


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

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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.

## CHAPTER 4 CIVIL CHARGES AND CIVIL PENALTIES

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## Introduction<sup>1</sup>

This chapter sets out the specific methods and criteria used by DEQ to calculate civil charges and civil penalties<sup>2</sup> 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.<sup>3</sup> This chapter does not address civil charges and civil penalties assessed in the “Air Check Virginia” Program, which is addressed by separate guidance.

In order to provide fair and equitable treatment of regulated communities, civil charges and civil penalties should be consistent across the Commonwealth based on specific procedures and calculation methodology. The civil charge or civil penalty calculations in this guidance include an amount reflecting the gravity of the violation (the “gravity component”) and the economic benefit of noncompliance.

The Virginia Code requires the development of guidelines and procedures that contain specific criteria for calculating the appropriate civil charge for each violation based on the following factors:<sup>4</sup>

- The severity of the violation(s);<sup>5</sup>
- The extent of any potential or actual environmental harm;
- The compliance history of the facility or person;
- Any economic benefit realized from the noncompliance; and
- The ability to pay the civil charge.

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<sup>1</sup> Guidance documents set forth presumptive operating procedures. *See* Va. Code §§ 2.2-4001 [and 2.2-4101](#). 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.

<sup>2</sup> The Virginia Code does not define the terms “civil charges” or “civil penalties.” Generally, civil charges are assessed with the consent of the responsible party while civil penalties are assessed in adversarial administrative or judicial actions. The terms “civil charge” and “civil penalty” are hereinafter referred to collectively as “civil charge” for brevity and to make use of the most appropriate term.

<sup>3</sup> In accordance with Va. Code § 10.1-1186(9) an informal fact finding proceeding held in accordance with Va. Code § 2.2-4019 may result in the issuance of a special order. “Special Order means an administrative order issued to any party that has a stated duration of not more than twelve months and that may include a civil penalty of not more than \$10,000.” *See*, Va. Code § 10.1-1182. A formal hearing can require a Responsible Party to pay civil penalties of up to \$32,500 for each violation, not to exceed \$100,000 per special order. *See*, VA Code § 62.1-44.15 (8a).

<sup>4</sup> Va. Code §§ 10.1-1316(D) (Air), 10.1-1455(L) (Waste), and 62.1-44.15(8a), (8e) and (8g) (Water). *See* Va. Code § 10.1-1197.9(C)(4) (Renewable Energy). Separate statutory factors are set out for violations of Article 11 of the State Water Control Law. Va. Code § 62.1-44.34:20(D).

<sup>5</sup> In this chapter, the use of the term “violation” prior to a case decision by DEQ means an “alleged violation.” DEQ makes case decisions in accordance with the Administrative Process Act, Va. Code § 2.2-4000, *et seq.* (APA).

## Consent Orders with Civil Charges

Unless a violation results in a substantial violation warranting a departure from these procedures, DEQ assesses civil charges using the appropriate Civil Charge Worksheet (Worksheet). In calculating the civil charge, staff first identifies the appropriate “Potential for Harm” classification and then works through the various categories on the Worksheet to calculate a Gravity Subtotal. The Worksheet Total may also be adjusted for appropriate reasons by providing a reasoned analysis on the Civil Charge Adjustment Form. Both the Worksheet and the Adjustment Form are part of the Enforcement Recommendation and Plan (ERP).

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

- Failure to adequately respond to compliance assistance efforts;
- Violation of a consent order or consent special order without mitigating circumstances;
- Violations that are avoidable or due to negligence;
- Violations of a fundamental requirement of the regulatory program (e.g. statutory or regulatory requirements, permit conditions);
- Noncompliance that is continuing or likely to recur absent a civil charge to serve as deterrence;
- Knowing or willful violations;<sup>6</sup> or
- Violations resulting in actual harm to human health or the environment.
- Violations that are HPV or SNC<sup>7</sup>.

## Potential for Harm Classification

Using staff’s professional judgement, staff will place violations into one of three “Potential for Harm” classifications, including “Serious,” “Moderate,” or “Marginal”, that are listed near the top of each Worksheet. Staff classify the violations, in part, based on: (1) the severity of the violation, and (2) the extent of any potential or actual harm.

- **Severity of the violation:** This consideration examines whether the violation(s) or pattern of violations at issue are fundamental to the integrity of the regulatory program and DEQ’s ability to monitor and protect human health and the environment.
- **Potential or actual Harm:** Harm evaluations consider the potential harm as well as the actual effect the violation has on human health or the environment.<sup>8</sup>

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<sup>6</sup> Evidence of a deliberate act may be grounds for referral for criminal investigation.

<sup>7</sup> For VPDES programs, consent orders without civil charges are typically not available for major facilities. For non-major SNCs, a no penalty consent order may be available if the facility’s non-compliance is addressed timely and there is a durable return to compliance.

<sup>8</sup>For example, the potential or actual harm to the environment is related to the potential to emit or discharge and/or the toxicity and volume of a pollutant.

## Serious Classification

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

## Moderate Classification

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

## Marginal Classification

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

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

## Statutory Factors

### *Compliance History Category<sup>9</sup>*

Staff evaluates the Responsible Party's history of noncompliance to determine if an increase to a civil charge is warranted. This factor is not used to reduce a civil charge when a Responsible Party has a history of compliance. When a Responsible Party has previously violated an environmental standard at the same or different source or facility, it is usually clear evidence that the Responsible Party was not deterred by DEQ's previous enforcement response. In calculating the adjustment factor for compliance history, staff considers:<sup>10</sup>

- a. Administrative or judicial orders/decrees in any other media program within 36 months of issuance of an initial Notice of Violation (NOV) that is also the subject of the current enforcement action (5% of the current gravity-based civil charge/civil penalty or \$5,000, whichever is less); and

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<sup>9</sup> This criterion relates to the statutory factor of compliance history.

<sup>10</sup> Because a Remedy Consent Order action is founded on noncompliance with the Remedy Consent Order itself, the Compliance History factor is usually limited to prior Remedy Consent Order non-compliance, but is not limited to 36 months, since Remedy Consent Orders can be effective over many years.

- b. Administrative or judicial orders/decrees in the same media program within 36 months of issuance of an initial NOV that is also the subject of the current enforcement action (0.5 factor).
  - c. An administrative or judicial order/decreed with an effective date outside of the 36 months counts towards this multiplier if it is still in effective during the 36 month window. If there has been more than one enforcement action in the past 36 months, staff consider whether it is appropriate to depart from the civil charge/civil penalty worksheet, as described in the Introduction.

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

The following steps are taken to calculate a compliance history charge:

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

#### *Degree of Culpability*

DEQ staff assesses a Responsible Party's culpability based on the facts and circumstances of the case and may add a multiplying factor to the amounts for one, a subset, or all violations, depending on the assessment. Enforcement Staff rate the Responsible Party's culpability as low (0%), moderate (25%), serious (50%), or high (100%) based on the one or more of the factors listed below. An ERP should document consideration of relevant factors thoroughly. It is not anticipated that culpability will increase the civil charge in all cases. The evidence to establish culpability cannot be identical to that used to support an adjustment based on compliance history. If the evidence is identical, an adjustment is made for compliance history rather than culpability. In determining the degree of culpability, one or more of the following should be considered:

- a) The degree to which the Responsible Party knew or should have known of the legal requirement that was violated;
- b) The degree of control the Responsible Party had over the events constituting the violation;
- c) The foreseeability of the events constituting the violation;
- d) Whether the Responsible Party knew or should have known of the hazards associated with the conduct;
- e) Whether the Responsible Party took reasonable precautions against the events constituting the violation;
- f) Whether there is evidence of unjustified delay in preventing, mitigating or remedying the violation;



- g) Whether the Responsible Party failed to comply with a consent order, special order, judicial order, or federal consent decree;
- h) Whether there have been Notices of Violation (NOVs) in the same media program during the past 36 months preceding the initial violation that is subject of the current enforcement action. However, staff do not consider NOVs that were withdrawn or not pursued because of insufficient evidence or strategic considerations;
- i) Commonality of ownership, management, and personnel with other RPs or facilities that have been subject of enforcement actions; and
- j) The level of sophistication within the industry in dealing with compliance issues or the accessibility of appropriate control technology. This should be balanced against the technology forcing nature of the statute, where applicable.

Lack of knowledge of a legal requirement is not a basis to reduce a civil charge.

### *Economic Benefit*

Calculation and recovery of economic benefit is included in a civil charge to ensure the enforcement action removes any illegal competitive advantage and places the Responsible Party in the same financial position as they would have been if they complied on time.<sup>11</sup> A civil charge should remove any (*i.e.*, greater than *de minimis*) economic benefit of noncompliance in addition to the gravity component.<sup>12</sup> An economic benefit is gained when the Responsible Party avoids or delays costs required to comply with a legal requirement or any profits generated from an illegal competitive advantage, and is evaluated on a case-by-case basis. Staff should use professional judgment when making the preliminary determination that an economic benefit exists. When there is evidence of an economic benefit based on delayed or avoided costs, or profits from an illegal competitive advantage, staff should estimate the value of the economic benefit and include this amount in the proposed civil charge.<sup>13</sup> Staff should consult Central Office Enforcement if there are questions about how to calculate and/or assess economic benefit.

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<sup>11</sup> Illegal competitive advantage occurs when the party's noncompliant actions allow it to attain a level of revenues that would not have been obtainable otherwise, *e.g.*, selling a product using water resources in excess of permitted amounts, or draining/filling and selling wetlands without appropriate permits.

