CHAPTER 5
INCENTIVES FOR IDENTIFYING AND RESOLVING VIOLATIONS

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ATTACHMENTS

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This chapter[1] describes incentives for Responsible Parties (RPs) to identify and disclose their own violations through voluntary environmental assessments – both a qualified privilege against production of information and a qualified immunity against civil charges and civil penalties. This chapter also describes how the Department of Environmental Quality (DEQ) and RPs can include Supplemental Environmental Projects (SEPs) in consent orders and consent decrees in partial settlement of civil charges and civil penalties. These incentives are in addition to the ones available to every RP for an expeditious return to compliance and quick settlement, as described in Chapter 4.

I. VOLUNTARY ENVIRONMENTAL ASSESSMENTS

A. BACKGROUND AND SUMMARY

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

Under Virginia statutes, facility owners or operators who perform voluntary environmental assessments enjoy a privilege from disclosing the resulting documents *and* immunity from all administrative or civil penalties for the violations they discover as a result, so long as the violations are voluntarily and promptly disclosed and corrected. The laws have qualifications, however, and they do not apply to programs that have been authorized, delegated, or approved by the U.S. EPA ("federally authorized programs").[2] For federal enforcement of these programs, EPA has issued its own policy on "self-policing," commonly called the "Audit Policy." For state enforcement of federally authorized programs (or if the conditions of the immunity statute are not met), DEQ uses its enforcement discretion to adhere in large measure to the federal Audit Policy.

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[1] Disclaimer: Guidance documents are developed as guidance and, as such, set forth presumptive operating procedures. *See* Va. Code § 2.2-4001. Guidance documents do not establish or affect legal rights or obligations, do not establish a binding norm, and are not determinative of the issues addressed. Decisions in individual cases will be made by applying the laws, regulations, and policies of the Commonwealth to case-specific facts. Chapter 5 supersedes both DEQ, *Voluntary Environmental Assessments*, Enforcement Guidance Memorandum (EGM) 1-2006 (June 13, 2006) and DEQ, *Supplemental Environmental Projects (SEPs)*, EGM No. 3-2006 (September 19, 2006).

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

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

Neither the state statutes nor the federal policy affect the obligation of facility owners and operators to correct violations and remediate their effects. [3]

B. STATUTORY REQUIREMENTS AND ENFORCEMENT DISCRETION

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

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

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

Va. Code § 10.1-1198 provides a privilege against compelled production of a document[4] resulting from a voluntary environmental assessment or information about its contents; a prohibition on the admissibility of such documents in administrative or judicial proceedings without the written consent of the facility owner or operator; and a privilege against production of the document under a state information request.

Exceptions to the privilege are as follows:

- where information demonstrates a clear, imminent, and substantial danger to the public health or the environment;
- where the information was generated or developed before the commencement of the voluntary environmental assessment showing noncompliance;

[3] This guidance does not address legislation on Brownfields, Va. Code § 10.1-1230 *et seq.*

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

- where the document is required by law (including documents or other information needed for civil or criminal enforcement of federally authorized programs);

- where the document was prepared independently of the voluntary environmental assessment; or

- where the document was collected, generated, or developed in bad faith.

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

2. <u>Va. Code § 10.1-1199 - Immunity Against Administrative or Civil Penalties for Voluntarily Disclosed Violation</u>

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

- *Discovery is made through a voluntary environmental assessment*.

- *Disclosure is not already required by law, regulation, permit, or administrative order*. For example, failure to report an oil spill would not qualify for immunity, since State Water Control Law requires immediate reporting of all oil spills.

- *Disclosure is made promptly after discovery*. To be prompt, notification should be provided to the Regional Director of the appropriate DEQ Regional Office (RO) within 21 calendar days after discovery.

- *The violation is corrected in a diligent manner*. Correction should occur within 60 calendar days of discovery, or under an acceptable compliance schedule submitted to the DEQ RO within the same period. As necessary, correction should be incorporated into a letter of agreement or an order.

- *The person making the disclosure has not acted in bad faith*. Examples of bad faith include rushing to commence or complete an assessment in anticipation of a pending government inspection or investigation, or the ensuing report (unless DEQ determines that the facility owner or operator did not know of the pending inspection or investigation and that it is otherwise acting in good faith), and an audit following the transfer of a facility with a poor compliance history to a new subsidiary of the same company or group of companies.

- *The disclosed violations are not violations of a federally authorized program*. Federally authorized programs are described in footnote 2, above.

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

3. Enforcement Discretion Using the Federal Policy on Self-Policing

There are no federal statutes conferring privilege or immunity for voluntary environmental assessments; however, EPA has a *policy* called *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations* (FRL-6576-3; effective May 11, 2000), [5] commonly called "the Audit Policy." The Audit Policy outlines circumstances in which EPA will exercise its enforcement discretion and forego some or all administrative or civil penalties for "regulated entities" that voluntarily discover, disclose and correct noncompliance, and take steps to prevent future noncompliance.

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

In keeping with federal policy, DEQ should exercise enforcement discretion and forego collection of **100%** of the **gravity**[6] portion of an administrative or civil penalty, if the regulated entity reports violations discovered during an environmental audit and meets **ALL** of the following criteria:

- *The violation is discovered using systematic methodology*. Examples of systematic methodologies include an environmental audit; an environmental management system (EMS) that includes components for compliance due diligence in preventing, detecting and correcting violations; and a similar EMS at an extraordinary environmental enterprise (E4) or an exemplary environmental enterprise (E3) facility in the Virginia Environmental Excellence Program (VEEP).

- *The discovery of the violation is voluntary*. The violation should be discovered voluntarily, and not as a result of a mandatory monitoring, sampling or auditing procedure required by law, regulation, permit or enforcement action. Examples of mandatory actions include continuous emissions monitoring, VPDES sampling and

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

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

media-specific compliance audits required by an enforcement action. However, the discovery is still considered voluntary if the violations are found under a comprehensive, multi-media EMS, even if the EMS was required by an enforcement action.[7]

- *Disclosure of the violation is prompt*. Discovered violations should be disclosed in writing to the Regional Director of the appropriate DEQ RO within 21 calendar days of discovery or when an officer, director, employee, or agent of the facility has an objectively reasonable basis for believing that a violation has, or may have, occurred. A shorter time may be prescribed by law. Disclosure should be immediate in the event that the violation poses a threat to human health or the environment. At the discretion of the Regional Director, an extension may be allowed for receipt of the final violation report or documentation.

