM-11B). These chapters of the Civil Enforcement Manual covers general compliance and enforcement procedures, the timely and appropriate policy for processing cases, procedures for calculating civil charges, and adversarial administrative proceedings.

Public comment on these updates was accepted from October 25, 2021 through November 24, 2021. This guidance is effective as of December 1, 2021.

A summary of the changes are as follows:

Chapter 2: General Enforcement Procedures

This chapter provides guidance on the procedures that DEQ staff use to address alleged violations of enforceable environmental requirements, including: (1) notifying responsible parties; (2) referring cases for enforcement action and deciding on a plan for the case; (3) resolving enforcement cases with and without Responsible Party consent; (5) special procedures for underground storage tanks (USTs) and for sanitary sewer overflows (SSOs); (6) monitoring enforcement orders and agreements; and (7) closing enforcement cases. Changes were limited to providing clarification and additional instruction where needed.

Chapter 3: Priority, Timeliness, and Certainty of Enforcement Actions

This chapter describes the enforcement procedures to help ensure an appropriate, timely, and consistent response to alleged noncompliance. Changes were made to clarify case prioritization by replacing the Case Priority Matrix with instructional text.

Chapter 4: Civil Chagres and Civil Penalties

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.” This chapter sets out the specific procedure and criteria used by DEQ to calculate civil charges and civil penalties 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.

Changes were made to provide clarifications where needed, increase consistency across all media, and inflationary adjustments to all the civil charge worksheets. Substantive changes were made in various water programs to address program experience. Significant instructional and penalty calculation procedures for solid and hazardous waste enforcement actions to align these programs with how penalties are calculated in other media.

Chapter 6: Adversarial Administrative Actions

This chapter addresses how to prepare for and conduct informal fact-finding proceedings, formal hearing and Section 10.1-1186 special order proceedings. It also addresses procedures intended for use by Supreme Court hearing officers conducting formal hearings for DEQ and its three regulatory boards pursuant to Va. Code § 2.2-4020. Although prompted by a legislative directive to develop procedures for formal hearings pursuant to Va. Code §§ 10.1-1309, 10.1-1455, and 62.1-44.15, it is recommended that these Procedures be used for any formal hearing conducted for DEQ.

Changes to this chapter include updates and consolidation of adversarial proceedings procedures that were found in separate guidance documents and covered various aspects of these proceedings. After consolidation, statutory updates and clarifications were made as appropriate.

Electronic Copy:

An electronic copy of this guidance is available on:

- The Virginia Regulatory Town Hall under the Department of Environmental Quality (<http://www.townhall.virginia.gov/L/gdocs.cfm?agencynumber=440>)

Contact Information:

Please contact the appropriate media Central Office Enforcement Manager with any questions regarding the application of this guidance to a specific case.

Certification:

As required by Subsection B of § 2.2-4002.1 of the APA, the agency certifies that this guidance document conforms to the definition of a guidance document in § 2.2-4101 of the Code of Virginia.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any alternative method. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

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CHAPTER 2 GENERAL ENFORCEMENT PROCEDURES

Introduction

This chapter provides guidance¹ on the procedures that DEQ staff use to address alleged violations of enforceable environmental requirements,² including: (1) notifying Responsible Parties (RP); (2) referring cases for enforcement action and deciding on a plan for the case; (3) resolving enforcement cases with and without Responsible Party consent; (4) special procedures for underground storage tanks (USTs) and for sanitary sewer overflows (SSOs); (5) monitoring enforcement orders and agreements; and (6) closing enforcement cases.

DEQ staff consider a full range of enforcement tools and select that which is most appropriate to achieve the desired enforcement outcome. Enforcement tools are generally listed in increasing order of severity. While staff begin with the least adversarial method appropriate to the case, enforcement strategy and methods to resolve a particular case are wholly in DEQ's discretion, within law and regulation. DEQ encourages open discussion between the Regional Offices, Central Office Program Offices, and the Central Office Division of Enforcement to ensure that enforcement actions support the goals listed in Chapter 1.

Retention Schedules and FOIA in Enforcement Actions

The documents and enforcement tools discussed in this Chapter and Chapter 4 are subject to enforcement specific and general retention policies.³ Enforcement staff should reference these policies throughout the enforcement action. Information regarding enforcement document production and FOIA requests can be found in DEQ's Manual for Processing Information Requests Pursuant to the Virginia Freedom of Information Act⁴ and the Virginia FOIA⁵. Enforcement staff should follow the regulations, Agency retention policies, and the FOIA manual to answer any questions or address any concerns regarding retention and FOIA requests. If after review, questions or concerns remain, such should be directed to the staff member's Enforcement Manager or directly to the Agency's FOIA Officer.

¹ Guidance documents set forth presumptive operating procedures. They 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. Va. Code §§ [2.2-4001](#) and [2.2-4101](#). This guidance update supersedes DEQ Enforcement Manual Chapter 2 (December 1, 2016).

² "Enforceable environmental requirements" or "environmental requirements" mean the statutes, regulations, case decisions (including but not limited to permits and orders), decrees, or certifications that are enforceable by one of the three citizens' boards (State Air Pollution Control Board, State Water Control Board (SWCB), or Virginia Waste Management Board) or by DEQ.

³ [The Library of Virginia Records Specific Retention Schedule NO. 440-003](#) and [General Retention Schedule NO. 101](#)

⁴ FOIA Manual:

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

⁵ VA FOIA Act:

<https://law.lis.virginia.gov/vacode/title2.2/chapter37/>

Notifying Responsible Parties

Determining Responsible Parties is often straight-forward and done through program staff and procedure. Compliance and enforcement staff must consult the SCC database and employ other resources to ensure Responsible Parties are active legal entities.⁶ In addition, staff should review DEQ databases to ensure DEQ documentation supports the Responsible Party determination (i.e. permitted entity in database is same as RP in Notice of Alleged Violation (NOAV) for permit violations). The regulations governing the respective program often discuss liable parties to varying degrees of specificity. NOAVs are a written notification from DEQ to an RP, alleging that an RP in violation of a permit requirement, regulation, and/or statute. Inspection reports, request for corrective actions (RCRA), warning letters (WL), and notices of violation (NOV), etc. are all types of NOAVs, and are not case decisions.¹ A NOV is an elevated NOAV and is considered the referral from compliance, to Enforcement.

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

Enforcement Referrals

DEQ compliance staff issue NOVs in accordance with program specific compliance procedures and guidance. The NOV notifies a Responsible Party of areas of alleged noncompliance and corresponding legal requirements. Though NOVs are not case decisions, they represent DEQ staff's view of conditions at a facility and the Responsible Party's compliance with environmental requirements which are frequently reported to the U.S. Environmental Protection Agency (U.S. EPA) and the public. The initial NOV serves as the referral of a case from compliance to the Division of Enforcement. Prior to NOV issuance, compliance and enforcement staff (and permitting when necessary) should coordinate a review of the NOV for accuracy and defensibility. At a minimum, enforcement staff should review the following NOV components: the observations/alleged violations, supporting documentation, cited legal requirements, the named RP, the RP address, the identifying information of the site (where unpermitted), the enforcement authorities, and the permit number.