<sup>12</sup> An economic benefit may be considered *de minimis* if the amount would be considered trivial to the overall civil charge or civil penalty and the collection of which would not be a significant deterrence of future noncompliance.

<sup>13</sup> Estimation of economic benefit in the case of failure to comply with Total Nitrogen or Total Phosphorus loading limitations of the *General Permit for Total Nitrogen and Total Phosphorus Discharges and Nutrient Trading in the Chesapeake Watershed* is not necessary. Nor is it necessary to use EPA's BEN model to calculate economic benefit for this class of violations. Economic benefit should be calculated using the cost of purchasing the necessary amount of end-of-year (Class B) nutrient credits from the Nutrient Credit Exchange Association and/or (if sufficient credits would not have been available through the Exchange), compliance credits from the Water Quality Improvement Fund for the calendar year in which the violation(s) occurred. Central office DE staff should be contacted for assistance in determining the per-unit cost of the appropriate credits for relevant calendar year.

If the economic benefit is estimated to exceed \$10,000, penalty and financial models produced by the U.S. EPA should be used to calculate the economic benefit.<sup>14</sup> The U.S. EPA's models compute the economic benefits of noncompliance with legal requirements and are a method for calculating economic benefit from delayed and avoided expenditures. The models use several data variables, most of which contain default values. The required variables include information about capital and non-capital costs, annual operation and maintenance costs, and the dates for the period of noncompliance. The economic benefit should be calculated from the first date of noncompliance but generally DEQ does not go back more than five years. A Responsible Party may provide actual financial data that could affect the economic benefit calculation. When the Responsible Party will not or cannot provide financial data in a timely manner, staff may make estimates based on available resources, including staff's professional judgment.<sup>15</sup> Finally, penalty and financial models other than those used by the U.S. EPA may be used to calculate economic benefit of noncompliance, where staff concludes that an alternative method provides more meaningful results.

A necessary first step when making a preliminary determination of an economic benefit is understanding the costs delayed or avoided through noncompliance. Delayed costs can include capital investments in pollution control equipment, remediation of environmental damages (*e.g.*, removing unpermitted fill material and restoring wetlands), or one-time expenditures required to comply with environmental regulations (*e.g.*, establishing a reporting system, or purchasing land on which to site a wastewater treatment facility). Avoided costs typically include operation and maintenance costs and/or other annually recurring costs (*e.g.*, off-site disposal of fluids from injection wells), but can occasionally include capital investments or one-time expenditures. Generally, enforcement staff can look at what actions the Responsible Party does (or will do) to achieve compliance when trying to determine what the Responsible Party should have installed or done to prevent the violations at issue in the enforcement action.

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

- Sampling and analytical costs for groundwater and gas monitoring;
- Disposing of hazardous or universal wastes at a sanitary landfill as opposed to at a permitted disposal facility. The avoided cost would be the difference in the cost of disposal at the landfill compared to disposal at a permitted hazardous waste disposal facility;

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<sup>14</sup>U.S. EPA. Penalty and Financial Models. Five models currently are available: BEN (calculates a violator's economic benefit of noncompliance from delaying or avoiding pollution control expenditures), ABEL (evaluates a corporation's or partnership's ability to afford compliance costs, cleanup costs or civil penalties), INDIPAY (Evaluates an individual's ability to afford compliance costs, cleanup costs or civil penalties), MUNIPAY (evaluates a municipality's or regional utility's ability to afford compliance costs, cleanup costs or civil penalties), PROJECT (Calculates the real cost to a Responsible Party of a proposed supplemental environmental project).

<sup>15</sup> Staff may use the following in exercising their judgment: For delayed compliance, 6% per year of the delayed one-time capital costs for the period from the date the violation began until the date compliance was or is expected to be achieved; for avoided costs, the expenses avoided until the date compliance is achieved, plus 6% per year. *See* Va. Code § 6.2-301. Should Va. Code § 6.2-301 be amended, this figure should change accordingly.

- Disconnecting or failing to properly operate and maintain existing pollution control equipment; failure to employ a sufficient number of staff; failure to adequately train staff; failure to establish or follow precautionary methods required by regulations or permits; removal of pollution equipment resulting in process, operational, or maintenance savings; disconnecting or failing to properly operate and maintain required monitoring equipment; and operation and maintenance of equipment that the party failed to install;
- Monitoring and reporting (including costs of the sampling and proper laboratory analysis);
- Permit fees, permit maintenance fees, or annual emissions fees; and
- Operation and maintenance expenses (*e.g.*, labor, power, chemicals) and other annual expenses.

Examples of delayed costs include, but are not limited to:<sup>16</sup>

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

While the BEN model may be appropriate for avoided and delayed costs, the BEN model often fails to capture adequately the illegal competitive advantage that may arise from violations. It may be necessary to use other standard accounting practices to determine the level of revenues that

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<sup>16</sup>In VPDES cases, especially municipal VPDES cases, it can be difficult to determine a clear “start date” for calculating the delayed costs of noncompliance. It is not unusual for Responsible Parties to need significant time to evaluate biological processes and/or infrastructure needs before settlement terms can be finalized. Issues like government appropriations, land availability, public participation and other facts not wholly within the control of a permittee can reasonably delay compliance. Finally, it is not unusual that savings that might have been realized from delayed costs are overtaken and surpassed by the increased construction costs resulting from delayed construction. Therefore, the calculation of the delayed costs of noncompliance should be commenced at such time as a VPDES Responsible Party fails or ceases to make a timely, diligent, and good faith effort to comply, while doing all it can to assure high quality treatment.

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

Once the economic benefit is calculated, DEQ is open to discussing the economic benefit with the Responsible Party and reviewing any documentation the Responsible Party may have that demonstrates a different economic benefit.

### *Ability to Pay*

Ability to pay is one of the five statutory factors. In general, DEQ can reduce a civil charge where a Responsible Party demonstrates an inability to pay. At the same time, it is important that the regulated community not perceive the violation of environmental requirements as cost savings for financially-troubled businesses, and DEQ will, in appropriate circumstances, continue to seek civil charges where a business has failed to allocate environmental compliance costs to their business operations. It is also unlikely that DEQ would reduce a civil charge where a Responsible Party refuses to correct a serious potential for harm, a party has a history of noncompliance, or the violations are particularly egregious. A Responsible Party must claim and provide sufficient documentation of an inability to pay before a consent order or consent special order has been executed. A civil charge cannot be reduced based on a claim of inability to pay once a case decision has been issued. Should a Responsible Party fail to make timely payment of a civil charge, DEQ's Office of Financial Management may negotiate delinquent accounts in accordance with the Commonwealth Accounting Policies and Procedures (CAPP) Manual.

The burden to demonstrate an inability to pay rests on the Responsible Party. In order to evaluate a Responsible Party's ability to pay, the Responsible Party must provide sufficient information to the Office of Financial Responsibility to calculate a potential ability to pay using U.S. EPA computer models that include ABEL, INDIPAY, or MUNIPAY. Failure of the Responsible Party to provide sufficient information to run these models may result in a determination that the Responsible Party has the ability to pay the total civil charge, a portion of the total assessed civil charge, or is able to make payments. In the event a Responsible Party claims an inability to pay, staff are encouraged to consult with the Office of Financial Responsibility early in the discussion, and to advise the Responsible Party that qualification requires a records disclosure and a close evaluation of their financial condition.

The Office of Financial Responsibility provides an evaluation to enforcement staff concerning a Responsible Party's ability to pay. The information may also be used to determine if a Responsible Party would be prevented from carrying out essential corrective action measures in the event a civil charge is not reduced. Where an inability to pay has been demonstrated, staff should consider the following options:

- Installment payment plan (at least quarterly payments for up to three years);

- Delayed payment schedule; and
- Reduction, up to the full amount of the civil charge, excluding economic benefit and/or the illegal competitive advantage, based on ability to pay modeling.

In its consent orders, DEQ does not suspend civil charges, and cannot charge interest as part of a payment plan. Regardless of a determination of an inability to pay a civil charge, a Responsible Party is required to comply with applicable laws, regulations, orders, permit conditions, and any corrective action to resolve the enforcement action. DEQ’s determination about an ability to pay a civil charge does not forgo the goal to collect any economic benefit or illegal competitive advantage realized from the noncompliance.<sup>17</sup>

## **Adjustments in the Enforcement Recommendation and Plan**

### *Civil Charge Reductions up to 30%*

DEQ may adjust the gravity component of a civil charge – excluding the economic benefit calculation – downward by up to 30% based on several factors where there are clearly documented, case-specific facts that support the adjustment, as provided in this section.<sup>18</sup>

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

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<sup>17</sup> The General Assembly stated in 1997 Acts c. 924, paragraph L.4: “It is the intent of the General Assembly that the [DEQ] recover the economic benefit of noncompliance in the negotiation and assessment of civil charges and penalties in every case in which there is an economic benefit from noncompliance, and the economic benefit can be reasonably calculated.”

<sup>18</sup> Va. Code § 10.1-1316(B) requires courts, in assessing judicial civil penalties, to consider “in addition to such other factors as [they] may deem appropriate, the size of the owner's business, the severity of the economic impact of the penalty on the business, and the seriousness of the violation.” Although not directly applicable to administrative actions, these considerations may be used to determine whether a downward adjustment is appropriate in the ERP, and if so, the amount of the adjustment.

The sophistication of the Responsible Party is also relevant in the case of a small business.