- *Discovery and disclosure are independent of government or third parties*. The violation should be discovered and disclosed before the government or a third party likely would have identified the violation. Examples of disclosure not meeting the "independent" criteria include those made: during the pendency of a government inspection or investigation, or the ensuing report (unless DEQ determines that the regulated entity did not know of the pending inspection or investigation and that it is otherwise acting in good faith); after the issuance of an information request from the government to the entity; following notice of a citizen suit, report of a "whistleblower," or other complaint by a third party; and when discovery of the violation by a regulatory agency is imminent.

- *Correction and remediation are timely*. Corrections should be completed within 60 calendar days from the date of discovery and notification of such provided in writing to the DEQ RO, or a satisfactory implementation plan and schedule for corrective action and remediation should be submitted to the DEQ RO within 60 calendar days. Schedules for corrective action should be incorporated into enforcement orders if determined to be necessary by the RO. Compliance schedules are public documents.

- *Steps are taken to prevent reoccurrence*. Regulated entities should document to DEQ the steps being taken to prevent a recurrence of the violation.

- *The violation is not a repeat violation*. Repeat violations are those resulting from errors or omissions that are the same or substantially similar and that have occurred at the same facility in the previous three years, or that are consistent with a recognizable pattern of similar violations across multiple facilities in the previous five years. In addition, the regulated entity should not have been subject to more than two enforcement actions in the previous three years.

- *The violation is not an excluded violation*. Examples of excluded violations are: those resulting in serious, actual harm to the human health and the environment; those that may have presented an imminent and substantial endangerment to human health or the

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

environment; those that are violations of enforcement actions; and those that are not asserted in good faith.

- *The regulated entity cooperates fully in the documentation, disclosure, and correction of the violations.*

If a regulated entity meets all criteria except "systematic discovery" (the first criterion listed above), DEQ should exercise enforcement discretion and forego collection of **75%** of the **gravity**[8] portion of an administrative or civil penalty.

C. PROCEDURE

1. Privilege from Disclosure of Documents or Information

A person or entity asserting a voluntary environmental assessment privilege has the burden of proving a *prima facie* case as to the privilege. If DEQ seeks disclosure of a document or information, it has the burden of proving the applicability of an exception to the voluntary environmental assessment privilege. Va. Code § 10.1-1198(C) contains detailed procedures for asserting and contesting a claim of privilege against the production of documents. If a facility owner or operator asserts the privilege, RO staff should contact DEQ Central Office (CO) enforcement staff for assistance. Note that owners or operators waive the privilege as to any information they disclose voluntarily.[9]

2. Immunity or Enforcement Discretion for Administrative or Civil Penalties

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

Regional Office evaluation. In reviewing the submitted information, the Region should consult with CO enforcement. If the facility is a VEEP participant, the Region should also consult with VEEP staff. The RO should also notify the appropriate CO Division if one of programs operated primarily from CO is impacted. An evaluation of and recommendation on the request should then be made by RO staff to the Regional Director by means of an Enforcement Recommendation and Plan (ERP). The ERP should also include an evaluation of the sufficiency of the corrective action measures taken and/or proposed, a recommendation whether part of the penalty should be collected (presuming enforcement discretion criteria are met, but not immunity criteria), and a recommendation whether an enforcement order is appropriate to ensure correction

[8] See footnote 6.

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

is completed. In no event should any DEQ staff acknowledge immunity or pledge enforcement discretion on penalties until corrective action is completed or substantially underway.

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

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

Consultation with Division of Enforcement. This guidance is summary in nature. Staff should consult with CO enforcement staff if they receive an assertion of privilege or a request for immunity or enforcement discretion regarding a voluntary environmental assessment or environmental audit.

II. SUPPLEMENTAL ENVIRONMENTAL PROJECTS (SEPs)

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

There is no presumption in favor of or against including a SEP in a given settlement. The RP must consent to and propose the SEP. DEQ's decision to agree or not agree to a SEP is wholly discretionary and not subject to appeal.[10] The benefits to human health and the environment should clearly outweigh the amount of the civil charges mitigated by the SEP and the resource costs to DEQ in reviewing the SEP Proposal and documenting its performance. Since neither DEQ nor the citizen boards are obligated to settle a case, they are not obligated to agree to a SEP as a partial settlement of civil charge liability. Still, SEPs are provided for by statute, and it is appropriate to incorporate SEPs into settlements, in accordance with statute and guidance, where they are beneficial.

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

DEQ staff uses this guidance in evaluating proposals to include SEPs in administrative or judicial orders.[11] DEQ staff also uses this guidance to calculate the resulting mitigation of civil charges and to review and document the performance of the SEP.[12]

A. STATUTORY DEFINITION AND REQUIREMENTS

Va. Code § 10.1-1186.2 provides authority to include SEPs in administrative and judicial orders.[13] A consent order with a SEP must be entered "with the consent of the person subject to the order."[14] The Va. Code defines a SEP as, "an environmentally beneficial project undertaken as partial settlement of a civil enforcement action and not otherwise required by law".[15]

The Va. Code requires that SEPs have a "reasonable geographic nexus to the violation or, if no such project is available, shall advance at least one of the declared objectives of the environmental law or regulation that is the basis of the enforcement action."[16] The elements of the SEP definition and the requirement for nexus are discussed in Section C, below.

The Code also provides that the following categories of projects may qualify as SEPs, if they meet all other requirements: public health, pollution prevention, pollution reduction, environmental restoration and protection, environmental compliance promotion, and emergency planning and preparedness.[17] The categories of projects that may qualify as SEPs are discussed in Section D, below.

In determining the appropriateness and value of a proposed SEP, the statute requires consideration of all of the following factors: net project costs, benefits to the public or the environment, innovation, impact on minority or low income populations, multimedia impact, and pollution prevention.[18] Statutory factors for evaluating SEP proposals are discussed in Section E, below.

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[11] For purposes of this guidance, the term "judicial order" includes a judicial consent decree.

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

[13] The authority extends to orders of the Director or any of the three citizens' boards - the State Air Pollution Control Board, the State Water Control Board, or the Virginia Waste Management Board.

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

[15] Va. Code § 10.1-1186.2(A).

[16] Va. Code § 10.1-1186.2(B).

[17] Va. Code § 10.1-1186.2(C).

[18] Va. Code § 10.1-1186.2(C).