After referral, enforcement staff have the responsibility for resolving the case. Enforcement staff will evaluate the case to determine the appropriate enforcement action and apprise compliance staff of the case status. In collaboration, compliance staff support the

⁶ A legal entity may be registered in a state other than Virginia. If a company is not in the Virginia SCC database, enforcement staff should check with the company to see if it is registered elsewhere. If the legal entity is not active in the SCC database, enforcement staff should check with the Regional Enforcement Manager or Central Office DOE to see if the issue can be resolved.

enforcement staff, continue compliance activities (unless otherwise agreed), and communicate regularly to ensure a case is appropriately resolved. The NOV should be entered into the Enterprise Content Management system (ECM) using the enforcement retention schedule (ECM 123-1). Enforcement staff should link the NOV to the enforcement action in CEDS by entering the EA number as the file number, and the Permit/Registration No. of the Facility where applicable.

If a Responsible Party asserts that an NOV is erroneous or requests that DEQ rescind an NOV, enforcement staff should coordinate with the compliance program staff, who issued the NOV, and decide on an appropriate response. In most situations, if DEQ decides to send a revised NOV or letter rescinding the NOV it will be sent by the staff who issued the original NOV. If a Responsible Party demonstrates that an NOV is erroneous in part, then a “Corrected NOV” should be sent to the Responsible Party. In the highly unusual case that an NOV is completely in error, then a letter rescinding the NOV should be sent.⁷ If DEQ staff and the Responsible Party are unable to resolve a disagreement about observations or legal requirements cited in an NOV, the Responsible Party can elevate the issue through the Process for Early Dispute Resolution.

Process for Early Dispute Resolution

Pursuant to Chapter 706 of the 2005 Acts of Assembly, the Director of DEQ has issued guidance to help identify and resolve disagreements regarding the issuance of notices of alleged violation.⁸ The Process for Early Dispute Resolution (PEDR) is optional and is initiated at the Responsible Party’s request. While the PEDR is being utilized, DEQ continues to perform all necessary inspections and record alleged violations but does not, except in cases of emergency, issue NOVs to the Responsible Party for the same or a substantially related alleged violation that is the subject of the PEDR. If the issuance of the NOV is found to be appropriate following the PEDR process, enforcement staff usually begins work on an Enforcement Recommendation Plan. If the issuance of the NOV is found to be inappropriate and no further DEQ action is warranted, the case should be closed using one of the closure methods discussed on pages 28, 29.

Enforcement Recommendation Plan

An Enforcement Recommendation Plan (ERP) explains a proposed strategy to resolve an enforcement action. In the ERP, enforcement staff provide a thorough, consistent, and well-reasoned analysis to support the enforcement approach, corrective action that will be required, and civil charges imposed. To assist with case management, inspectors and any witnesses (and their affiliation) should be identified by name. Once approved, the ERP authorizes enforcement staff to proceed under its terms.⁹ ERPs are generally prepared for all matters referred to

⁷ NOV correction or rescission is very unusual, and is only appropriate when the NOV as issued was wrong – it is not to be used as a negotiation tool or where there are genuine disagreements as to interpretation of facts or law.

⁸ The requirement for PEDR is found in 2005 Acts c. 706. clause 2 at the end of the Act. It is not codified. [Agency Policy Statement No. 8-2205](#) provides additional guidance on the PEDR.

⁹ The authority to approve an ERP is based on the Agency’s delegation of authority.

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enforcement with few exceptions.¹⁰

The ERP should:

- Identify the facility or source of the alleged violation and its location;
- State whether the Responsible Party is in the Virginia Environmental Excellence Program (VEEP) and if so at what level;¹¹
- Identify the Responsible Party;
- Identify the permit, registration, or PC/IR number;
- Identify the media program;
- State whether the violation is HPV or SNC;
- Identify any state waters affected;
- Cite the applicable legal requirements¹² and describe the alleged violations;
- Provide a case summary, including relevant NOV's and Warning Letters;
- Where appropriate, attach the civil charge worksheet(s), and discuss civil charge line items (in the text or on the worksheet(s)), including the economic benefit of noncompliance;
- Recommend a preferred course of action; and
- Where appropriate, attach a completed Supplemental Environmental Project (SEP) Analysis Addendum (*See* Chapter 5) with a recommendation regarding the SEP (consult Pollution Prevention staff for Environmental Management System SEPs).

Central Office Program Managers and Regional Office Enforcement Specialists must concur on the contents of the ERP prior to approval. Regional program staff consultation is encouraged. If concurrence is not achieved, the Regional Office Director and Director of Enforcement, along with pertinent Enforcement staff, shall discuss to issue at hand, and agree to a resolution in accordance with DEQ's Decision Making Protocol.

During negotiations with the Responsible Party, new violations may be alleged or additional information may be provided that requires changes to the ERP (e.g. subsequent inspection reports with new or ongoing violations). In instances where new violations are alleged, additional information is provided, civil charges are adjusted, or negotiations lead to significant changes to the Order or LOA, an ERP Addendum must be prepared in order to document the changes and provide justification. If enforcement staff believe reductions to the calculated civil charge may be appropriate, staff should consult Chapter 4 and provide the justifications and documentation required by Chapter 4.

Enforcement Procedures by Consent

¹⁰ ERPs are not prepared when an enforcement action is closed through an informal return to compliance or an administrative closure. ERPs are not prepared in the Fillable Form Consent Order process.

¹¹ A person or facility must have a "record of sustained compliance" for VEEP membership. *See* Va. Code §§ [10.1-1187.1](#); [-1187.3](#).

¹² In ERPs, the alleged violations should be described briefly; the full legal requirements need not be set out.

Letter of Agreement

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

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

Circumstances for LOAs

LOAs serve only to establish specific requirements to return a Responsible Party to compliance and are effective in resolving non-compliance in relatively limited circumstances, including: 1) relatively minor violations that can be corrected in 12 months or less; 2) civil charges are either not appropriate or very *de minimis*; and 3) the Responsible Party is relatively cooperative and confidence exists that the terms of the LOA are achievable within the prescribed time.

DEQ does not use LOAs for:

- Priority noncompliance, including HPVs (Air), SNCs (Hazardous Waste and VPDES);
- Severity Level III violations (Solid Waste);
- Setting interim effluent or withdrawal limits (Water) or emissions limits (Air);
- A Responsible Party that has the same or substantially similar alleged violations in the last 12 months at the same facility;¹³
- Allegedly operating without a permit or pending permit issuance;
- Alleged violations of RCRA Subtitle C requirements; or
- Where the assessment of a civil charge is appropriate.

Elements of a Letter of Agreement

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

¹³ For water programs that means the 12-month period preceding the point accumulation period that led to the referral.