To provide a disincentive for any unreasonable delay, the civil charge reduction available to the Responsible Party should be reduced beginning 30 days after the draft consent order has been issued to the Responsible Party and continue to be reduced as unreasonable delays continue.

#### *Civil Charge Reductions of More Than 30%*

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

- **Problems of Proof:** Challenges with proving the elements of a violation may be due to inadequate information, conflicting evidence, witness availability or contributory activity by DEQ. In many cases, problems of proof are considered as part of the Litigation Potential, but may also be considered independently.
- **Actual or potential harm (or Lack Thereof) to Human Health or the Environment:** The actual or potential harm to human health or environment should be considered in conjunction with other strategic considerations. A thorough and reasoned analysis should be provided for reducing a gravity component of the civil charge beyond 30% when considering the potential for harm. The evaluation should include a broad assessment of the potential or actual harm to human health or the environment in all media regardless of whether or not there is a legal requirement.
- **The Precedential Value of the Case:** Resolution of certain cases may establish a valued endorsement of an agency program, regulatory or enforcement initiative. A reduction to the proposed civil charge or civil penalty may be appropriate to obtain such a precedent.
- **Probability of Meaningful Recovery of a Civil Charge:** In certain cases, information available to DEQ indicates that recovery of a meaningful civil charge is not possible, e.g. an inability to pay.
- **Litigation Potential.** Through negotiations it may become apparent that the case is destined for litigation based solely on factors not relevant to environmental protection.

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

## Consent Orders with a Maximum Penalty Allowed by Law

DEQ may depart from the recommended calculations in this guidance to seek civil charges up to the maximum sums permitted by law where the interests of equity, deterrence, and justice require. While uncommon, such departure is appropriate in egregious cases of noncompliance such as, but not limited to:

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

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

Civil charges cannot exceed the statutory maximum, usually \$32,500 per day for each violation. Certain statutes set out other maximum civil charges, especially for specific programs under the State Water Control Law.<sup>19</sup>

### Consent Orders without Civil Charges

A civil charge is not appropriate in every case. The Virginia Code grants immunity from civil charges for certain voluntarily disclosed violations.<sup>20</sup> DEQ exercises its enforcement discretion to mitigate most or all of the gravity portion of a civil charge for violations that are discovered

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<sup>19</sup> Va. Code § 62.1-44.34:20(C) also establishes minimum civil charges for certain violations involving the discharge of oil. Va. Code § 62.1-44.15(8f) establishes maximum civil charges for sanitary sewer overflows (“SSOs”) in consent orders requiring SSO corrective action. If this guidance does not specifically reference a statute authorizing a civil charge, such charge may be calculated using the five statutory factors. Va. Code § 62.1-270 indicates a civil charge shall not exceed \$25,000 for each violation of the Ground Water Management Act of 1992. Va. Code § 62.1-44.15(8g) establishes a civil charge shall not exceed \$50,000 per violation for natural gas transmission pipelines greater than 36 inches inside diameter in special orders issued following a special procedure.

<sup>20</sup> Va. Code §§ 10.1-1199, -1233. *See*, Chapter 5.

pursuant to an Environmental Assessment<sup>21</sup> and that are promptly self-reported and corrected.<sup>22</sup> Finally, the civil charge amount may be partially mitigated by a Supplemental Environmental Project.<sup>23</sup>

Initially, staff establish whether the violation warrants a civil charge.<sup>24</sup> Some enforcement actions may present facts and circumstances where no civil charge is appropriate.

The following criteria may qualify for a consent order without civil charges:

- The extent of the actual or potential harm results in little to no harm to the environment or the regulatory program;
- The Responsible Party is not in chronic noncompliance and has demonstrated a good-faith effort to comply;
- Municipal VPDES (major or minor) upgrade or expansion or collection system correction delayed due to the inability to secure funding;
- Interim limits needed pending connection to a municipal wastewater treatment system or a larger regional wastewater treatment system;
- Minor VPDES permittees, such as trailer courts operating lagoons or other antiquated systems, which will eventually be shut down or be connected to a municipal sewer system pursuant to a schedule of compliance.

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

## **Air Program**

State Air Pollution Control Law (Air Law) at Va. Code § 10.1-1316(C) provides for negotiated civil charges in consent orders for violations of the Air Law, regulations, orders, or permit conditions. A civil penalty cannot exceed \$32,500 for each violation. Each day of violation constitutes a separate offense.

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<sup>21</sup> "Environmental assessment" means 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. An environmental assessment may be conducted by the owner or operator of a facility or an independent contractor at the request of the owner or operator.

<sup>22</sup> Voluntary disclosure and reporting do not include mandatory monitoring, sampling, or auditing procedures required by laws, regulations, permits, or enforcement actions. *See*, Chapter 5.

<sup>23</sup> Va. Code § 10.1-1186.2. *See* Chapter 5.

<sup>24</sup> No civil charge can be assessed if a statute grants the party immunity from civil charges, provided all requirements have been met. *See*, Va. Code §§ 10.1-1199, -1233. Civil charges may be mitigated by voluntary reporting and correction or by a SEP. *See*, Chapter 5.



Virginia DEQ classifies air pollution sources as True Minor (TM), Synthetic Minor (SM), 80% Synthetic Minor (SM-80) or Major sources (includes Title V, Prevention of Significant Deterioration (PSD) and state major sources). Sources classified as true minors do not have the potential to emit pollutants at major source levels. Synthetic minor sources have a potential to emit pollution at major source levels, but have accepted federally enforceable limits to operations keeping emissions below the major source threshold. 80% Synthetic Minor are a subcategory of synthetic minor sources that have operational limits that place them within 80-99.9% of major source threshold.

Major sources emit pollutants at levels above major source thresholds. These thresholds may differ by pollutant and geographic area; and a facility may be considered major for only some pollutants. Refer to the general tab in the CEDS Air module for the overall classification for a facility subject to enforcement and the specific source classification by pollutant contained in the table.

### **Potential for Harm Examples**

DEQ staff assess the potential for harm for each violation based on the classifications below; these classifications are not used to determine whether a violation warrants formal enforcement. Departures from the examples listed below should be discussed with a Central Office enforcement manager and documented in the Enforcement Recommendation and Plan.

#### *Serious Classification*

Examples include, but are not limited to:

- Emissions violations at a major source involving a pollutant for which that source is major;
- Violations which cause a documented potential for exceedance of a National Ambient Air Quality Standard (NAAQS);
- Not maintaining control equipment or failure to use control equipment, for a regulated pollutant for which the source is major, in a manner consistent with good air pollution control practices. Also applicable to SM sources where there is evidence that the failure may have caused emissions to exceed the applicable major source threshold;
- Failure to conduct emissions tests, monitor, or maintain records necessary to demonstrate compliance with standards involving a pollutant for which the source is major;
- For a SM source, failure to comply with standards critical to maintenance of that minor status or failure to maintain records sufficient to document continued minor status (applies to PSD, MACT, and Title V);
- Failure to obtain a permit prior to construction, modification, or operation of a major source or SM-80. Also applies to a major modification at these sources.
- Failure to obtain a permit prior to construction, reconstruction, or modification that triggers the requirements of 9 VAC 5-80-1605, *et seq.* or 9 VAC 5-80-2000, *et seq.*;

- Violation of a National Emission Standard for Hazardous Air Pollutants (NESHAP) or MACT standards that indicate excess emissions or substantially interfere with DEQ's ability to determine emissions compliance;
- Violation of a substantive requirement in a consent order, consent special order, or judicial decree (typically not for late reports or minor record keeping deficiencies); and
- Failure to submit a timely Title V permit application (more than 60 days late), or to timely submit a compliance certification, Excess Emissions Report, or other substantive report required by a Title V permit (more than 60 days late).

### *Moderate Classification*

Examples include, but are not limited to:

- Failure to obtain a permit prior to construction, modification or operation of a SM source.
- Emissions violations at a SM source that do not jeopardize the synthetic minor status of the source or violations at a major source involving pollutants for which the source is not considered major;
- Not maintaining control equipment or failure to use control equipment, for a pollutant, at a SM source, in a manner consistent with good air pollution control practices (unless there is evidence that the failure resulted in emissions that jeopardize the synthetic minor status of the source – in this case, the potential for harm is elevated to Serious);
- Failure to conduct emissions tests, monitor, or maintain records necessary to demonstrate compliance with standards involving a pollutant for which the source is a synthetic minor (unless there is additional evidence to indicate that the source is not in compliance with the limits that establish synthetic minor status for that pollutant); and
- Opacity violations at a source that is subject to the PSD, MACT, or Title V Programs.

### *Marginal Classification*

Examples include, but are not limited to:

- Failure to obtain a permit prior to construction, modification or operation of a true minor source.
- Not maintaining control equipment or failure to use control equipment for a pollutant at a true minor source, in a manner consistent with good air pollution control practices, unless there is evidence that the failure resulted in emissions of a pollutant at a major source level;
- Failure to conduct emissions tests, monitor or maintain records necessary to demonstrate compliance with standards involving a pollutant for which the source is a true minor source;
- Most record keeping and reporting violations including non-substantive violations at major, synthetic minor, and New Source Performance Standard (NSPS) sources (see Serious and Moderate categories for additional information on when violations at major or synthetic minor sources are not Marginal); and

- Opacity violations at a source that has been classified as either a true minor or a synthetic minor.

## **Calculating the Civil Charge**

The categories are the numbered items (Categories 1 through 10) that make up the rows of the Worksheet. These categories are used together to make up the portions of the total civil charge for a particular air violation. Each line item on the air worksheet does not necessarily constitute a separate violation. For example, the preliminary civil charge for a permit emissions limit violation may be made up of a charges on line 1c, 4a, 4c, and 5.