Any decision whether or not to agree to a proposed SEP is within the sole discretion of the applicable board, the Director, or the court, and is not subject to appeal.[19] Once a SEP is incorporated into an order, performance of the SEP is "enforceable in the same manner as any other provision of the order."[20]

B. COORDINATION WITHIN AND OUTSIDE DEQ; USING THIS GUIDANCE

Once a civil charge amount has been negotiated, it is the responsibility of the party subject to the order, if it so chooses, to submit a complete SEP proposal in an expeditious manner, so that the proposal can be fully considered as part of the settlement process. In no event should a SEP proposal be allowed to slow or unduly burden the settlement process. Informal communications concerning possible SEPs may begin early in the settlement process. When a SEP is proposed that has a reasonable expectation of meeting the statutory requirements, RO enforcement staff should consult with staff from CO. If the SEP is proposed by a RP participating in the VEEP, or if the SEP is a pollution prevention (P2) project, staff should also consult with the Office of Pollution Prevention to ensure that the proposal is appropriately categorized as P2 and/or is not otherwise required in an existing VEEP agreement. If the proposed SEP is intended to restore impaired waters, staff should consult with staff in the Total Maximum Daily Load (TMDL) Program to confirm that the SEP appropriately addresses the pollutant(s) of concern. Staff may consult with specialists in any RO, the CO, or federal, state, or local agencies, as needed, when evaluating a proposed SEP. If a SEP impacts more than the originating Region, the RO should send the SEP proposal to each Region that may be impacted and invite its comments prior to giving approval.

Attachment 3 is a form entitled "Analysis of Proposed Supplemental Environmental Project" (SEP Analysis Addendum) for reviewing a proposed SEP under the Virginia statutory requirements. It functions as an addendum to the Enforcement Recommendation and Plan (ERP).[21] The SEP Analysis Addendum includes a calculation of the civil charge mitigation (see Section F, below) and a recommendation by staff whether or not to approve the SEP. A RP may prepare a draft SEP Analysis Addendum and send it to DEQ electronically, but DEQ staff remain responsible for its contents, completeness and accuracy. Staff should forward the completed SEP Analysis Addendum, together with documentation of the projected net project costs, to DE for concurrence and then to RO management for approval.

C. ELEMENTS OF THE SEP DEFINITION AND NEXUS

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

[19] Va. Code § 10.1-1186.2(E).
[20] Va. Code § 10.1-1186.2(B). SEPs do not alter a party's obligation to return to compliance and remedy any violations expeditiously. Furthermore, a SEP does not reduce the stringency or timeliness of any applicable environmental statutes, regulations, orders, or permits. *See 1998 EPA SEP Policy* at page 5.
[21] *See* DEQ, *Civil Enforcement Manual – Chapter 2, General Enforcement Procedures* (Revision 2).

1. Environmentally Beneficial

"Environmentally beneficial" means a SEP should improve, protect, or reduce risks to public health and/or the environment.[22] While in some cases a SEP may provide the violator with certain benefits, there should be no doubt that the project primarily benefits the public health and/or the environment. SEPs are not intended to reward RP's for undertaking activities that are in their individual economic interest. Rather, they should demonstrate a substantial, quantifiable benefit through the amelioration of an adverse impact to public health and/or the environment.

2. As Partial Settlement of a Civil Enforcement Action

"As partial settlement of a civil enforcement action" means that the SEP is a direct and sole result of a civil settlement of an alleged violation in a consent order. In other words, the RP has not begun the project before DEQ: (1) identifies an alleged violation; (2) approves the SEP as part of the settlement of that violation; and (3) authorizes the RP to begin implementation of the SEP through the issuance of an order. DEQ should have the opportunity to review and approve, and in some cases help shape the scope of the project, before it is implemented.[23]

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

3. Not Otherwise Required by Law

"Not otherwise required by law" means the project is not required to be performed by the party to the order or by another party, under any federal, state, or local statute, regulation, ordinance, order, or permit condition.[24] In particular, the SEP cannot include actions that the party to the order or another party may be required to perform:

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

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

[22] *See 1998 EPA SEP Policy* at page 4.
[23] *Id.*
[24] *Id.*

4. Nexus

SEPs must have "a reasonable geographic nexus to the violation," except as allowed by statute.[25] Determining if a reasonable geographic nexus exists begins by evaluating the relationship between the violation and the proposed project. For geographic nexus to be reasonable, the project should benefit the "general area" in which the underlying violation occurred (*e.g.*, immediate geographic area, same river basin, same air quality control region, same planning district, same TMDL watershed, or same ecosystem, generally not to exceed 50 miles from the location of the violation without justification). All SEPs should be performed in the Commonwealth and benefit public health and the environment within the Commonwealth.

Under the Va. Code, if no project is available within the geographical area, the project may still be acceptable if it "advances at least one of the declared objectives of the environmental law or regulation that is the basis of the enforcement action". In federally authorized programs, the presence of geographic nexus alone by itself does not satisfy the nexus requirement. [26]

D. CATEGORIES OF PROJECTS THAT MAY QUALIFY AS SEPS

Va. Code § 10.1-1186.2(C) lists the categories of projects that may qualify as SEPs. A SEP must satisfy the requirements of at least one category below. The lists of examples in this section do not constitute an endorsement, recommendation, favoring, or pre-approval of any specific project or type of project.[27] A list of the types of projects that would not qualify as SEPs may be found in subsection 7, below.

1. Public Health

A public health project provides diagnostic, preventive, and/or remedial components of human healthcare that are related to the actual or potential damage to human health caused by the violation. Public health SEPs are acceptable only where the primary beneficiary of the project is the population that was harmed or put at risk by the alleged violations.[28]

Examples of potential public health projects include:

- Epidemiological data collection and analysis;
- Medical examinations of potentially affected persons;

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

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

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

[28] *See 1998 EPA SEP Policy* at page 7.

- Collection and analysis of blood/fluid/tissue samples; and
- Medical treatment and rehabilitation therapy.

2. Pollution Prevention

A pollution prevention project reduces the generation of pollution through "source reduction," *i.e.*, any practice which reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise being released into the environment, prior to recycling, treatment, or disposal.[29] Some pollution prevention projects protect natural resources through conservation or increased efficiency in the use of energy, water, or other materials. "In-process recycling" - where waste materials produced during a manufacturing process are returned directly to production as raw materials on site - may qualify as pollution prevention.