Monitoring and Terminating a Letter of Agreement

LOAs are monitored for compliance as any other case.¹⁴ If the Responsible Party satisfactorily completes the terms of the LOA, enforcement staff acknowledge the completion, and the case is closed. The enforcement specialist should notify the RP of termination in writing. If the Responsible Party fails to comply with the terms of an LOA, enforcement staff prepare a new or amended ERP and escalate to another enforcement method, usually including a civil charge. A new NOV may be issued, as appropriate, citing the original and any subsequent alleged violations. Since an LOA is not enforceable, failure to comply with its terms is not a separate alleged violation and **shall not** be included as an alleged violation in the subsequent NOV¹⁵; the LOA may be referenced for supporting information in the NOV.

Consent Orders¹⁶

A consent order is an administrative order issued on behalf of one or more of the citizens' Boards to a Responsible Party with its consent. Consent orders are case decisions, are authorized by statute,¹⁷ can be enforced in court, and may include civil charges and/or specified actions that a Responsible Party must perform to return to compliance with environmental requirements. DEQ uses consent orders with private entities and federal or local government agencies. Regional office staff should consult with Central Office enforcement staff prior to drafting a consent order for a federal agency or entity. For state agencies, DEQ uses Executive Compliance Agreements (ECAs). Enforcement staff develop consent orders, usually after meeting with the Responsible Party, and in accordance with the Central Office\ and Regional Office concurrence section of this guidance.

Circumstances for Consent Orders

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

1. Complying with statutes, regulations, permit conditions, orders, and enforceable certifications;
2. Applying for and obtaining a permit or coverage under a permit;
3. Installing, testing, or implementing new control technology;
4. Complying with a schedule for facility upgrades, modifications, startups, and shakeouts;
5. Performing a site assessment and clean up or remediation;
6. Restoring wetlands and streams, or purchasing compensatory mitigation credits;

¹⁴ In the event that an LOA is drafted by the compliance staff, compliance staff are responsible for monitoring.

¹⁵ The presence of an LOA should be clearly referenced in any subsequent ERP and consent order.

¹⁶ Though Remediation Consent Orders are administrative orders developed by the Division of Land Protection to remediate property, the development of Remediation Consent Orders do not fall under this guidance.

¹⁷ Va. Code §§ [10.1-1309](#), [-1316\(C\)](#) (Air); § [10.1-1455\(F\)](#) (Waste); § [62.1-44.15\(8d\)](#) (Water and UST); § [62.1-44.34:20\(D\)](#) (Oil); § [62.15:25\(6\)](#) (Stormwater); § [62.1-268](#) (Ground Water); and § [10.1-1197.9\(C\)\(2\)](#) (Renewable Energy).

7. Purchasing nutrient credits or including other offsite measures to compensate for nutrient control deficiencies;¹⁸
8. Setting interim effluent or emissions limits;
9. Assessing civil charges for past violations of enforceable environmental requirements, including the recovery of economic benefit;
10. Undertaking and completing a Supplemental Environmental Project as proposed by the Responsible Party and approved by DEQ;
11. Recovering appropriate fees and other costs; or
12. Performing any other action to return to compliance.

Elements of Consent Orders

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

1. *Caption and Style* – The Caption and Style includes the letterhead of the office issuing the order; the Board or Boards in whose name the order is issued; a recital that it is an “Enforcement Action – Order by Consent”; the correct Responsible Party legal name; the facility or source that is the subject of the order; and the permit or registration number, if any, or that the facility or source is unpermitted (use the PC/IR No., if available).
2. *Section A – Purpose* – The Purpose recites the authority of the Board to issue the order and states that the order is to resolve certain violations (not “alleged violations”) of the law, regulations, and permit conditions. If the order supersedes another order, the Purpose states that as well.
3. *Section B – Definitions* – Definitions are used to specify the references and meaning of terms used in the order. The model orders contain common definitions. Staff can modify existing definitions if necessary, or add other appropriate definitions, and should delete definitions that are not used.
4. *Section C – Findings of Fact and Conclusions of Law* – This section describes the jurisdictional, factual, and legal basis for the order. Inspectors are not referred to by name in orders, but as “DEQ staff.” NOVs issued during the consent order process are cited in this section. **The Findings must provide a basis for each item in the Schedule of Compliance. This section must also include a Board finding or conclusion that the Responsible Party has violated one or more specific, enforceable environmental requirements.**
5. *Section D – Agreement and Order* – This section sets out what the Responsible Party agrees to and is ordered to do. It typically incorporates a “Schedule of Compliance” as Appendix A (and Appendix B, *etc.*, as needed) and orders any monetary payments that are imposed (civil charges, annual fees, permit fees, *etc.*). Any payment plan or Supplemental Environmental Project offset is included in this section. Putting all monetary payments into one section simplifies tracking and collecting payments as

¹⁸ This applies only to construction stormwater activities. *See* Va. Code § 62.1-44.15:35. The Department may include the use of nutrient credits or other offsite measures in resolving enforcement actions to compensate for (i) nutrient control deficiencies occurring during the period of noncompliance and (ii) permanent nutrient control deficiencies.

DEQ “receivables.” If the order supersedes another one, termination of the prior order is effected in this section.

6. *Section E – Administrative Provisions* – The Administrative Provisions are the “legal” provisions of the order. Alternative provisions are included in the model orders. **Any changes from the model or alternative language for these provisions must be approved through the Director of Enforcement.**
7. *Signature and Notary Statement* – The order must be signed by a current, authorized official of the Responsible Party. On a case by case basis, enforcement staff may require a notary statement. The notary statement may be appropriate in situations where there is increased risk to the Agency (enforcement staff have not met the RP, high profile case, there is reason to suspect signature may be disputed, unpermitted, etc.). The type of notary statement should match the type of Responsible Party (individual, corporate, partnership, limited liability company, etc.).
8. *Schedule of Compliance* – The schedule details what the RP must do to return the facility or source to compliance. The schedule should include firm date commitments for beginning and completing activities wherever possible. Dates for interim milestones may be dependent on DEQ review or approval (i.e., “ratchet dates”). **The goal of a Schedule of Compliance is to compel a Responsible Party to return to compliance by a date certain in all possible cases.**¹⁹ Staff must be sure that all violations in the Findings section are fully accounted for; DEQ may not be able to re-address violations cited in the order at a later time. For multimedia orders, the schedule should indicate which items relate to each Board.
9. *Other Appendices* – The details of any Supplemental Environmental Project or interim effluent limits are set out in separate appendices.

Model Consent Orders

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

Addressing Additional or Subsequent Violations

The violations in a consent order usually match those in the referring NOV or the NOVs leading to the referral. For Virginia Pollutant Discharge Elimination System programs that use a point system, violations that occur in the 6-month or alternative window for accumulating enough points for an NOV are included in the consent order. If the Responsible Party returns to compliance before issuance of the consent order, this can be noted in the ERP and consent order.²⁰ If subsequent NOVs are issued prior to execution of the consent order, the consent order should be modified to include those violations, and the civil charge modified, as appropriate.

¹⁹ A date certain may not be possible with multi-year schedules of compliance, as determined on a case-by-case basis.

²⁰ No civil charge is assessed for alleged violations cited in a Warning Letter that were completely resolved.