When using the Worksheet to address multiple violations discovered during the same compliance activity, staff calculates civil charges for each violation independently, with the exception of Category 7, and then combine them to provide the total proposed civil charge. Applicable portions of the Worksheet may be copied to accommodate multiple violations. Staff uses this procedure to determine the appropriate civil charge for each category listed and enter it on the Worksheet.

### *Statutory, Regulatory, or Permit Violation Category*

This category is general in nature and is intended to establish a minimum civil charge for all violations of statutory, regulatory, or permit requirements. Generally speaking, every air case will include a civil charge in line 1 as the base charge for a violation - this charge is in addition to any which may apply under the other categories of the Worksheet for the same violation with the exception of Category 2. If the source is being assessed for violation of a substantive PSD, NESHAP, MACT, NSPS, or Title V requirement, the applicable charges in Category 1 are doubled due to the risk to public health and the environment. Substantive PSD, NESHAP, MACT, NSPS, or Title V requirements may include emissions limits, testing requirements, and reporting requirements.

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

### *Order Violation Category*

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

### *Pollution Control Equipment Violation Category*

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

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

- Failure to install air pollution control equipment specifically required by permit, order, or regulation, or removal of such equipment;
- Failure to install equipment necessary to meet BACT, RACT, LAER, Best Achievable Retrofit Technology (BART), or similar mandatory control technology requirements (in situations of construction/ modification/reconstruction without a permit) as may be determined through the permit review process; or
- Failure to install pollution control equipment capable of meeting emissions limits established by permit, order, or regulations where installation of control equipment is required by a permit, regulation, consent or administrative order, consent decree, or court order.

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

### *Emissions, Reporting/Monitoring, and Toxics Violations Category*

- Emissions violations: In Category 4, DEQ assesses a charge for documented violations of emissions standards in addition to charges applied in Subcategory 1.c, 2, or 3. A Category 4 emissions charge applies to the percent over a standard established by state or federal statutes, regulations, permits, or orders (including throughput and production limits). If a charge is assessed in Category 4, then a charge is also assessed in Category 5.
- To calculate the appropriate charge for an emissions violation, staff enter the emissions limit or standard and the observed value in the Data column of the Worksheet. Then staff

calculate the “% over limit” and insert the percentage in the Data column.<sup>25</sup> Staff select the charge from the appropriate Potential for Harm column and transfer to the Amount column of the Worksheet.

- For example, assume a source has a permitted limit of 422 tons per year for volatile organic compounds (VOCs), calculated as the sum of a consecutive 12-month period. Records demonstrate that the facility had actual emissions of 519 tons of VOCs for a 12-month rolling period. Assume the violation is classified as “Serious.” The charge for the emissions violation is calculated as follows:
  - Subtract the permitted limit of 422 tons from the observed VOC emissions of 519 tons. Divide the difference by the permit limit of 422 and multiply by 100 to obtain the “% over limit,” in this case, 23%.  $((519-422)/422) \times 100 = 23\%$
  - Use the appropriate multiplier for the Potential for Harm. The civil charge for a Serious violation can be calculated by multiplying the percent over by \$100.  $23\% \times \$100 = \$2,300$
  - In this example, the Amount entered in Category 4.a. of the Worksheet would be \$2,300.

As another example, assume a minor source has a permitted limit of 50 tons per year for VOCs, calculated as the sum of a consecutive 12-month period. Records demonstrate that the facility had actual emissions of 75 tons of VOCs for a 12-month rolling period. Assume the violation is classified as “Marginal.” The charge for the emissions violation is calculated as follows:

- Subtract the permitted limit of 50 tons from the observed VOC emissions of 75 tons. Divide the difference by the permitted limit of 50 and multiply by 100 to obtain the “% over limit,” in this case, 50%.  $((75-50)/50) \times 100 = 50\%$
- Use the appropriate multiplier for the Potential for Harm. The civil charge for a Marginal violation can be calculated by multiplying the percent over by \$25.  $50 \times \$25 = \$1,250$ .
- In this example, the Amount entered in Category 4.a. of the Worksheet is \$1,250.

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

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<sup>25</sup> Opacity violations are calculated by the highest documented non-exempt “six-minute period” of the “one hour” (*e.g.*, VEE) or a “one-hour period” (*e.g.*, COMS), as may be applicable and as defined in 9 VAC 5-10-20.

### *Sensitivity of the Environment Category*

Category 5 focuses on the geographic location of the violation. Civil charges associated with this category are dependent on the nonattainment/ attainment status or the PSD area classification and the classification of the violation.<sup>26</sup> The sensitivity of the environment charge applies only to emission standards violations or to work practice or technology standards that serve as emission standards, or to violations of monitoring requirements. When a violation occurs in a nonattainment area, the nonattainment charge applies only for violations involving pollutants or pollutant precursors for which the area is designated nonattainment. The regulations contain a description of the nonattainment areas and the Class I PSD areas, and the remainder of the Commonwealth is currently classified as a Class II area.<sup>27</sup>

### *Length of Time Factor Category*

The longer a violation continues uncorrected, the greater the potential for harm to air quality and the more severe the violation. The Worksheet addresses this consideration in the category labeled “Length of Time Factor.” Where separate charges are not assessed for daily, documented violations, DEQ calculates the charge for this factor as follows: (a) multiply the number of days the violation occurred by 0.274 (*i.e.*, 1/365) - this is the Percent (%) Increase Factor; (b) divide this factor by 100 to obtain the decimal expression, which is then multiplied by the Preliminary Subtotal to obtain the additional civil charge.

The time span (expressed in days) used to calculate the charge begins, based on available evidence, on the day the violation began. The time span ends on the date the source corrects the deficiency addressed by the civil charge or the date the source agrees in principle to a set of corrective actions designed to achieve compliance with the regulatory requirement for which the charge was assessed. For violations where the length of time exceeds five years, as determined by this section, DEQ calculates the charge based on a length of time of five years (1,826 days). This limitation on length of time is not applicable to calculation of economic benefit.

- For construction without a permit, the time span begins with the start of construction and ends when the source either begins operation of the equipment or the source submits a permit application for the affected process or equipment or agrees in principle to a set of corrective actions.
- For operation without a permit, the time span begins with the start-up of the equipment and ends when the source submits a permit application for the affected process or equipment.
- For stack tests that occur prior to execution of an Order, the time span begins with the date the test was required (or date of the failed stack test) and ends the date the test is completed and demonstrates compliance as documented by a stack test report.

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

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<sup>26</sup> If the air quality in a particular geographic region meets the national standard set by EPA, it is called an attainment area; areas that do not meet the national standard are considered nonattainment areas.

<sup>27</sup> 9 VAC 5-20-204 (nonattainment) and 9 VAC 5-20-205 (PSD).

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

## Air Civil Charge/Penalty Worksheet

Va. Code §§ 10.1-1316, -1309

<i>Source/Responsible Party</i>	Reg.#		NOV Date			<i>Amount</i>
	NOV Observation #	Potential for Harm				
		Serious	Moderate	Marginal		
<b>1. Statutory/Regulatory/Permit Violation</b>						
a. Failure to obtain required permit.		\$ 7,938	\$ 2,646	\$ 1,323		
b. Operating without a permit		\$ 5,292	\$ 2,646	\$ 1,323		
c. Statute/regulation/permit violated ( <i>other than a or b above</i> ) (Multiply by 2 for violation of a substantive PSD, NESHAP, MACT, NSPS or TV requirement)		\$ 2,646	\$ 1,323	\$ 661		
<b>2. Order Violation</b>						
a. Consent or Other Order condition violated.		\$ 5,292	\$ 2,646	\$ 1,323		
<b>3. Pollution Control Equipment Violation</b>						
a. Failure to install required equipment.		\$ 13,229	\$ 7,938	\$ 2,646		
b. Failure to properly operate or maintain equipment.		\$ 13,229	\$ 7,938	\$ 2,646		
<b>4. Emissions, Monitoring, and Toxics Violations</b>						
a. Violation of Emission Limit or Standard ( <i>% over limit or standard</i> )		\$100 (x) % over	\$50 (x) % over	\$25 (x) % over		
- Limit or Standard						
- Observed Value						
b. Toxic Pollutant Violations		\$ 2,646	\$ 1,323	\$ 814		
<b>5. Sensitivity of the Environment</b>						
a. Nonattainment Area		\$ 5,292	\$ 2,646	\$ 1,323		
b. Class I PSD area		\$ 2,646	\$ 1,323	\$ 814		
c. Class II and III PSD area		\$ 1,323	\$ 509	\$ 305		
<b>Preliminary Civil Charge/Civil Penalty Subtotal</b>						
	Data	Factor				
<b>6. Length of Time Factor</b> ( <i>enter days</i> )						
		%				
<b>7. Compliance History</b>						
Order or decree <u>in another media program</u> within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) Preliminary Subtotal, or \$5,000			
Order or decree <u>in same media program</u> within 36 mo. before initial NOV	Y	N	0.5 (x) Preliminary Subtotal (for 1 order in 36 mo.)			
<b>8. Degree of Culpability</b> ( <i>apply to violation(s)' Amount or to the Preliminary Civil Charge/Civil Penalty Subtotal</i> )	Low = (x) 0		Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
<b>9. Economic Benefit</b>						
<b>10. Ability to Pay</b> ( <i>based on information supplied by the source/party</i> )						(       )
<b>Total Civil Charge/Civil Penalty</b> ( <i>may not exceed \$32,500 per day per violation</i> )						<b>\$</b>



## **Animal Feeding Operations and Poultry Waste**

Va. Code § 62.1-44.17:1 provides specific statutory authority for the Department's VPDES permits for confined animal feeding operations and General VPA Permit for Animal Feeding Operations (AFO) and outlines certain design and operational criteria for AFO owners and operators. Va. Code § 62.1-44.17:1(J) states that persons violating the provisions of § 62.1-44.17:1 may not be assessed civil charges that exceed \$2,500 for any AFO covered by a VPA permit. For AFOs covered by a VPA permit, enforcement staff use the AFO Civil Charge/Civil Penalty Worksheet to assess appropriate civil charges on a per settlement action basis. Enforcement staff should use the VPDES worksheet in this chapter for AFOs covered by a VPDES permit.