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

Examples of potential pollution prevention projects include:

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

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

[29] *Id.*

3. Pollution Reduction

If the pollutant or waste stream has already been generated or released, a pollution reduction project - which employs recycling, treatment, containment or disposal techniques - may qualify as a SEP.[30] A pollution reduction project decreases the amount and/or toxicity of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment. "Out-of-process recycling" is a pollution reduction strategy where industrial or consumer wastes are used as raw materials for off-site production, resulting in a reduction in the need for treatment, disposal or consumption of energy or natural resources. In addition, pollution reduction can be achieved by installing more effective end-of-process control or treatment technology.

Examples of potential reduction projects include:

- Installation of "polishing equipment," such as an ion-exchange unit, at the end of a facility's wastewater pretreatment system that removes the final traces of toxic elements from its effluent; and
- Installation of a wet electrostatic precipitator to capture and remove particulate matter from the exhaust stream of a process equipment stack.

4. Environmental Restoration and Protection

Environmental restoration and protection projects include those that go beyond repairing the damage caused by the violation, *i.e.*, the damage that can be corrected through injunctive relief.[31] Environmental restoration and protection SEPs may also be used for enhancing a site to "better-than-baseline" conditions. Such SEPs may be used to restore or protect natural environments (*i.e.*, ecosystems), man-made environments (*i.e.*, facilities and buildings) or endangered species.

Examples of potential environmental restoration and protection projects include:

- Remediating abandoned waste sites or brownfields areas;
- Installing or funding Best Management Practices (BMPs) such as, stream restoration, TMDLs or water quality impairments;
- Installing water lines or sewer lateral lines for private homeowners where no other party has responsibility for connecting homes;
- Protection or preservation of ground water quality, especially in Ground Water Management Areas;
- Conducting nonregulatory conservation projects;
- Conducting fish tissue studies in the watershed that was adversely affected or in a study area of statewide importance;

[30] *See 1998 EPA SEP Policy* at page 8.
[31] *See 1998 EPA SEP Policy* at page 8.

- Restoring a wetland along the same avian flyway in which the facility is located;
- Purchasing and managing a watershed area to protect a drinking water supply;
- Removing or mitigating contaminated materials at facilities or buildings, such as contaminated soils, asbestos and lead based paint, which are a continuing source of releases and/or threat to individuals; and
- Establishing conservation easements to protect in perpetuity sensitive or critical ecosystems.

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

5. Environmental Compliance Promotion

An environmental compliance promotion[32] project provides training or technical support to other members of the regulated community and/or the general public to:

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

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

Examples of potential compliance promotion projects include:

- Producing or sponsoring a seminar directly related to correcting widespread or prevalent violations within the facility's industry sector;
- Producing or sponsoring a workshop directly related to BMP implementation in watersheds with TMDL implementation plans, TMDLs or water quality impairments; and

[32] *See 1998 EPA SEP Policy* at p. 10.

- Educational programs as part of identifiable initiatives with targeted audiences and specified goals to benefit the environment, such as anti-litter campaigns, BMP benefits campaign aimed at residential and agricultural audiences near impaired waters and training for developers on low-impact development.

6. Emergency Planning and Preparedness

An emergency planning and preparedness project provides assistance to a responsible state or local emergency response or planning entity.[33] These projects enable these organizations to fulfill their obligations under the federal Emergency Planning and Community Right-to-Know Act (EPCRA) to collect information and assess the dangers of hazardous chemicals at facilities within their jurisdiction, to train emergency response personnel, and to better respond to chemical spills.[34]

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

Examples of potential emergency planning and preparedness projects include:

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

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

7. Unacceptable Projects

Unless the project also meets the requirements of one or more of the categories above, the following types of projects are not acceptable SEPs[35]:

- General educational projects with little or no discernable environmental benefit (*e.g.*, conducting tours of environmental controls at a facility, donating museum equipment, and educating the public on steps taken by industry to reduce pollution);

[33] *Id.* at 11.
[34] *See* 42 USC 116 and regulations implementing U.S. EPA, "Emergency Management Program," http://www.epa.gov/oem/lawsregs.htm. *See also* U.S. EPA, "Emergency Management," http://www.epa.gov/oem/content/epcra/.
[35] *See 1998 EPA SEP Policy* at p. 5.

- Contributions toward environmental research to a college or university that lacks a quantifiable environmental benefit and the subject of which lacks an appropriate nexus to the impacted community or ecosystem, and the underlying violation;
- Conducting a project, which, though beneficial to a community, is unrelated to a discrete advancement of environmental compliance, restoration or protection (*e.g.*, making a contribution to charity for a non-specific purpose or donating playground equipment);
- Studies (except fish tissue studies, as described above) undertaken without a commitment to implement the results and/or address specific environmental problems;
- Any project that will otherwise be performed by the Commonwealth, a local or the federal government, or that is legally required of another party;
- Any project that would be required as part of a TMDL allocation being implemented pursuant to a permit; and
- Settlements in which the facility agrees to spend a certain sum of money on a project(s) to be determined later (*i.e.*, after the Consent Order is issued).

E. DETERMINING THE APPROPRIATENESS AND VALUE OF A SEP

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

1. Net Project Costs

The party should provide an accounting of the net present after-tax cost of the SEP, including tax savings, grants, and first-year cost reductions and other efficiencies realized by virtue of project implementation.[36] If the proposed SEP is for a project for which the party will receive an identifiable tax savings (*e.g.*, tax credits for pollution control or recycling equipment), grants, or first-year operation cost reductions or other efficiencies, the value of the SEP should be reduced by those amounts. The statute provides that the costs of those portions of SEPs that are funded by state or federal low-interest loans, contracts or grants shall be deducted from the net project cost in evaluating the project.[37]

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

- The facility may submit an itemized cost statement or spreadsheet, accompanied by a certification from a Certified Public Accountant (CPA), that the cost statement represents net project costs, as described above;

[36] *See 1998 EPA SEP Policy* at p. 12.
[37] Va. Code §10.1-1186.2(C).

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

A copy of the PROJECT software and the user's manual can be downloaded from EPA's financial analysis computer models web page.[38] To employ PROJECT, the user needs reliable estimates of the costs and savings associated with the performance of a SEP. If the PROJECT model reveals that a project has a negative cost, it means that the SEP represents a positive cash flow to the party and, as a profitable project, is generally not acceptable as a SEP.