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

Civil Charges

Consent orders may impose civil charges pursuant to the criteria in Chapter 4. If the Responsible Party voluntarily self-discloses certain violations, there may be a statutory immunity against civil charges or penalties for those violations, or mitigation based on the self-disclosure, as described in Va. Code § [10.1-1198 and -1199](#) and in Chapter 5 of DEQ's Enforcement Manual.

The consent order must state where the civil charges are to be deposited, in the Virginia Environmental Emergency Response Fund (VEERF), Va. Code § [10.1-2500](#) *et seq.*, the Virginia Underground Petroleum Storage Tank Fund (VPSTF), Va. Code § [62.1-44.34:11](#), or the Virginia Stormwater Management Fund (VSMF), Va. Code § [62.1-44.15:29](#).²¹ Civil charges collected under Articles 9, 10, and 11 of State Water Control Law are deposited to VPSTF. Civil charges collected pursuant to Articles 2.3, 2.5, and 4.02 are to be deposited in the VSMF. All other civil charges and penalties are deposited to VEERF.

Supplemental Environmental Projects

Supplemental Environmental Projects (SEPs) are environmentally beneficial projects not otherwise required by law that a Responsible Party agrees to undertake in a consent order in partial settlement of an enforcement action.²² The procedures and forms for analyzing and approving SEPs are described in Chapter 5. The model orders have language for incorporating SEPs in Section D and language for SEP appendices. Any decision whether or not to agree to a SEP is within the sole discretion of the applicable Board, official, or court and is not subject to appeal. Central Office concurrence is required for SEP reviews and approvals. If concurrence or agreement cannot be reached between Central Office and the Regional Office, then the Director of Regional Operations and Director of Central Operations should coordinate to reach a final decision of SEP approval or denial.

Preparing Draft Consent Orders; Negotiation

Negotiating an agreement with a Responsible Party involves a thorough analysis of DEQ's and the Responsible Party's interests, as well as both parties' alternatives to a negotiated resolution.

²¹ In accordance with §§ 10.1-2500, civil penalties and civil charges collected pursuant to Va. Code §§ 62.1-44.15:25, 62.1-44.15:48, 62.1-44.15:63, 62.1-44.15:74, 62.1-44.15(19), and 62.1-44.19:22 are to be deposited in the Stormwater Local Assistance Fund once the accompanying stormwater regulations are effective.

²² Va. Code § 10.1-1186.2 states: "Make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this chapter, including, but not limited to, contracts with the United States, other states, other state agencies and governmental subdivisions of the Commonwealth."

Preparing a draft consent order for presentation to the Responsible Party includes:

1. Reviewing the NOVs and the approved ERP;
2. Review of the law, regulation, or permit condition at issue;
3. Verifying the Responsible Party's identity and name with the State Corporation Commission, land records, or otherwise, as appropriate;
4. Checking databases and/or with compliance staff for unresolved violations;
5. Checking the DEQ facility or source files for additional, relevant information;
6. Preparing a draft using a model consent order; and
7. Circulating the draft consent order for comment and concurrence with Regional and Central Office staff.

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

Consent Orders Negotiated by the Central Office

Most consent orders are negotiated by the Regional Office Enforcement Specialists. In some cases, however, Central Office staff negotiate directly with the Responsible Party, and the Director is authorized to execute the consent order on the Board's behalf. These cases are identified individually, either by agreement with the Regional Office or by direction of DEQ management.

Due to resources and staff availability, Central Office managers sometimes assist the Regional Office by drafting the ERP and draft Order, while formally the case stays at the Regional Office. In these circumstances, Central Office managers act as Regional Office Enforcement Specialists. The Director of Enforcement must approve the case assignment and a referral form is not needed.

If the Regional Office wants to refer a case to Central Office for APA action or case development, the Regional Office must submit the appropriate referral form to Central Office (refer to Adversarial Administrative Actions section below). If Central Office accepts the referral, Central Office staff continue to coordinate and communicate with Regional Office staff. In turn, Regional Office staff support the case development through coordination and communication, particularly where new information becomes available that can influence the outcome of an enforcement action (i.e., upcoming inspections). Once referred, Central Office staff is the lead point of contact, and negotiates directly with the RP. Once executed, the monitoring of the consent order is conducted by Central Office unless an alternative agreement is reached with the Regional Office, and Central Office staff ensure the documents are stored in ECM appropriately.

Actions appropriate for Central Office Staff may include:

1. Adjudications (e.g. permit revocations, informal fact findings, formal hearing);
2. Potential Criminal Conduct;
3. Cases with a high potential for referral to the Office of the Attorney General;

4. Parallel actions being undertaken with federal agencies requiring intimate coordination on substantive programmatic and legal issues;
5. CERCLA and natural resource damage claims;
6. Violations across multiple regional boundaries;
7. Cases not meeting the goals established in the timely and appropriate policy or established agency enforcement timelines;
8. Anticipated civil charges of \$250,000 or higher;
9. Emergency Orders; and
10. Actions that present novel issues, significant public interest, or upon request.

Responsible Party Agreement and Signature

After preparing a draft consent order in accordance with the ERP and collaborating with Regional Office and Central Office staff to ensure concurrence, DEQ staff send the draft consent order to the Responsible Party for review and comment. Staff consider the Responsible Party's comments and, where appropriate, incorporate them into the draft consent order. When the Responsible Party makes substantive comments, staff may hold a meeting or use other means to resolve differences. DEQ and the Responsible Party must agree to all of the terms of the consent order before it is sent for signature. In instances where there are significant changes to the penalty, injunctive relief, or findings of fact, Regional Office staff should coordinate for follow up concurrence from Central Office. The Responsible Party executes the consent order and returns the document to DEQ. The consent order is then a "proposed order" and ready for public notice and comment, if required. If the Consent Order includes a civil charge, send a copy of the RP signed Consent Order to Office of Financial Management (OFM); in the event the RP sends the civil charge prior to public notice completion, the OFM will know how to direct the civil charge deposit.²³ One original consent order is prepared, and is stored electronically once executed, in ECM under 127-1.

Public Notice and Comment

After the Responsible Party signs the consent order, DEQ must provide at least 30 days' public notice and comment on proposed Waste and Water orders, and obtain State Water Control Board approval for certain proposed Water consent orders. Air consent orders do not require public notice or comment.²⁴ The table below sets out public notice and comment requirements. DEQ pays for public notice. By DEQ policy, all Water consent orders are given the same public notice. For Water consent orders requiring State Water Control Board approval, the public comment period should end before the board books are sent to State Water Control Board

²³ The OFM will place the penalty in escrow until the Consent Order is effective. The executed consent order will be required to be conveyed to OFM, for final payment processing.

²⁴ The DEQ enforcement strategy exemption from FOIA ends when the consent order is approved for public notice (Water or Waste) or is presented for proposed execution (Air). Va. Code [§ 2.2-3705.7\(16\)](#); *DEQ Virginia Freedom of Information Act Compliance* at Attachment E (on [TownHall](#) website under DEQ guidance). Unless another FOIA exemption applies, the file should be scanned or loaded into ECM in accordance with policy (including quality assurance).