In no event may the Final Recommended Civil Charge for AFO general permit violations exceed \$2,500. However, it is clear from the language of the statute, which focuses on AFO design and normal operating conditions, and from the legislative history of that section of the State Water Control Law, that the General Assembly did not intend to limit penalty liability for onsite violations not addressed under § 62.1-44.17:1 (*e.g.*, violations of § 62.1-44.5 which prohibits unpermitted discharges to state waters). Those violations should be assessed separately using the appropriate Civil Charge/Civil Penalty Worksheet.

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

In calculating the appropriate civil charge, staff assesses the gravity-based component of the charge by selecting the appropriate violation category and multiplying the individual charge noted by the number of occurrences of the violation. After calculating a civil charge for each violation category, staff adds the civil charges to arrive at a subtotal. The noncompliance period considered should generally be limited to six months. Aggravating factors, including threats to human health and safety and environmental damage caused by the violation are then considered. If an aggravating factor is present, staff multiplies the civil charge subtotal by the aggravating factor multiplier of 1.5 and adds it to the Subtotal to arrive at the civil charge.

## Animal Feeding Operation Civil Charge/Civil Penalty Worksheet

Va. Code § 62.1-44.17:1(J)

<i>Facility/Responsible Party</i>		Reg./Id. #			NOV Date	
		NOV Observation #	<b>Potential For Harm</b> (Environmental Harm and Severity)			<i>Amount</i>
			Serious	Moderate	Marginal	
<b>1. Violations and Frequency</b> (per occurrence per inspection unless otherwise noted) ( <i>Severity and Environmental Harm</i> )			\$ (x) occurrences	\$ (x) occurrences	\$ (x) occurrences	
(a) Failure to monitor soils, waste or groundwater			1000 (x) ___	500 (x) ___	200 (x) ___	
(b) Failure to maintain records			1000 (x) ___	500 (x) ___	200 (x) ___	
(c) Improper documentation of liner, seasonal high water table, siting, design and construction			500 (x) ___	300 (x) ___	100 (x) ___	
(d) Improper operation and maintenance of waste storage facility			1000 (x) ___	500 (x) ___	200 (x) ___	
(e) Improper operation and maintenance of equipment (including but not limited to checking for leaks, calibrations, having manufacturer's manuals on site)			1000 (x) ___	500 (x) ___	200 (x) ___	
(f) NMP Violations			1000 (x) ___	500 (x) ___	200 (x) ___	
(g) Evidence of breached buffers or runoff			1000 (x) ___	500 (x) ___	200 (x) ___	
(h) Operator training requirements not met			500 (x) ___	500 (x) ___	100 (x) ___	
(i) Insufficient notice prior to animal placement or utilization of new waste storage facilities			500 (x) ___	300 (x) ___	100 (x) ___	
(j) Improper closure of waste storage facility			1000 (x) ___	500 (x) ___	200 (x) ___	
(k) Other violations			1000 (x) ___	500 (x) ___	200 (x) ___	
<b>Violations and Frequency Subtotal</b>						
<b>2. Adjustment Factors: If there is a threat to human health or safety, or environmental damage multiply the Violations and Frequency Subtotal by 1.5</b>						
<b>Compliance History</b>						
Order or decree <u>in another media program</u> within 36 mo. before initial NOV		Y	N	If yes, add lesser of 0.05 * Violations and Frequency Subtotal, or \$5,000		
Order or decree <u>in same media program</u> within 36 mo. before initial NOV		Y	N	If yes, add 0.5 * Violations and Frequency Subtotal (for 1 order in 36 mo.)		
Culpability( <i>apply to violation(s)' Amount or to the Violations and Frequency Subtotal</i> )		Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
<b>Adjustment Factor Subtotal</b>						
<b>3. Economic Benefit of Noncompliance</b> ( <i>Economic Benefit</i> )						
<b>4. Ability to Pay</b> ( <i>based on information supplied by the responsible party</i> ) ( <i>Ability to Pay</i> )						(       )
<b>Total Civil Charge/Civil Penalty</b> ( <i>not to exceed \$2500 when covered by a VPA permit</i> )						\$

## Poultry Waste Civil Charge/Civil Penalty Worksheet

(for any confined animal feeding operation covered by a Virginia Pollution Abatement permit)  
Va. Code § 62.1-44.17:1.1

<b>Facility/Responsible Party</b>	Reg./Id. #		NOV Date		
	NOV Observation #	<b>Potential For Harm</b> <i>(Environmental Harm and Severity)</i>			<b>Amount</b>
		Serious	Moderate	Marginal	
<b>1. Violations and Frequency</b> (per occurrence per inspection unless otherwise noted) <i>(Severity and Environmental Harm)</i>	<b>\$ (x) occurrences</b>	<b>\$ (x) occurrences</b>	<b>\$ (x) occurrences</b>		
(a) Failure to monitor soils, waste or groundwater	1000 (x) ___	500 (x) ___	200 (x) ___		
(b) Failure to maintain records	1000 (x) ___	500 (x) ___	200 (x) ___		
(c) Transfer of more than 10 tons of poultry waste without providing the nutrient analysis or fact sheet to recipient	500 (x) ___	300 (x) ___	100 (x) ___		
(d) Improper disposal of mortalities	1000 (x) ___	500 (x) ___	200 (x) ___		
(e) Improper storage of poultry waste	1000 (x) ___	500 (x) ___	200 (x) ___		
(f) Improper operation and maintenance of waste storage facility	1000 (x) ___	500 (x) ___	200 (x) ___		
(g) Nutrient Management Plan (NMP) Violations	1000 (x) ___	500 (x) ___	200 (x) ___		
(h) Improper winter land application of poultry waste or land application to soils that are saturated	1000 (x) ___	500 (x) ___	200 (x) ___		
(i) Evidence of breached buffers or runoff	1000 (x) ___	500 (x) ___	200 (x) ___		
(j) Improper closure of poultry waste storage facility	1000 (x) ___	500 (x) ___	200 (x) ___		
(k) Operator training requirements not met	500 (x) ___	300 (x) ___	100 (x) ___		
(l) Other violations	1000 (x) ___	500 (x) ___	200 (x) ___		
<b>Violations and Frequency Subtotal</b>					
<b>2. Adjustment Factors: If there is a threat to human health or safety, or environmental damage multiply the Subtotal by 1.5</b>					
Compliance History					
Order or decree <u>in another media program</u> within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or \$5,000		
Order or decree <u>in same media program</u> within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)		
Culpability( <i>apply to violation(s)' Amount or to the Violations and Frequency Subtotal</i> )	Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
<b>3. Adjustment Factor Subtotal</b>					
<b>4. Economic Benefit of Noncompliance</b> <i>(Economic Benefit)</i>					
<b>5. Ability to Pay</b> <i>(based on information supplied by the responsible party) (Ability to Pay)</i>				(       )	
<b>Total Civil Charge/Civil Penalty</b> <i>(not to exceed \$2,500 when covered by a VPA permit)</i>				\$	

## Article 9 – Underground Storage Tank Program

The Underground Storage Tank (UST) Program is authorized under Article 9 of the State Water Control Law, Va. Code §§ 62.1-44.34:8 and 62.1-44.34:9. Article 9 typically addresses USTs for petroleum products, but also includes USTs for other “regulated substances,” as defined by statute. Authority for negotiated civil charges for violations of Regulated UST Program laws, regulations, orders is found in the Water Law at Va. Code § 62.1-44.15(8d). The maximum civil charge is \$32,500 per day for each violation.<sup>28</sup>

### Potential for Harm Evaluation

In evaluating the Potential for Harm, issues to consider when assessing actual or potential harm to human health and the environment, include the volume of the product, characteristics of the product, population density where the discharge/release occurred and risk to that population (e.g. receptor population heavily reliant on drinking water wells and vapor intrusion), skill set/training/certification of employees, time of exposure, distance from a drinking water source, sensitivity of the environment, or any other criteria that may be appropriate. The criteria established in the Storage Tank Program Compliance Manual, specifically Appendix-C Underground Tank Delivery Prohibition Decision Matrix, should provide additional guidance on determining the Potential for Harm.

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

In evaluating the Potential for Harm for failures to report, investigate or cleanup a UST release, issues to consider include the extent of the release, population density where the discharge/release occurred, the presence and proximity of nearby human health or environmental receptors and any other criteria that may be appropriate. Some receptors of concern include supply water wells, surface water bodies, underground utilities (vapor impacts) and other vapor impacts to structures.

#### Line 1.a: *Failure to Report a Release or Investigate and/or Report a Suspected Release*

This category includes violations for failure to investigate, confirm and/or report a release or a suspected release. This would also include failure to immediately clean up a spill or overfill pursuant to 9 VAC 25-580-220.