2. Benefits to the Public or the Environment

This factor evaluates the extent to which a proposed SEP will significantly and quantifiably reduce discharges of pollutants to the environment, reduce risk to the general public, provide measurable progress in protecting and restoring ecosystems (including wetlands and endangered species habitats), and/or facilitate compliance.[39] Community involvement in the development or performance of a SEP increases the benefits to the public and the RP is encouraged to incorporate public input when appropriate.

A SEP proposing a clean-up activity should be at least as beneficial to the environment as a clean-up DEQ could perform with the civil charges deposited to the Virginia Environmental Emergency Response Fund (VEERF). *See* Va. Code § 10.1-2500.

3. Innovation

This factor evaluates the extent to which a proposed SEP further develops and implements innovative processes, technologies or methods - including "technology forcing" techniques which may establish new regulatory "benchmarks" - that more effectively:[40]

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

[38] U.S. EPA. Enforcement Economic Models. The PROJECT model. http://www.epa.gov/compliance/civil/econmodels/index.html
[39] *See 1998 EPA SEP Policy* at p. 15.
[40] *Id.*

4. Impact on Minority or Low-Income Populations

This factor evaluates the extent to which a proposed SEP mitigates damage or reduces risk to minority or low-income populations that may have been disproportionately exposed to pollution or are at environmental risk.[41]

5. Multimedia Impact

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

6. Pollution Prevention

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

F. CALCULATING THE CIVIL CHARGE MITIGATION

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

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

The remainder of the calculated civil charge may be mitigated by a SEP, at the discretion of the appropriate Board or the Director.

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

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

[41] *See 1998 EPA SEP Policy* at p. 16.

G. APPROVAL OR DISAPPROVAL OF A SEP

The Va. Code provides: "Any decision whether or not to agree to a SEP is within the sole discretion of the applicable board, official, or court and shall not be subject to appeal."[42] Even though a project appears to satisfy all of the provisions of the Va. Code and this guidance, the Board, the Director or a designee may determine that a SEP is not appropriate. Without limitation, the following are examples of when a SEP may be denied:

- where the primary beneficiary of the SEP appears to be the party rather than the public;
- where the total civil charge is $10,000 or less;
- where the cost of reviewing a SEP proposal or evaluating compliance with the approved SEP may be disproportionate or excessive in comparison to the overall civil charge;
- where the benefit to human health and the environment is insignificant or the SEP will not result in substantial or sustained benefits;
- where the RP may not have the ability or reliability to complete the proposed SEP (*e.g.*, the party has demonstrated an inability or unwillingness to comply with existing requirements; or has repeated alleged violations of the same requirement);
- where the party has already proffered two SEP proposals (or one proposal and a substantial revision) which DEQ has denied.

If DEQ agrees to the SEP proposal, it is incorporated into the order (*See*, Section H, below). A template letter for use in denying a proposed SEP is found at Attachment 4.

H. INCORPORATION INTO A CONSENT ORDER

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

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

DEQ prefers that SEPs be performed by the RP subject to the order. However, if a third party performs the SEP (*e.g.*, a contribution is made to an organization to fund a specific project), the order should state that the RP remains responsible for satisfactory completion of the project, which includes its quality and timeliness. Failure to perform the SEP by the third party

[42] Va. Code § 10.1-1186.2(E).

shall trigger the obligation for the RP to pay the original civil charge sum within a required period of time. The mere transfer of funds to a third party does not discharge the RP's SEP obligation.

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

If a SEP involves performing an environmental assessment or environmental audit, the order should require the submission of the report and documenting the correction of any violations discovered as a result of the assessment or audit.[43]

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

I. ENFORCEABILITY; SEP PERFORMANCE AND COMPLETION

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

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

The RP should verify to DEQ the completion of the project and the final net project costs, along with proof of payment. The final verification may be in the form of a Certified Public Accountant certification or certification from a responsible corporate officer or owner. Once the RP has submitted its final report, the determination of whether the SEP has been satisfactorily completed is in the sole discretion of DEQ, which applies a standard of reasonableness in making its determination.

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

[43] See Part I of this chapter.

J. CASE FILES AND DATABASE DOCUMENTATION

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

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

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

Attachment 1 - Letter from Attorney General of Virginia (January 12, 1998)

COMMONWEALTH of VIRGINIA

Richard Cullen
Attorney General

Office of the Attorney General
Richmond 23219

900 East Main Street
Richmond, Virginia 23219
804 - 786 - 2071
804 - 371 - 8946 TDD

January 12, 1998

The Honorable Michael McCabe
Regional Administrator, Region III
U.S. Environmental Protection Agency
841 Chestnut Building
Philadelphia, Pennsylvania 19107

General Responses Regarding Virginia's
Environmental Assessment Privilege and Immunity Law

Dear Mr. McCabe:

We have received EPA's September 4, 1997 letter requesting information regarding whether Virginia's Environmental Assessment Privilege and Immunity Law (§§ 10.1-1198 and 10.1-1199 of the Code of Virginia ("Code")) ("Environmental Privilege/Immunity Law") deprives the Commonwealth of adequate authority to enforce various requirements of our environmental programs that have been authorized, delegated, or approved by EPA or whose authorization, delegation, or approval by EPA is pending (collectively, "Virginia's federally authorized environmental programs"). With this letter, I respond to the questions presented in the Cross-Programmatic Enclosure to that letter. As explained fully below, none of Virginia's federally authorized environmental programs are subject to the Environmental Privilege/Immunity Law.

1. Virginia's Environmental Privilege/Immunity Law

Virginia's Environmental Privilege/Immunity Law was enacted in 1995 and is found at §§ 10.1-1198 and 10.1-1199 of the Code. Section 10.1-1198 provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. Not protected by the privilege are documents or information (1) that are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent, and substantial danger to the public health or environment; or (4) that are required by law. "Document" is defined to include "field notes, records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, videotape, computer-generated or electronically recorded information, maps, charts, graphs and surveys." Any document submitted to the Commonwealth pursuant to its federally authorized environmental programs would fall within this definition. See Cross-Programmatic Enclosure, No. 3. As discussed below, however, documents (and information about the content of those documents) that are needed for civil and criminal enforcement of Virginia's federally authorized environmental programs would not be privileged.

Section 10.1-1199 provides that immunity from administrative or civil penalty, "[t]o the extent consistent with requirements imposed by federal law," may be accorded to persons making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order. As explained below, this immunity is not available in civil and criminal enforcement of Virginia's federally authorized environmental programs.