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members in advance of the Board meeting (typically 30 calendar days ahead of the Board meeting).

Media Program	Va. Register	Local newspaper	DEQ Webpage	Notice to local gov't
Air	No	No	No	No
VPDES (9 VAC 25-31-910(B)(3))	Yes	Yes	Yes	Yes
VPA (9 VAC 25-32-280(B)(3))	Yes	Yes	Yes	Yes
VWP	Yes	Yes	Yes	Yes
UST	Yes	Yes	Yes	Yes
Oil and AST	Yes	Yes	Yes	Yes
GWM Act	Yes	Yes	Yes	No
AFO and Poultry (VPDES or VPA)	Yes	Yes	Yes	Yes
Solid Waste (9 VAC 20-81-70(D))	No	No	Yes	No
Hazardous Waste (9 VAC 20-60-70(F))	No	Yes	Yes	No

Enforcement staff should use the public notice template provided by Central Office for the *Virginia Register* and newspapers. Enforcement staff should place the *Register* directly into the RIS for publication; *as a general rule*, it takes at least 19 days to process the notice (its publication deadlines and schedules are provided in each issue and are online). Public notices need to be submitted to the appropriate Regional Office or Central Office RIS web contributor as soon as practicable, but at least two days prior to the *Register* material submittal deadline. For newspaper notice, a *Directory of Virginia Newspapers* may be obtained from the Virginia Press Association. The newspaper dates and *Register* schedule may not line up exactly. In this situation, the newspaper should run the notice in advance, but as close as possible to, the *Register* publication date. The public comment period start and end date in the newspaper and *Register* should be identical and the start date will be the date of publication in the *Register*. Enforcement staff must request an affidavit or confirmation that the newspaper notice ran in the paper and enter the affidavit/confirmation in ECM upon receipt. At the same time as *Register* and/or newspaper notice, Regional Office staff send a copy of the public notice and proposed Waste and Water orders to the appropriate Regional Office or Central Office web contributor to post on the DEQ website. Notification to local government concerning a Water order must also be completed prior to publication.²⁵ The email to the local government should include a request for confirmation of receipt and enforcement staff should enter the confirmation in ECM.

If public comments are received, they should be summarized with the agency response. If the consent order requires substantial changes to address public comment, the Central Office Division of Enforcement and the Office of Regulatory Affairs should be consulted about whether a second comment period is necessary. The comment-response document is prepared before the consent order is signed or before the State Water Control Board meeting, if the consent order is to be presented to the Board. Copies of the comment-response document may be sent to the Responsible Party and to anyone who commented during the public notice period (or posted to the DEQ Enforcement website with a notice to those who participated in the comment process of

²⁵ “Upon determining that there has been a violation of a regulation promulgated under this chapter and such violation poses an imminent threat to the health, safety or welfare of the public, the Executive Director shall immediately notify the chief administrative officer of any potentially affected local government.” Va. Code § [62.1-44.15:4\(A\)](#).

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its location). Public comments and responses must be entered into ECM as part of the file of record for the case.

State Water Control Board Approval of Water Law Consent Orders

DEQ executes consent orders on the State Water Control Board's behalf without seeking Board approval at the quarterly meeting when the proposed consent order assesses a civil charge less than \$40,000 and no significant comments were received during the public comment period.²⁶ For all other Water consent orders, the orders must be approved by the State Water Control Board at a Board meeting. For orders requiring Board approval, Regional Office staff must submit a copy of the following to Central Office DOE in accordance with the schedule established by the Office of Regulatory Affairs: (i) the order, (ii) a copy of the signed ERP, and (iii) an agenda item summary. When drafting the agenda item summary, staff use the agenda item template provided by Central Office. After review, Central Office staff forward the agenda item summary and consent order to the Office of Regulatory Affairs for inclusion in the State Water Control Board agenda review materials and briefing books. At the State Water Control Board meeting, the Central Office Enforcement Manager, or designated DEQ staff, presents the consent orders to the Board and responds to questions. The Regional Office provides support during the Board meeting preparation and makes sure Regional office staff are available to answer specific Board questions about the order during the Board meeting. After each presentation, the Central Office Enforcement Manager, or designated DEQ staff, makes the following Board recommendation²⁷:

“The staff recommends that the Board approve the consent order, that the Board authorize the DEQ's Director to execute the consent order on the Board's behalf, and that the Board authorize the Director to refer violations of the consent order to the Office of the Attorney General for appropriate legal action.”

For SSO consent special orders presented at a Board meeting where at least one comment is received, staff should also include the following recommendation (in addition to a recommendation to the Board above that it approve the proposed SSO consent special order):

It is further recommended that the Board authorize the Director to accept petitions on its behalf requesting this order to be set aside and to provide a formal hearing thereon and to make a determination whether to set aside the order and to provide such formal hearing based on the requirements in Virginia Code § 62.1-44.15 (8f).

The State Water Control Board may decide to approve, modify, or disapprove the consent order. Any modifications must be agreed to by the Responsible Party. If the modifications requested by the Board are less stringent than what is proposed, a new public notice and comment period may be necessary.

²⁶ See, State Water Control Board meeting, December 17, 2013, Minute No. 12.

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Execution by DEQ

Air orders can be executed by DEQ immediately after the Responsible Party's signature. After considering public comment on proposed Waste and Water orders, and following State Water Control Board approval of Water orders (when required), the Director of DEQ or his designee executes the original consent order on behalf of the Board. The consent order becomes effective upon DEQ signature.

Enforcement staff immediately send a complete executed copy to the Responsible Party for implementation. The executed consent order is then uploaded to ECM in order to comply with the [record retention policy](#).

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

- For Air orders, to the Office of Air Compliance Coordination (if designated a High Priority Violation);
- If the consent order requires monetary payments to DEQ, to the Office of Financial Management; and
- If the consent order affects the Responsible Party's financial assurance, to the Office of Financial Assurance; and
- To the Central Office for posting to the public webpage, along with a copy of the executed ERP.

Collecting Civil Charges

DEQ specifies in all consent orders that the payment check include the Responsible Party's Federal Employer Identification Number (unless the FEIN is also the social security number) and a notation that it is for payment of a civil charge pursuant to the consent order. The consent order states that the DEQ civil charge payment is to be made out to the Treasurer of Virginia and sent to:

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

The consent order states which fund the civil charges are to be deposited.

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

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

Amended and Superseding Consent Orders

After a consent order is executed, subsequent events may require modifying or supplementing its terms, either through an amended or a superseding order. An amended consent order modifies or supplements the existing consent order, but leaves the rest of the consent order intact. A superseding consent order replaces the previous consent order in its entirety and terminates it. Whether one is amending or superseding an existing consent order, a new or amended ERP must be prepared.

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

- To modify, supplement, or supersede a schedule of compliance in an existing consent order (*e.g.*, to extend deadlines or integrate new requirements);
- To resolve violations of the existing consent order or independent violations found while the consent order is in effect; and
- To pay civil charges for such violations.²⁸

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

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

²⁸ Amended and superseding orders should not be used to reduce or abate a civil charge after an order has been executed based on inability to pay. Inability to pay should be claimed before an RP agrees to a civil charge.