#### Potential for Harm Example:

	Serious	Moderate	Marginal
Failure to report a confirmed release or investigate/report suspected release.			
Release impacted receptor OR release poses imminent threat to a receptor. Failure to investigate a suspected release (other than a suspected release indicated by inconclusive monitoring results)	X		

<sup>28</sup> Va. Code § 62.1-44.15 incorporates by reference the penalty amounts from Va. Code § 62.1-44.32.

at a facility in a groundwater use area or nearby to surface water body.			
Repeated failure to investigate suspected release indicated by monitoring results or failure to report confirmed release with no known receptors nearby		X	
Failure to report suspected release that facility later investigated and determined no actual release. Failure to investigate a suspected release indicated by inconclusive monitoring results at a facility with no apparent nearby receptors.			X

Line 1.b: *Corrective Action /Monitoring/Closure Report Not Submitted*

This category would include violations for failure to submit any kind of report detailing what corrective actions have been performed at the site, including initial abatement, site characterization, CAP implementation, monitoring and closure reports.

Potential for Harm example:

Corrective Action/Monitoring/Closure Report not submitted	Serious	Moderate	Marginal
Critical implementation/characterization reports where receptors are impacted or at imminent risk of impact OR critical reports late that identify potential receptors (e.g., site characterization report)	X		
Other reports late where receptors impacted or at imminent risk of impact.		X	
Late interim reports (e.g., quarterly monitoring reports) with no potential receptors under imminent threat of impact			X

Line 1.c: *Failure to Abate, Characterize or Otherwise Remediate a Confirmed Release*

This category includes cleanup-related items (9 VAC 25-580-240 to -270) such as failure to conduct initial abatement, site characterization or failure to remove free product.

Potential for Harm example:

Failure to abate, characterize or remediate a release	Serious	Moderate	Marginal
Failure to take ANY corrective actions to address a confirmed release that has impacted human health receptors OR critical activities necessary to address cleanup of impacted environmental receptors or receptors at imminent risk of impact. Failure to take actions necessary to identify potential receptors.	X		
Failure to perform routine activities (e.g., quarterly monitoring) where receptors at imminent risk of impact		X	
Late performing routine actions such as quarterly monitoring event at facility where no receptors at imminent risk of impact.			X

Line 1.d: *No CAP or Failure to Execute a CAP*

This category includes situations where the RP does not have an approved Corrective Action Plan (CAP) from DEQ or does not execute the CAP at all or properly.

Potential for Harm example:

No Corrective Action Plan or Failure to execute CAP	Serious	Moderate	Marginal
Failure to have an approved CAP or execute the CAP for a release that has impacted human health receptors (e.g., basements or other indoor spaces, water supply wells) or surface waters	X		
Failure to have an approved CAP or execute a CAP for a release that has impacted human health or surface receptors but RP is otherwise performing cleanup activities that address the contamination		X	
The corrective action is performed and would have been the approved work under the CAP but RP did not go through process to obtain a CAP. Work was done, however.			X

**Potential for Harm Evaluation for Pollution Prevention Noncompliance**

Potential for harm in cases of UST pollution prevention noncompliance is assessed both as potential harm caused by a release that may occur or be made worse as a result of noncompliance and the extent of deviation from regulatory requirements (i.e., harm to the regulatory program), and staff should use the general assessment criteria at the beginning of this chapter. For example, a facility located in a groundwater use area and in violation of corrosion protection requirements may have a higher potential for harm assessed than a facility with the same violation located within a city block on public water. However, a facility with no nearby receptors can still be assessed a “serious” potential for harm if the deviation is severe enough, e.g., no release detection is performed at all for the last year or failing to repair a CP system that has failed its 3-year test.

DEQ’s UST risk based inspection strategy (RBIS) can assist in evaluating the potential for harm associated with pollution prevention noncompliance. Facilities are assigned risk levels (high to low) according to the following factors: the presence of nearby human health and/or environmental receptors, tank age and noncompliance with key UST requirements. Noncompliance at high-risk facilities will generally equate to higher potential for harm than noncompliance at a low risk facilities. However, depending upon the applicable criteria, there may not be much difference in potential for harm between high and medium risk facilities. A facility’s risk level is a helpful tool but should be used in conjunction with other factors, i.e., an evaluation of the extent of deviation from the regulatory requirements, to assess potential for harm. A facility’s risk category can be found on the general tab of the Tank Facility screen in CEDS.

Line 1.e: *Tank System Operated Improperly (per violation)*

This includes failure to properly operate equipment and failure to conduct required testing to ensure the equipment is operating properly, e.g., the shutoff valve is not set to shut off flow into the tank at the required level or the alarm is not audible or visible to delivery driver. This includes all testing requirements, including failing to test following a repair and improper testing. This category would also include situations where the rectifier has been turned off, where release detection is not being performed every month or correctly, and where the owner does not meet all the requirements to use

certain forms of release detection (e.g. the release detection method has expired or their equipment is faulty such as a measuring stick that is not capable of measuring 1/8 of an inch). It would also cover failure to comply with the temporary closure requirements (9 VAC 25-580-310 to -330).

Potential for Harm examples:

Tank system operated improperly (release detection)	Serious	Moderate	Marginal
No release detection for last 6-12 months OR no release detection for last 3 or more months (high risk facility)	X		
No release detection for last 3 months (medium or low risk facility)		X	
No release detection for 3 out of 12 months with subsequent passing results			X
Tank system operated improperly (corrosion protection)	Serious	Moderate	Marginal
CP system turned off or CP system failed test and not repaired (high or medium risk facility)	X		
CP system turned off or CP system failed test and not repaired (low risk facility) or failure to get 3 year CP test (high or medium risk facility)		X	
Failure to get 3 year test (low risk facility)			X

Line 1.f: *Tank system Installed, Upgraded, Equipped, or Closed Improperly (per violation)*

This category includes items that demonstrate the tank system is not equipped to perform required pollution prevention including Overfill (OF), Corrosion Prevention (CP), Release Detection (RD), Secondary Containment (SC), Spill Prevention (SP) and Compatibility. This includes items that were never installed (e.g. no secondary containment) or installed improperly (e.g. ball float installed on or after 1.1.18), or the equipment is so damaged or broken that it no longer functions. This also includes tanks and/or piping that are not compatible with the substance stored as well as items that were not upgraded properly (e.g. no CP integrity assessment prior to upgrade). This would also include items related to improper tank closure such as failure to conduct site assessments, provide soil samples or begin corrective action when necessary.

Potential for Harm example:

Tank system installed, upgraded, equipped or closed improperly	Serious	Moderate	Marginal
Basic pollution prevention (P2) equipment (e.g., spill bucket, CP system, overfill prevention) not installed at all or P2 equipment such as CP system, release detection equipment or overfill equipment nonfunctional at high/medium risk facility	X		
P2 equipment such as CP system, release detection equipment or overfill equipment nonfunctional at low risk facility		X	
Minor functionality issues such as a hole in a spill bucket at low/medium risk facility; ball float installed after 1/1/18			X

Line 1.g: *Failure to Demonstrate Financial Responsibility*

This category includes situations where the owner has no financial responsibility mechanism or the current mechanism needs to be updated. The Potential for Harm evaluation for financial

responsibility violations is based on the potential harm to DEQ’s cleanup reimbursement fund. Larger owners are responsible for paying a higher amount of cleanup costs before becoming eligible for reimbursement from Virginia’s fund than smaller owners, and noncompliance with these requirements in the event of a UST release will have a higher financial impact on the Fund. An owner’s financial responsibility regulatory amount is based on the amount of petroleum that flows through an owner’s tanks annually. Each tank owner’s financial responsibility obligation is tracked on the financial responsibility tab in CEDS.

Potential for Harm example:

Failure to Demonstrate Financial Responsibility	Serious	Moderate	Marginal
Tank owner is a large petroleum throughput owner with an annual aggregate FR obligation of \$200,000.	X		
Tank owner is moderate petroleum throughput owner with an annual aggregate more than \$20,000 but less than \$200,000		X	
Tank owner is small petroleum throughput owner with an annual aggregate FR obligation of \$20,000			X

Line 1.h: *Records no available*

This category includes missing or incomplete annual and 3-year test records, monthly and annual release detection records, test records not provided after repairs, repair records, 60-day rectifier logs (inspections), operator training records, closure documents, walkthrough inspection records and some release monitoring and investigation reports that are not categorized elsewhere.

Potential for Harm example:

Records not available	Serious	Moderate	Marginal
Records not maintained at all (e.g., no equipment testing records, CP system rectifier logs, or release detection records)	X		
Records incomplete at high/medium risk facility (e.g., missing 4 out of 10 months RD records or a few days’ worth of rectifier logs)		X	
Records incomplete at low risk facility			X

Line 1.i: *Improper/No Registration*

This category includes situations where the facility has never been registered or the registration is incorrect (e.g. the owner, substance stored, tank/piping material, piping type, RD type, SP, OF, tank closure, piping closure, or temporary closure information is incorrect). Potential for harm assessment for registration violations is generally assessed as the extent of deviation from regulatory requirements. An unregistered facility with a UST released should be assessed for a higher potential for harm.