2. Non-Applicability of Environmental Privilege/Immunity Law

In general, the Environmental Privilege/Immunity Law does not limit the Commonwealth's civil and criminal enforcement authority for Virginia's federally authorized environmental programs because § 10.1-1198 precludes granting a privilege to documents required by law and any immunity accorded under § 10.1-1199 is conditioned on its being consistent with federal law.[1] As you know, in order to obtain full authorization, delegation, or approval from EPA for any of these programs, the Commonwealth is required by federal law to have full authority to enforce those programs, both civilly and criminally. As such, all aspects of Virginia's environmental laws and regulations that are necessary to implement and enforce Virginia's federally authorized environmental programs in a manner that is no less stringent than their federal counterparts are necessarily "required by law."[2]

Regarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in the manner required by federal law to maintain program delegation, authorization, or approval. As to § 10.1-1199, no immunity could be afforded from administrative, civil, or criminal penalties because granting such an immunity would not be consistent with federal law, which is one of the criteria for the immunity. Granting immunity would be inconsistent with the federal requirement to have full civil and criminal enforcement authority, which is necessary for the Commonwealth's programs to remain at least as stringent as the federal counterparts.

3. Definition of "Environmental Law"

In the definition of "environmental assessment," Code § 10.1-1198 refers to "environmental laws and regulations." As noted in the September 4 letter, "environmental laws" is not defined in § 10.1-1198. See Cross-Programmatic Enclosure, No. 1. "Environmental laws" would include statutes adopted by the Virginia General Assembly to protect Virginia's environment and the

[1]Accordingly, I will not respond to the questions set forth in Number 15 of the Cross-Programmatic Enclosure.

[2]Any other interpretation would conflict with a variety of general and specific grants of authority to state agencies to obtain federal authorizations, delegations, and approvals for implementation of environmental programs.

public, mainly in terms of air, water, and waste pollution. "Regulations" would include any and all regulations adopted pursuant to these environmental laws. In addition, "environmental laws and regulations" includes permits, consent agreements, and orders by virtue of the fact that they are issued pursuant to these statutes and regulations.

4. Criminal Violations

The Environmental Privilege/Immunity Law applies by its terms only to administrative and civil enforcement actions. Thus, it does not provide a privilege from disclosure of documents and does not authorize immunity to be accorded from prosecution from criminal violations of environmental laws, regulations, permits, or orders pertaining to any of Virginia's federally authorized environmental programs. The Commonwealth retains full enforcement authority to prosecute criminal conduct. As such, the Environmental Privilege/Immunity Law has no effect on the activities listed in Number 2 of the Cross-Programmatic Enclosure. A privilege cannot be asserted under § 10.1-1198 in any criminal investigation arising under any federally authorized, delegated, or approved environmental program for any document (and information about the content of such document) that is the product of a voluntary environmental assessment.

Moreover, as noted above, the Commonwealth retains full authority for criminal enforcement because it is a requirement of federal law that Virginia have such authority in order to obtain and maintain full authorization, delegation, or approval from EPA for any of these programs. For this additional reason, the Environmental Privilege/Immunity Law does not apply to criminal prosecutions or investigations.

5. Documents Required by Law

As noted in Number 8 of the Programmatic Enclosure to the September 4 letter, Virginia's federally authorized environmental programs contain comprehensive monitoring, recordkeeping, compliance certification, and reporting requirements. For this very reason, the phrase "documents required by law" in Code § 10.1-1198 renders the privilege provision in that statute inapplicable to these programs. Likewise, the phrase "to the extent consistent with requirements imposed by federal law" in Code § 10.1-1199 renders the immunity provisions of the statutes inapplicable to these programs.

Similarly, in response to Number 4 of the Cross-Programmatic Enclosure, Code § 10.1-1198 does not provide a privilege for documents and information required to be collected, maintained, reported, or otherwise made available to the Commonwealth by statute, regulation, ordinance, permit, order, consent agreement, settlement agreement, or otherwise as provided by law. Accordingly, the privilege in § 10.1-1198 would not apply to any documents or information relevant to noncompliance with Virginia's federally authorized environmental programs.

6. Investigations by DEQ

In response to the inquiry in Number 5 of the Cross-Programmatic Enclosure, I note that the Environmental Privilege/Immunity Law does not impede or adversely affect the Commonwealth's authority to investigate possible violations of any program requirement (including any requirement of statute, regulation, ordinance, permit, order, consent agreement, settlement agreement, or as otherwise provided by law), as well as the Commonwealth's authority to verify adequate correction of any such violations and to inspect and copy any records pertaining to compliance with program requirements for the reasons set forth in the introductory paragraphs.

7. Access of Public to Documents

The Environmental Privilege/Immunity Law does not impede the public's access to documents that are required to be collected, maintained, reported, or otherwise made available to the Commonwealth or made available directly to the public under Virginia's federally authorized environmental programs. Cross-Programmatic Enclosure, No. 6.

The Law also does not impede public access to documents and information in the Commonwealth's files, whether those documents and information are voluntarily submitted or are collected pursuant to Virginia's information gathering authorities.[3] Cross-Programmatic Enclosure, No. 7. This is true because the Environmental Privilege/Immunity Law does not alter the right of Virginia's citizens to acquire any such documents pursuant to the Virginia Freedom of Information Act ("FOIA"), Code §§ 2.1-340 *et seq.* FOIA ensures that the public has ready access to records in the custody of public officials and agencies, which would include the types of documents and information addressed here. Public access is withheld only if one of the narrowly construed FOIA exceptions or exemptions apply. There is no exception or exemption in FOIA, however, for documents and information claimed as privileged under the Environmental Privilege/Immunity Law. The public, therefore, would not be precluded access to documents and information in the possession of Virginia's information gathering authorities based upon a claim of privilege under § 10.1-1198. Further, because the Environmental Privilege/Immunity Law does not expressly retain the privilege for voluntarily disclosed documents or information, any claim of privilege for such documents or information would be waived by such voluntary disclosure.