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Amended and superseding consent orders in the Waste and Water programs require public notice and approval as other consent orders. They are entered as separate consent orders in DEQ and the Enforcement module in CEDS.

Monitoring and Terminating Consent Orders

Consent orders are monitored for compliance as any other agreement.

DEQ may terminate a consent order after the Responsible Party has fully complied with its terms. The case manager must document that all of the requirements of the consent order have been fully completed. The Regional Director, Division Director, or the Director of Enforcement then signs a Case Closure Memorandum (CCM), which closes the enforcement action in the administrative record.²⁹ Once the CCM is signed and approved, Regional Director, Division Director, or the Director of Enforcement then signs a termination letter to the Responsible Party, notifying the RP of case closure and Order termination. This may be conveyed electronically, requesting the RP to confirm receipt by replying to the email conveyance. If the consent order has been fully complied with, but has not yet been terminated, the Responsible Party can petition DEQ to terminate the consent order. Finally, the Director of DEQ can terminate the consent order at his or her discretion upon 30-day's notice to the Responsible Party.

Executive Compliance Agreements

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

Central Office and Regional Office Concurrence

The general roles of Central Office and Regional Office enforcement staff are listed in Chapter 1. Enforcement documents are the product of DEQ, not of one individual or office. Collaboration between the Regional Offices and Central Office is essential for the efficient

²⁹ Formerly, consent orders required 30-day notice before termination, even if there was a full return to compliance. A modified process may be required, depending on the wording of the consent order's administrative provisions. Any discrepancies between this guidance and consent order terms should be resolved in favor of the terms of the order.

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production of professional documents that are factually correct, legally enforceable, and consistent, both internally and statewide. DEQ enforcement is regionalized, and most enforcement occurs in the DEQ's Regional Offices. Central Office coordinates statewide implementation of the enforcement program and assures consistency in the enforcement approach, injunctive relief, and civil charges assessed. Consistency in DEQ's enforcement approach means consistent use and application of enforcement guidance, and appropriately documented deviation from guidance for case specific variation(s).

In most cases, Regional Office staff investigate, develop, and implement enforcement actions. Regional Office staff also draft enforcement documents that may require review and concurrence by the appropriate Central Office Enforcement Manager. The Regional Office Enforcement Program Manager is responsible for conducting a "peer review" of the documents prior to sending them to Central Office for review and concurrence. Central Office concurrence is required for the following:³⁰

- ERPs, civil charge worksheets, and SEP Analysis Forms (and substantive amendments);
- Draft LOAs, Consent Orders, Amendments, and ECAs;
- Case closure memoranda that involve violations of a consent order, cases that present unique or sensitive issues, or cases without a full return to compliance to confirm that no enforcement action will practicably lead to further compliance or payment of an appropriate civil charge.

Central Office enforcement staff comments are divided into those that are considered essential to the consistency and enforceability of the document and those that are advisory.

Essential comments include those addressing the following elements:

- Whether the consent order correctly identifies the Board and/or authority;
- Whether the consent order identifies a legal Responsible Party and uses the proper notary block (if notary is applicable);
- Whether definitions in an consent order are needed, correct, or unused, and in alphabetical order;
- Whether the statements concerning the Responsible Party and the facility type are accurate;
- Whether all violations are addressed;
- Whether supporting documentation for cited violations is sufficient;
- Whether the observations support the violations cited in the legal requirement;
- Whether observations and legal requirement support the injunctive relief in the schedule of compliance;
- Whether the injunctive relief in the schedule of compliance leads by necessity to a Responsible Party's return to compliance by a date certain in all possible cases;

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

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- Whether the civil charge calculations, including economic benefit, have sufficient justification and are consistent with policy and with similar cases across the Commonwealth;
- Whether any fees, oil spill, or other costs have been collected;
- Whether the model formats have been used;
- Whether there have been any changes to administrative provisions;
- Whether the legal citations are correct;
- Whether any Supplemental Environmental Project conforms to policy; and
- Whether the enforcement action and injunctive relief is consistent with similar consent orders across the state.

Informal communication during the concurrence process is encouraged, and every effort should be made to offer all comments at once, although significant and complex changes necessary to ensure consistency, quality, and defensibility of the enforcement action may require additional reviews. In certain cases, Central Office may provide comments on the ERP and hold off on providing comments on the LOA, CSO, or ECA until the ERP is updated or further case discussions occur. Central Office enforcement staff and the Regional Office must agree on the essential elements of the enforcement action under review before a document is first presented to the Responsible Party. Central Office gives its concurrence by signature, email or ECM workflow after reviewing the documents with the agreed changes.

Once Central Office enforcement staff and the Regional Office enforcement staff have reached concurrence, any significant changes to the essential elements listed above, or any changes to the following items, restart the concurrence process:

- A change in the Responsible Party;
- Modified definitions that may change the legal effect of the consent order;
- Qualitatively different findings of fact and conclusions of law, or corrective action;
- Any change to “Agreement and Order” section of the consent order;
- Civil charge reductions beyond 30% of the gravity-based civil charge;
- Extension of final completion of a corrective action;
- A modified or changed Supplemental Environmental Project; or
- Other significant changes to the model language.

Significant changes may also require a notation on the ERP or an ERP Addendum to document the reasoned analysis for the agency decision process and to conform to the consent order.

Enforcement Procedures without Consent

Adversarial Administrative Actions

The Administrative Process Act (APA) provides for informal fact finding proceedings and formal hearings for addressing alleged violations when the Responsible Party will not resolve a case by consent. If the Regional Office wants to refer a case for APA action, the

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Regional Office must complete a Request for APA Action form and submit to Central Office. The Regional Office will draft an ERP, including the Civil Charge Worksheet, and include them with the referral to Central Office. The Central Office Enforcement Adjudication Manager must be consulted when drafting subsequent notices of alleged violation in anticipation of a formal hearing. Chapter 6 contains procedures for adversarial administrative actions.

Special Procedures for Delivery Prohibition and Sanitary Sewer Overflows

Delivery Prohibition

The [Federal Energy Policy Act of 2005](#) (EPACT) makes it unlawful for anyone to deliver petroleum into or accept delivery of petroleum product or other regulated substance into certain noncompliant USTs. EPACT also requires states to promulgate regulations and to develop processes and procedures to implement the delivery prohibition (“red tag” or “DP”) requirement. Part IX of the UST Technical Standards ([9 VAC 25-580-370](#)) has been promulgated to comply with EPACT and [U.S. EPA guidance](#). Under either class of violations, staff provide notice to the owner/operator and conduct an Informal Fact Finding to determine whether a UST is noncompliant and subject to delivery prohibition. DEQ has issued guidance on delivery prohibition procedures, which can be found on the Town Hall website under SWCB guidance. In appropriate cases, delivery prohibition can be combined with an Informal Fact Finding Proceeding in accordance with Va. Code § [10.1-1186\(9\)](#) which may result in a civil charge. A DP proceeding is a Central Office function, and must be referred to DOE/OSRR to process.