Potential for Harm example:

Improper/No Registration	Serious	Moderate	Marginal
Facility not registered at all	X		



New tanks installed at existing facility not registered or new facility ownership not registered or tank permanent closure not registered		X	
Incomplete or incorrect forms/ release detection equipment changes not registered/Piping run closure not registered.			X

Line 1.j: *Other violation*

This category includes operator training issues that are not covered in the records violation section, such as operator training not completed; operators not designated; emergency response procedures not kept on site; and Class C refresher training not conducted. It would also cover failure to conduct monthly or annual operation and maintenance walkthrough inspections or conducting incomplete inspections, pursuant to 9VAC25-580-85.

Potential for Harm example:

Other violation	Serious	Moderate	Marginal
No walkthrough inspection performed at high risk facility.	X		
No designated or trained operators at high risk facility. No walkthrough inspections performed at low or medium risk facility. Incomplete walkthrough inspections at high risk facility.		X	
Incomplete walkthrough inspections or Class C operator not trained annually/emergency procedures not posted (low to medium risk facility)			X

## Underground Storage Tank Civil Charge/Civil Penalty Worksheet

Va. Code § 62.1-44.15

<i>Facility/Responsible Party</i>	Reg./Id. #		NOV Date		
	NOV Observation #	<b>Potential for Harm</b> <i>(Environmental Harm and Severity)</i>			<i>Amount</i>
		Serious	Moderate	Marginal	
<b>1. Violations and Frequency*</b> <i>(Severity and Environmental Harm)</i>					
a. Failure to Report a Release or Investigate and/or Report a Suspected Release		\$13,229	\$6,615	\$1,323	
b. Corrective Action /Monitoring/Closure Report Not Submitted		\$1,323 per phase	\$712 per phase	\$305 per phase	
c. Failure to, Abate, Characterize or Remediate a Release		\$5,292	\$2,646	\$1,323	
d. No CAP or Failure to Execute a CAP		\$2,646 per tank *	\$1,323 per tank *	\$712 per tank *	
e. Tank System Operated Improperly (per violation)		\$1,323 per tank *	712 per tank *	\$305 per tank *	
f. Tank system Installed, Upgraded, Equipped, or Closed Improperly (per violation)		\$2,646	\$1,323	\$712	
g. Failure to Demonstrate Financial Responsibility		\$1,323	\$712	\$305	
h. Records not Available		\$1,323	\$712	\$305	
i. Improper/No Registration		\$1,323 per tank *	\$712 per tank *	\$305 per tank *	
j. Other Violation Component		\$1,323	\$712	\$305	
* per tank or, if compartments, per tank compartment					
<b>2. Violations and Frequency Subtotal</b>					
<b>3. Degree of Culpability</b> <i>(Severity and Compliance History) (apply to violation(s)' Amount or to the Violations and Frequency Subtotal)</i>		Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0
<b>4. History of Noncompliance</b> <i>(Compliance History)</i>					
Order or decree <u>in another media program</u> within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or \$5,000		
Order or decree <u>in same media program</u> within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)		
<b>4. Subtotal</b>					
<b>5. Economic Benefit of Noncompliance</b> <i>(Economic Benefit)</i>					
<b>6. Ability to Pay</b> <i>(based on information supplied by the responsible party) (Ability to Pay)</i>					
<b>Total Civil Charge/Civil Penalty</b> <i>(may not exceed \$32,500 per day per violation)</i>					\$ (      )

## ARTICLE 11 – OIL DISCHARGES AND ABOVEGROUND STORAGE TANKS

Article 11 of the State Water Control Law<sup>29</sup> establishes a unique civil charge scheme for the discharge of oil, for violations related to aboveground storage tanks (ASTs), and for violations of underground storage tanks not regulated under Article 9. Va. Code § 62.1-44.34:20(C) establishes civil charges and penalties for:

1. For **failing to obtain approval of an oil discharge contingency plan** as required by § 62.1-44.34:15;
2. For **failing to maintain evidence of financial responsibility** as required by § 62.1-44.34:16;
3. For **discharging or causing or permitting a discharge of oil into or upon state waters**, or owning or operating any facility, vessel or vehicle from which such discharge originates in violation of § 62.1-44.34:18;
4. For **failing to cooperate in containment and cleanup of a discharge** as required by § 62.1-44.34:18 or for **failing to report a discharge** as required by § 62.1-44.34:19; and
5. For **violating or causing or permitting to be violated any other provision of this article, or a regulation, administrative or judicial order, or term or condition of approval issued under this article...**

Va. Code § 62.1-44.34:17 sets out exemptions for items 1 and 2, above.<sup>30</sup> Va. Code § 62.1-44.34:23 sets out exceptions to Article 11 generally.

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

- a. The willfulness of the violation;
- b. Any history of noncompliance;
- c. The actions of the person in reporting, containing and cleaning up any discharge or threat of discharge;
- d. The damage or injury to state waters or the impairment of their beneficial use;<sup>31</sup>
- e. The cost of containment and cleanup;
- f. The nature and degree of injury to or interference with general health, welfare and property; and

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<sup>29</sup> Va. Code § 62.1-44.34:14, *et seq.*

<sup>30</sup> The exemptions and exceptions include (but are not limited to): (1) farm or residential tanks of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes (9 VAC 25-580-10) (“UST” definition); (2) tanks used for storing heating oil for consumption on the premises where stored (*Id.*); and (3) aboveground storage tanks with a capacity of 5,000 gallons or less containing heating oil for consumption on the premises where stored (Va. Code § 62.1-44.34:17(E)).

<sup>31</sup> Though Va. Code §62.1-44.15(8e) states that the procedures for calculating a civil charge shall include, “the extent of any potential or actual environmental harm”, note that the specific penalty provision for violations of Article 11, Va. Code §62.1-44.34:20(D), does not use the term potential.

- g. The available technology for preventing, containing, reducing or eliminating the discharge.

## **Harm Examples**

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

## **Discharges to State Waters**

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

Marginal – 0, 10, 20  
Moderate – 30, 45, 60  
Serious – 70, 85, 100

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

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

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

- Serious: Fish kill (consider the type and number of fish and the waters affected), significant threat to sensitive ecosystem, loss of beneficial use, or harm to wildlife

(especially endangered species), or other impacts that can only be corrected after a substantial effort or period of time.

- Moderate: Moderate threat to State waters, adjoining shorelines, or vegetation (other than a sensitive ecosystem) that can be corrected after a period of time
- Marginal: Spill created a visible sheen, film, sludge, or emulsion and damage was quickly corrected
- N/A: No apparent damage to State waters or impairment of beneficial use

**Line 1(c): History of Noncompliance**

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

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

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

**Line 1(e): Cost of Containment and Cleanup** - The higher the cost, the lower this number will be.

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

**Line 1(f): Culpability**

- Culpability should be analyzed as in all other programs.

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

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

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

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

*Va. Code § 62.1-44.34:20(C)(3)*

<i>Responsible Party/Facility</i>	Reg./Id.#		NOV Date	
	Nature and degree of Harm			<i>Amount</i>
	Serious	Moderate	Marginal, NA or None	
<b><i>C (3) for discharging or causing or permitting a discharge of oil into or upon state waters, or owning or operating any facility, vessel or vehicle from which such discharge originates in violation of § 62.1-44.34:18.</i></b>				
1. Statutory Factors <i>Discuss each factor, circle the Potential for Harm and assign a dollar amount between \$0 and \$100 to each factor.</i>				
a. Nature/Degree of Injury to Health, Welfare and Property	70, 85, 100	30, 45, 60	0, 10, 20	\$
b. Damage/Injury to State Waters or Impairment of Beneficial Use	70, 85, 100	30, 45, 60	0, 10, 20	\$
c. History of Non-Compliance	70, 85, 100	30, 45, 60	0, 10, 20	\$
d. Actions in Reporting/Containing/Cleaning Up the Discharge	70, 85, 100	30, 45, 60	0, 10, 20	\$
e. Cost of Containment and Clean Up (Relative to Amount of Oil Spilled)	70, 85, 100	30, 45, 60	0, 10, 20	\$
f. Culpability (Willfulness)	70, 85, 100	30, 45, 60	0, 10, 20	\$
g. Available Technology to Prevent/Contain/Reduce/Eliminate Discharge	70, 85, 100	30, 45, 60	0, 10, 20	\$
<b>Gravity Subtotal</b>				\$
Gravity Subtotal Average [ <i>Gravity Subtotal divided by seven (7)</i> ]				\$
Number of gallons of oil discharged				
Number of gallons discharged multiplied by the Gravity Subtotal Average				
<b>Economic Benefit of Noncompliance</b>				\$
<b>Ability to Pay</b> ( <i>based on information supplied by the party</i> )				( )
<b>Total Civil Charge/Civil Penalty</b> ( <i>cannot exceed statutory maximum amounts</i> )				\$

Oil Discharges (Lands or Storm Drain Systems) Civil Charge/Civil Penalty Worksheet  
*Va. Code § 62.1-44.34:20(C)(5)*