EPA has asked about the access of moving parties to documents as contemplated in § 10.1-1198(C). As provided in that statute, in an administrative or judicial proceeding a moving party would be given limited access to documents and information claimed as privileged for the purpose of proving an exception to the privilege. That limited access is available is consistent with the last sentence of § 10.1-1198(C), which provides for restrictions on that party's use of those documents and information. Furthermore, as to § 10.1-1198, if the fact-finder in the administrative or judicial proceeding concludes that the privilege does not apply, the documents or information would be

[3] "Virginia's information gathering authorities" means any agency responsible for the administration and enforcement of Virginia's federally authorized environmental programs.

subject to production through the normal discovery process. In the administrative context, this would mean the documents and information would be subject to the provisions of Code § 9-6.14:13 of the Virginia Administrative Process Act which authorizes the fact-finder to issue subpoenas requiring testimony or the production of books, papers, and physical and other evidence.

8. Protection for Whistle Blowers

In Number 9 of the Cross-Programmatic Enclosure, EPA asks whether Code § 10.1-1198 conflicts with various federal statutory protections for employee disclosure or "whistle blowers" provided for public and private employees. The Environmental Privilege/Immunity Law has no effect on any such protections. The Law serves only to prevent the Commonwealth from compelling a person to produce a document covered by the privilege. It would not sanction an employee or other person for disclosing such a document.

9. Injunctive Relief, Civil Penalties, and Emergency Orders Regarding Harmful Activities

As noted above, documents and information that demonstrate a clear, imminent, and substantial danger to the public health or environment are not protected under the Environmental Privilege/Immunity Law. Accordingly, Virginia's ability to obtain injunctive relief, civil penalties, and emergency orders to restrain activities that are endangering or causing damage to public health or the environment would not be affected. See Cross-Programmatic Enclosure, No. 10 and No. 12. The Commonwealth would not be obstructed in the collection of evidence in such situations because the evidence, pursuant to Code § 10.1-1189, would not be protected under the Environmental Privilege/Immunity Law.

EPA has asked whether voluntary testing that indicated levels greater than regulatory limits, but not so high as to be a "clear, imminent, and substantial danger to public health or environment," would be privileged. The answer is no. As noted in the introductory section above, documents and other information – which would include results of such testing – needed for civil or criminal enforcement of one of Virginia's federal environmental programs would not be privileged because they are required by law in order for the Commonwealth to meet the federal requirement to have full civil and criminal enforcement authority at least as stringent as the federal counterparts.

10. "Federal Law" as Used in Code § 10.1-1199

The term "federal law" in Code § 10.1-1199 includes federal statutes, federal common law (as decided by federal courts and administrative tribunals), federal regulations, and the Federal Rules of Evidence, Civil Procedure, and Appellate Procedure. See Cross-Programmatic Enclosure, No. 11.

11. Citizen Suits

In Number 13 of the Cross-Programmatic Enclosure, EPA inquires whether Code § 10.1-1199 would bar civil penalty recovery by citizens pursuant to § 304 of the CAA and § 7002 of RCRA. Section 10.1-1199 would not bar citizen suits and civil penalty recovery by citizens bringing those suits because the immunity could not be used to defend against an action in federal court. That defense is available only in suits brought in Virginia state court. In addition, the immunity would not be available because § 10.1-1199 conditions the use of that immunity on it being consistent with requirements imposed by federal law. Use of the immunity to preclude the imposition of civil penalties in federal citizen suits would not be consistent with requirements of federal law.[4]

It is the Commonwealth's intention to append this letter to and incorporate it by reference in all Attorney General's statements or certifications included in applications for any program that is to be delegated, approved, or authorized by EPA. Further, we will apprise you if any changes in Virginia state law alter the conclusions of this letter. Please let me know if you have any questions about the above.

Sincerely yours,

Richard Cullen
Attorney General of Virginia

MJL\air\auditgeneral
cc: The Honorable Becky Norton Dunlop
The Honorable Robert C. Metcalf
Randolph L. Gordon
Thomas L. Hopkins

[4]Virginia law does not provide for citizen suits, so your inquiry does not apply in that context.

Attachment 2 – U.S. EPA, Statement of Principles – Effect of State Audit Immunity/Privilege Laws on Enforcement Authority for Federal Programs (February 14, 1997)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MEMORANDUM

SUBJECT: Statement of Principles
Effect of State Audit Immunity/Privilege Laws
On Enforcement Authority for Federal Programs

TO: Regional Administrators

FROM: Steven A. Herman
Assistant Administrator, OECA

Robert Perciasepe
Assistant Administrator, OW

Mary Nichols
Assistant Administrator, OAR

Timothy Fields
Acting Assistant Administrator, OSWER

Under federal law, states must have adequate authority to enforce the requirements of any federal programs they are authorized to administer. Some state audit immunity/privilege laws place restrictions on the ability of states to obtain penalties and injunctive relief for violations of federal program requirements, or to obtain information that may be needed to determine compliance status. This statement of principles reflects EPA's orientation to approving new state programs or program modifications in the face of state audit laws that restrict state enforcement and information gathering authority. While such state laws may raise questions about other federal program requirements, this statement is limited to the question of when enforcement and information gathering authority may be considered adequate for the purpose of approving or delegating programs in states with audit privilege or immunity laws.

I. Audit Immunity Laws

Federal law and regulation requires states to have authority to obtain injunctive relief, and civil and criminal penalties for any violation of program requirements. In determining whether to authorize or approve a program or program modification in a state with an audit immunity law, EPA must consider whether the state's enforcement authority meets federal program requirements. To maintain such authority while at the same time providing incentives for self-policing in appropriate circumstances, states should rely on policies rather than enact statutory immunities for any violations. However, in determining whether these requirements are met in states with laws pertaining to voluntary auditing, EPA will be particularly concerned, among other factors, with whether the state has the ability to:

1) Obtain immediate and complete injunctive relief;

2) Recover civil penalties for:

i) significant economic benefit;

ii) repeat violations and violations of judicial or administrative orders;

iii) serious harm;

iv) activities that may present imminent & substantial endangerment.

3) Obtain criminal fines/sanctions for wilful and knowing violations of federal law, and in addition for violations that result from gross negligence under the Clean Water Act.

The presumption is that each of these authorities must be present at a minimum before the state's enforcement authority may be considered adequate. However, other factors in the statute may eliminate or so narrow the scope of penalty immunity to the point where EPA's concerns are met. For example:

1) The immunity provided by the statute may be limited to minor violations and contain other restrictions that sharply limit its applicability to federal programs.

2) The statute may include explicit provisions that make it inapplicable to federal programs.