Sanitary Sewer Overflows

In 2007, the General Assembly enacted Senate Bill 798 (“SB 798”), which added subdivision (8f) to Va. Code § 62.1-44.15:³¹

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

³¹ Following legislative enactment and signature by the Governor, SB 798 became [2007 Acts c. 144](#).

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to the public the reasons for such denial, and the petitioner shall have the right to judicial review of such decision under [§ 62.1-44.29](#) if he meets the requirements thereof.

This subdivision specifies different procedures for issuing SSO consent special orders under subdivision (8d) and SSO hearing special orders under subdivision (8a). Chapter 6 provides more information on the process for SSO hearing special orders under subdivision (8a). A flow chart of the process under (8d) is included at the end of this section of the guidance.³² Subdivision (8f) does not address the issuance of emergency special orders under subdivision (8b) or the issuance of special orders under Va. Code [§ 10.1-1186\(9\)](#).

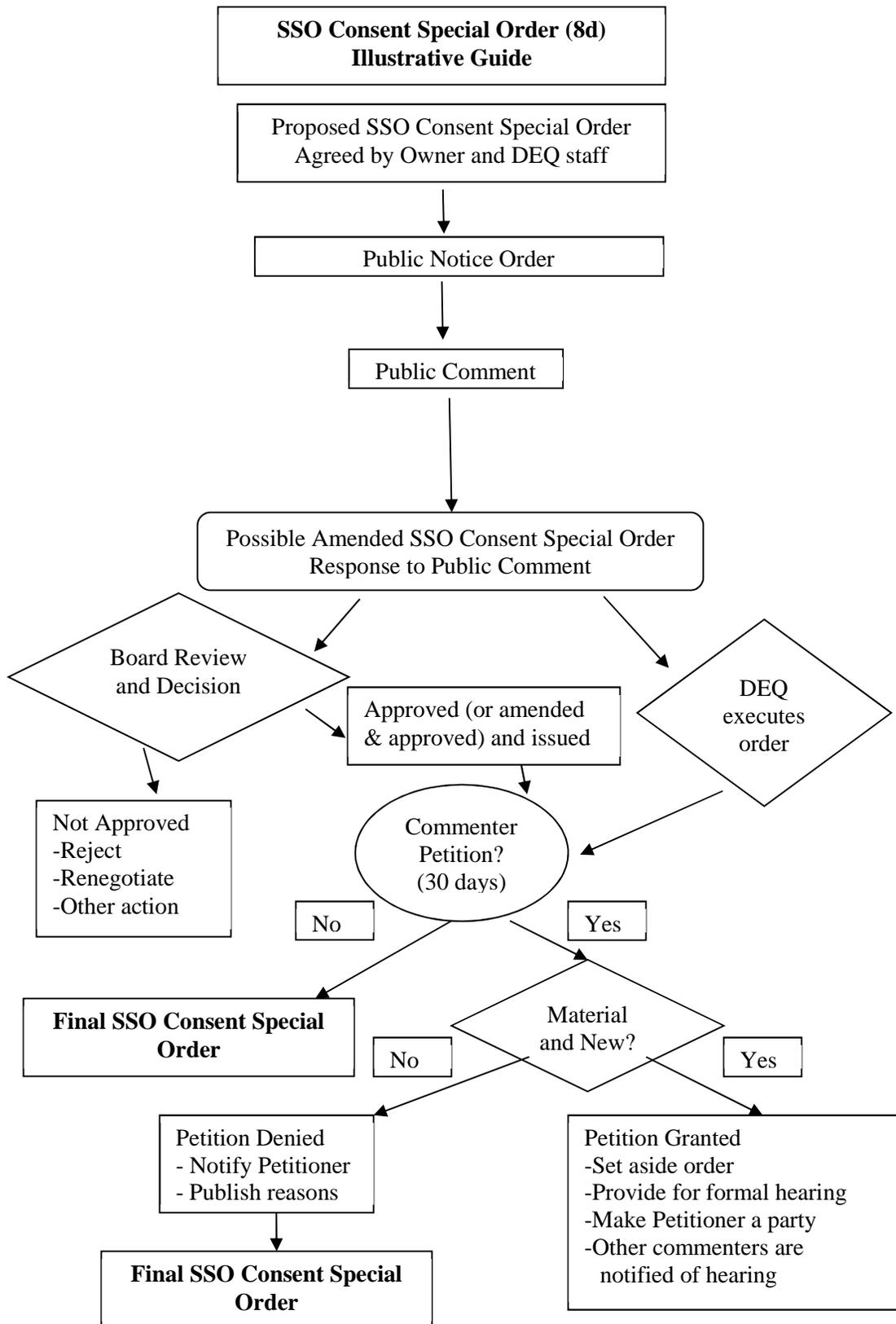
Subdivision (8f) does not fundamentally alter the existing process prior to issuance for SSO consent special orders.³³ Subdivision (8f) sets out new rights for persons who comment on a proposed SSO consent special order after the order is issued. Any person who commented on the proposed order may file a petition, within 30 days after the issuance of the order, requesting that the Board set aside the SSO consent special order and provide a formal hearing on it.³⁴ See the State Water Control Board Approval of Water Law Consent Orders section of this Chapter 2 guidance for an additional Board recommendation that is needed for SSO consent special orders presented at a Board meeting where at least one comment is received. Chapter 6 provides more detail on the Board/Director's consideration of the petition and the process for notices and hearings following a successful petition.

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

³² The flow chart does not include all steps or options, and it does not replace adherence to the Virginia Administrative Process Act, Va. Code § 62.1-44.15 or the text of this guidance.

³³ Before SB 798, public notice and comment were required by regulation. [9 VAC 25-31-910\(B\)\(3\)](#); see Va. Code [§ 62.1-44.15:4\(E\)](#) (requirement to notify locality where the alleged offense has or is taking place, upon commencement of public notice of an enforcement action).

³⁴ Because of possible petitions and the time necessary to consider them, SSO consent orders should direct payment of any civil charges by the party **within 60 days** of the date of the order, rather than the customary 30 days



Emergency Orders

Circumstances for Emergency Orders

Each Board (and DEQ) is authorized by law to issue administrative emergency orders where circumstances require immediate action to abate imminent and substantial injury or damage.³⁵ The Office of the Attorney General must be consulted throughout the administrative process concerning an emergency order.

Emergency orders are the administrative equivalent of judicial temporary injunctions. They are effective upon service and are issued without the consent of the Responsible Party. DEQ must make “a reasonable attempt to give notice” (Air and Waste), or may give no formal notice (Water), prior to issuance. By law, however, there must be a prompt formal hearing after reasonable notice to the Responsible Party to affirm, modify, amend, or cancel the emergency order.³⁶ Delivery of a case decision after a hearing on an emergency order and time limits are governed by statute.³⁷

Drafting Emergency Orders³⁸

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

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

³⁵ Va. Code § [10.1-1309\(B\)](#) (Air); §§ [10.1-1402\(18\) and \(21\)](#), and [-1455\(G\)](#) (Waste); § [62.1-44.15\(8b\)](#) (Water); and § [10.1-1197.9\(C\)\(5\)](#) (Renewable Energy). In Air and Water, such orders are titled “Emergency Special Orders.” Here they are referred to collectively as “emergency orders.”

³⁶ The Air and Waste statutes specify that the hearing be held within 10 days. Under Water law, if the emergency order requires cessation of a discharge, the Board shall provide an opportunity for a hearing within 48 hours.

³⁷ See, Va. Code § [10.1-1309\(C\)](#) (Air); § [62.1-44.12](#), [-44.28](#) (Water); § [10.1-1455\(C\)](#) (Waste).

³⁸ In most cases, an emergency order is appropriate when there is an imminent and substantial danger to human health and the environment.

Issuance, Hearing, and Notice to Local Government

Once the emergency order is signed by the person delegated that authority, DEQ must serve the executed emergency order on the Responsible Party by a means that is quick, certain, and verifiable, *e.g.*, hand-delivery, sheriff service, express carrier, or process server. The hearing notice should be served simultaneously, either as a separate document or part of the emergency order. DEQ may transmit a copy of the emergency order by fax or electronic mail if receipt is confirmed, if this method is chosen DEQ should also send a copy by U.S. Mail, with delivery confirmation. In the case of emergency orders issued under the Water Law, the Central Office Adjudications Manager must notify the Office of Regulatory Affairs to poll the [State Water Control Board](#) members by telephone to schedule a meeting on the emergency order.³⁹

Circumstances that are serious enough to warrant consideration of an emergency order are also likely to require notice to the local government of the alleged violations. Va. Code §§ [10.1-1310.1](#) (Air), [10.1-1407.1](#) (Waste), and [62.1-44.15:4\(A\)](#) (Water).

Court Actions

After evaluating all other options, the Director of DEQ may determine that court action is the most appropriate enforcement tool. Generally, DEQ considers civil litigation only after it has exhausted all reasonable administrative remedies, unless there is an emergency. Remedies in court actions include temporary and permanent injunctions and civil penalties. The Attorney General (personally or through his or her assistants) renders all legal services for the Boards and DEQ. Va. Code § [2.2-507\(A\)](#). Court actions are covered in more detail in Chapter 7.

A referral to the OAG may be appropriate where:

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

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

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

³⁹ This consultation must occur before issuance of an emergency order when the order includes cessation of a discharge that requires the hearing within 48 hours of issuance.

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

United States Environmental Protection Agency Enforcement Actions

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

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

Circumstances for Referral to the United States Environmental Protection Agency

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

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

Process for EPA Referrals

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

If a case is referred, Central Office staff, in collaboration with the Regional Office, prepare and send the referral package to the Director of DEQ for consideration. The referral package includes a letter from the Director of DEQ to the U.S. EPA, a brief memorandum outlining the facts of the case, and relevant attachments. The attachments may include the whole file or selected documents (*e.g.*, NOAVs, draft consent order, reports). DEQ staff should be prepared to provide additional information to the U.S. EPA upon request. Central Office Enforcement is the point of

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contact with U.S. EPA, and Regional Staff may be asked for technical support and review at the direction of U.S. EPA.

EPA Communications about Compliance and Enforcement Activities in the Commonwealth

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

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

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

Case Closure

DEQ may close an enforcement case when: (1) an appropriate enforcement action is complete and the Responsible Party has returned the facility to compliance; or (2) no enforcement action will practicably lead to further compliance or payment of an appropriate civil charge. Staff uses the same Enforcement Case Closure Memorandum for both.

Return-to-Compliance Closure

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

durable.

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

To close a case, enforcement staff complete the closure memorandum, attach any supporting documentation, obtain the necessary concurrences, and forward the memorandum and attachments for the appropriate management approval. The closure memorandum identifies the Responsible Party, facility, the media and program, the permit or other identifying numbers, the violations addressed, the date of the order or other enforcement instrument, and the reason for the closure. It may be accompanied by supporting documentation but must clearly show that all requirements of any enforcement instrument have been completed. A letter terminating an Executive Compliance Agreement, or any administrative order should also be attached, so that the entire matter is brought to management at one time, and the Responsible Party is notified of the termination. Central Office concurrence is not necessary for a return-to-compliance closure, except for the instances involving SNCs or HPVs.

After the closure memorandum is approved, enforcement staff place it into ECM, and link it to the Enforcement Action number (EA). Copies of the termination letter should be sent to permitting or compliance staff. Enforcement staff should also update the relevant databases as soon as possible, but no later than 30 days.

Administrative Case Closures and Dereferral

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

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

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

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

List of Acronyms

APA - Administrative Process Act, Va. Code § 2.2-4000 *et seq.*
AST - Aboveground Storage Tank
CAPP - Commonwealth Accounts Payable Procedures
CAS – Compliance Auditing System (Water)
CO – Central Office
DD – Division Director
DE – Division of Enforcement
DEQ – Virginia Department of Environmental Quality
DL – Deficiency Letter
DMR – Discharge Monitoring Report (Water)
DWR – Virginia Department of Wildlife Resources
EA- Enforcement Action Number, assigned by CEDs for tracking Enforcement Case
ECA – Executive Compliance Agreement
ECM - Enterprise Content Management. ECM is DEQ’s electronic document management system. An ECM number refers to the file series and document type of a document in ECM (*e.g.*, ECM 127-1 signifies a consent order or ECA).
EPACT - Federal Energy Policy Act of 2005
ERP – Enforcement Recommendation and Plan
FOIA – Virginia Freedom of Information Act, Va. Code § 2.2-3700 *et seq.*
GWM – Ground Water Management Act, Va. Code § 62.1-254 *et seq.*
IFF – Informal Fact Finding under the APA
HPV – High Priority Violator in the Air Program
ICL – Informal Correction Letter
LOA – Letter of Agreement
NOAV – Notice of Alleged Violation
NOV – Notice of Violation
OAG – Office of the Attorney General, or Department of Law
OFM – Office of Financial Management
ORA - Office of Regulatory Affairs
PC/IR No. – Pollution complaint or incident response number
PEDR – Process for Early Dispute Resolution
RCA – Request for Corrective (or Compliance) Action
RD – Regional Director
REM – Regional Enforcement Manager
RO – Regional Office
RP - Responsible Party
SCC – State Corporation Commission
SEP – Supplemental Environmental Project
SNC – Significant Noncomplier (Hazardous Waste); Significant Noncompliance (Water)
SSO – Sanitary Sewer Overflow
SWCB – State Water Control Board
UST – Underground Storage Tank
VEEP – Virginia Environmental Excellence Program
VEERF – Virginia Environmental Emergency Response Fund, Va. Code § 10.1-2500 *et seq.*
VPA – Virginia Pollution Abatement
VPDES – Virginia Pollutant Discharge Elimination System

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VPSTF - Virginia Underground Petroleum Storage Tank Fund, Va. Code § 62.1-44.34:11 VWP –
Virginia Water Protection

ⁱ See General Compliance Procedures,

https://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\440\GDoc_DEQ_6066_v1.pdf

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