II. Audit Privilege Laws

Adequate civil and criminal enforcement authority means that the state must have the ability to obtain information needed to identify noncompliance and criminal conduct. In

determining whether to authorize or approve a program or program modification in a state with an audit privilege law, EPA expects the state to:

1) retain information gathering authority it is required to have under the specific requirements of regulations governing authorized or delegated programs;

2) avoid making the privilege applicable to criminal investigations, grand jury proceedings, and prosecutions, or exempted evidence of criminal conduct from the scope of privilege;

3) preserve the right of the public to obtain information about noncompliance, report violations and bring enforcement actions for violations of federal environmental law. For example, sanctions for whistleblowers or state laws that prevent citizens from obtaining information about noncompliance to which they are entitled under federal law appear to be inconsistent with this requirement.

III. Applicability of Principles

It is important for EPA to clearly communicate its position to states and to interpret the requirements for enforcement authority consistently. Accordingly, these principles will be applied in reviewing whether enforcement authority is adequate under the following programs:

1) National Pollutant Discharge Elimination System (NPDES), Pretreatment and Wetlands programs under the Clean Water Act;

2) Public Water Supply Systems and Underground Injection Control programs under the Safe Drinking Water Act;

3) Hazardous Waste (Subtitle C) and Underground Storage Tank (Subtitle I) programs under the Resource Conservation Recovery Act;

4) Title V, New Source Performance Standards, National Emission Standards for Hazardous Air Pollutants, and New Source Review Programs under the Clean Air Act.

These principles are subject to three important qualifications:

1) While these principles will be consistently applied in reviewing state enforcement authority under federal programs, state laws vary in their detail. It will be important to scrutinize the provisions of such statutes closely in determining whether enforcement authority is provided.

2) Many provisions of state law may be ambiguous, and it will generally be important to obtain an opinion from the state Attorney General regarding the meaning of the state law

and the effect of the state's law on its enforcement authority as it is outlined in these principles. Depending on its conclusions, EPA may determine that the Attorney General's opinion is sufficient to establish that the state has the required enforcement authority.

3) These principles are broadly applicable to the requirements for penalty and information gathering authority for each of the programs cited above. To the extent that different or more specific requirements for enforcement authority may be found in federal law or regulations, EPA will take these into account in conducting its review of state programs. In addition, this memorandum does not address other issues that could be raised by state audit laws, such as the scope of public participation or the availability to the public of information within the state's possession.

IV. Next Steps

Regional offices should, in consultation with OECA and national program offices, develop a state-by-state plan to work with states to remedy any problems identified pursuant to application of these principles. As a first step, regions should contact state attorneys general for an opinion regarding the effect of any audit privilege or immunity law on enforcement authority as discussed in these principles.

Attachment 3 - Analysis of Proposed Supplemental Environmental Project

Va. Code § 10.1-1186.2

Source/Facility/Regulated Party

Project Description:

1. Explain in detail how the project is environmentally beneficial and, if possible, provide a quantifiable measure of the benefit (*e.g.*, pounds of nutrient and/or emission reduction):

2. A SEP may only be a partial settlement: show what initial civil charge was computed, along with the appropriate SEP amount and final civil charge figure:

Civil Charge/Penalty without a SEP	$_____
Minimum Payment Amount with a SEP (see Section II(F))	$_____
Projected Net Project Costs (see No. 6, below)	$_____
SEP Mitigation Amount	$_____
Final Monetary Civil Charge/Penalty	$_____

3. Explain how the SEP is not otherwise required by law and is solely the result of the settlement of an alleged violation:

4. Is there reasonable geographic nexus? If YES, explain:

   If NO, then does the SEP advance one of the declared objectives of the law or regulation that is the basis of the enforcement action (always preferred)? Explain:

5. Check all the qualifying categories that may apply (at least one must be checked):

☐ Public Health	☐ Environmental Restoration and Protection
☐ Pollution Prevention	☐ Environmental Compliance Promotion
☐ Pollution Reduction	☐ Emergency Planning and Preparedness

6. Does the SEP require a significant amount of DEQ management, resource investment or evaluation such that DEQ is unable to provide active oversight?

7. Does the proposed SEP require a significant amount of DEQ time and resources for negotiation, administration, SEP oversight or other management activities in comparison to the value of the SEP?

8. Does the Responsible Party have the ability or reliability to complete the proposed SEP and demonstrated an ability or willingness to comply with existing requirements?

9. Each of the following factors MUST be considered. Respond to each:

   o Net Project Costs (zero out all State or Federal government loans, grants and tax credits for project) (net cash flow to party should not be positive). Explain:

   o Benefits to the Public or the Environment (should exceed VEERF value; include any Community Involvement). Explain:

   o Innovation. Explain:

   o Impact on Minority or Low-Income Populations. Explain:

   o Multimedia Impact. Explain:

   o Pollution Prevention. Explain:

☐ Division of Enforcement, Other RO, Program – Concurrence/Consultation

Recommended/Not Recommended _____
(DEQ Regional Staff)

SEP Approved/Disapproved _____
(Subject to Execution of the Order) (DEQ Regional Director)

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Attachment 4 – Letter Declining a SEP Proposal

[date]

[RP Contact] [Title]
[RP Name]
[RP Address]
[City, State, Zip Code]

Re: Proposed SEP
[Facility or Source, and Permit or Facility Number]

Dear **[RP Contact]**:

The Department has reviewed the proposal for a Supplemental Environmental Project (SEP) offered by **[RP]** on **[date]**, pertaining to **[general nature of SEP proposal]**. Under Va. Code § 10.1-1186.2, a SEP is "an environmentally beneficial project undertaken as partial settlement of a civil enforcement action and not otherwise required by law." The **[RP]** has proposed **[short summary of SEP, if needed]**.

It is our desire to return **[RP]** to compliance as quickly and straightforwardly as possible. Based on the facts and circumstances of this case, however, the Department does not agree to the proposed SEP. **[If appropriate, short statement of reasons for not agreeing with the proposal.]** Under the Code section cited above, "Any decision whether or not to agree to a supplemental environmental project is within the sole discretion of the applicable board, official or court and shall not be subject to appeal."

If you have any questions about this letter, please contact **[DEQ Contact]**, **[Title]**, at **[(xxx) xxx-xxxx]** or **[Contact.Name]**@deq.virginia.gov.

Sincerely,

[Regional Director] or
[Regional Enforcement Mgr.] or
[Regional Enforcement Rep.]

Cc: Case File
[DEQ Contact]