<i>Responsible Party/Facility</i>	Reg./Id.#		NOV Date		
	<b>Nature and degree of Harm<sup>32</sup></b>				
	<b>Serious</b>	<b>Moderate</b>	<b>Marginal</b>	<b>Amount</b>	
<b><i>C (5) for discharging or causing or permitting a discharge of oil into or upon lands or storm drain systems in violation of § 62.1-44.34:18.</i></b>					
<b>1. Nature and Degree of the Violation</b>					
a. Nature/Degree of Injury to Health, Welfare and Property	\$4,132	\$2,066	\$1,038	\$	
b. Actions in Reporting/Containing/Cleaning Up the Discharge	\$4,132	\$2,066	\$1,038	\$	
c. Cost of Containment and Clean Up (Relative to Amount of Oil Spilled)	\$4,132	\$2,066	\$1,038	\$	
d. Available Technology to Prevent/Contain/Reduce/Eliminate Discharge	\$4,132	\$2,066	\$1,038	\$	
<b>2. Gravity Subtotal</b>				\$	
<b>3. Degree of Culpability</b> ( <i>Severity and Compliance History</i> ) ( <i>apply to violation(s)' Amount or to the Violations and Frequency Subtotal</i> )	Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	\$
<b>4. History of Noncompliance</b> ( <i>Compliance History</i> )					
Order or decree <u>in another media program</u> within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or \$5,000		\$
Order or decree <u>in same media program</u> within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)		\$
<b>5. Subtotal</b>				\$	
<b>6. Natural gas transmission pipeline greater than 36 inches inside diameter</b> (special order under § 62.1-44.15(8g))	Y	N	If yes, add 0.5 * subtotal 1.a		\$
<b>7. Economic Benefit of Noncompliance</b> ( <i>Economic Benefit</i> )				\$	
<b>8. Ability to Pay</b> ( <i>based on information supplied by the responsible party</i> ) ( <i>Ability to Pay</i> )				(      )	
<b>Total Civil Charge/Civil Penalty</b> ( <i>may not exceed \$32,500 per day per violation</i> )				\$	

<sup>32</sup> Note that VA Code 62.1-44.34:20(D) does not reference the potential for harm. This worksheet should not be used to assess a civil charge or civil penalty for damage or injury to state waters or the impairment of their beneficial use.



## Article 11 – Other Violations

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

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

- In assessing C(1), failing to submit and obtain approval of an oil discharge contingency plan (ODCP) would be at the higher end of the spectrum compared to an incomplete ODCP. In addition, failing to have an ODCP for a product with a high toxicity and requires a special type of emergency response would fall into the higher end of the spectrum compared to failing to have an ODCP when a less toxic product is involved.
  - Assign a dollar amount of not less than \$1,000 nor more than \$50,000 for the initial violation, and \$5,000 per day for each day of violation thereafter
- In assessing C(2), for failing to maintain evidence of financial responsibility, a Responsible Party whose storage capacity is 25,000 gallons or less would be at the lower end of the spectrum compared to an RP whose storage capacity is over 1 million gallons. In assessing the potential for harm to the environment, an Responsible Party whose product requires a more expensive response cost would be at the higher end of the spectrum compared to an Responsible Party whose product requires a minimal response cost, which would be at the lower end of the spectrum.
  - Assign a dollar amount of not less than \$1,000 nor more than \$100,000 for the initial violation, and \$5,000 per day for each day of violation thereafter.
- In assessing Line C(4) for failing to cooperate in the containment and clean-up, or failing to report: For example, failing to report a discharge of a highly toxic product would be at the high end of the spectrum, whereas failing to report a discharge of a low toxicity product would be at the low end of the spectrum. In addition, a Responsible Party failing to provide information about the product (*i.e.*, amount, type, characteristics) which would hinder the clean-up process would fall at the higher end of the spectrum, compared to a Responsible Party who provides necessary information about their product. Furthermore, failing to report a discharge for a week would fall into the high end of the spectrum, whereas failing to report a discharge for a few hours would fall into the low end of the spectrum.
  - Assign a dollar amount of not less than \$1,000 nor more than \$50,000 for the initial violation, and \$10,000 for each day of violation thereafter.

**Article 11 – Other Violations Charge/Civil Penalty Worksheet**

*Va. Code § 62.1-44.34:20(C)(1,2,&4)*

Facility/Responsible Party	Reg./Id. #		NOV Date		
	NOV Observation #	Nature and degree of Harm			Amount
		Serious	Moderate	Marginal	
<b>1. Violations and Frequency</b>					
a. Failure to obtain approval of an oil discharge contingency plan.		\$8,500	\$4,500	\$1,000	\$
		<i>Each subsequent day of violation is subject to a penalty of \$5,000 per day.</i>			\$
b. Failing to maintain evidence of financial responsibility.		\$3,250	\$2,000	\$1,000	\$
		<i>Each subsequent day of violation is subject to a penalty of \$5,000 per day.</i>			\$
c. Failing to cooperate in containment and clean-up of a discharge.		\$8,500	\$4,500	\$1,000	\$
		<i>Each subsequent day of violation is subject to a penalty of \$10,000 per day.</i>			\$
d. Failing to report a discharge		\$8,500	\$4,500	\$1,000	\$
		<i>Each subsequent day of violation is subject to a penalty of \$10,000 per day.</i>			\$
<b>2. Violations and Frequency Total</b>					
a. Nature/Degree of Injury to Health, Welfare and Property		\$4,132	\$2,066	\$1,038	\$
b. Actions in Reporting/Containing/Cleaning Up the Discharge		\$4,132	\$2,066	\$1,038	\$
c. Cost of Containment and Clean Up (Relative to Amount of Oil Spilled)		\$4,132	\$2,066	\$1,038	\$
d. Available Technology to Prevent/Contain/Reduce/Eliminate Discharge		\$4,132	\$2,066	\$1,038	\$
<b>Gravity Subtotal</b>					\$
<b>3. Degree of Culpability</b> ( <i>Severity and Compliance History</i> ) ( <i>apply to violation(s)' Amount or to the Violations and Frequency Subtotal</i> )	Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	\$
<b>4. History of Noncompliance</b> ( <i>Compliance History</i> )					
Order or decree <u>in another media program</u> within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or \$5,000		\$
Order or decree <u>in same media program</u> within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)		\$
<b>Subtotal</b>					\$
(4) Natural gas transmission pipeline greater than 36 inches inside diameter (special order under § 62.1-44.15(8g))	Y	N	If yes, add 0.5 * subtotal 1.a		
<b>5. Economic Benefit of Noncompliance</b> ( <i>Economic Benefit</i> )					\$
<b>6. Ability to Pay</b> ( <i>based on information supplied by the responsible party</i> ) ( <i>Ability to Pay</i> )					( )
<b>Total Civil Charge/Civil Penalty</b>					\$

### Aboveground Storage Tanks Charge/Civil Penalty Worksheet

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

<b>Facility/Responsible Party</b>	Reg./Id. #		NOV Date			<b>Amount</b>
	NOV Observation #	Nature and Degree of Harm				
		Serious	Moderate	Marginal		
<b>1. Violations and Frequency</b>						
a. Corrective Action /Monitoring/Closure Report Not Submitted		\$1,323 per phase	\$712 per phase	\$305 per phase		
b. AST, pipeline, or facility: Installed, Upgraded, Equipped, or Closed Improperly (per violation)		\$2,646 per tank	\$1,323 per tank	\$712 per tank		
c. AST, pipeline, or facility Operated Improperly (per violation)		\$1,323 per tank	\$712 per tank	\$305 per tank		
d. Failure to implement any applicable oil spill contingency plan or Failure to Execute an approved CAP		\$2,646	\$1,323	\$712		
e. Records not Available		\$1,323	\$712	\$305		
f. No Registration or inventory of ASTs		\$1,323 per tank	\$712 per tank	\$305 per tank		
g. Other Violation Component		\$1,323	\$712	\$305		
<b>2. Violations and Frequency Total</b>						
a. Nature/Degree of Injury to Health, Welfare and Property		\$4,132	\$2,066	\$1,038		\$
b. Actions in Reporting/Containing/Cleaning Up the Discharge		\$4,132	\$2,066	\$1,038		\$
c. Cost of Containment and Clean Up (Relative to Amount of Oil Spilled)		\$4,132	\$2,066	\$1,038		\$
d. Available Technology to Prevent/Contain/Reduce/Eliminate Discharge		\$4,132	\$2,066	\$1,038		\$
<b>Gravity Subtotal</b>						\$
<b>3. Degree of Culpability</b> ( <i>Severity and Compliance History</i> ) (apply to violation(s)' Amount or to the Violations and Frequency Subtotal)		Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	\$
<b>4. History of Noncompliance</b> ( <i>Compliance History</i> )						
Order or decree <u>in another media program</u> within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or \$5,000			\$
Order or decree <u>in same media program</u> within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)			\$
<b>Subtotal</b>						\$
(4) Natural gas transmission pipeline greater than 36 inches inside diameter (special order under § 62.1-44.15(8g))	Y	N	If yes, add 0.5 * subtotal 1.a			\$
<b>5. Economic Benefit of Noncompliance</b> ( <i>Economic Benefit</i> )						\$
<b>6. Ability to Pay</b> ( <i>based on information supplied by the responsible party</i> ) ( <i>Ability to Pay</i> )						(      )
<b>Total Civil Charge/Civil Penalty</b> ( <i>may not exceed \$32,500 per day per violation</i> )						\$

## CHEAPEAKE BAY PRESERVATION ACT LOCAL PROGRAM REVIEWS

### Chesapeake Bay Preservation Act

Staff should calculate an appropriate civil charge or penalty using the Civil Charge/Penalty Worksheet at the end of this section. In calculating the appropriate civil charge/penalty, staff assesses the gravity-based component of the charge by selecting the appropriate violation category and potential for harm category and multiplying the individual charge noted by the number of occurrences of the violation. Although not required by statute for local program violations<sup>33</sup>, the Degree of Culpability, History of Noncompliance, Economic Benefit, and Ability to Pay are considered for consistency with other programs and the categories are calculated as they are for other programs (see Chapter 4, pages 7-13). However, the time period that should be considered for the History of Noncompliance is generally five years which corresponds with the typical frequency of program reviews. When considering this factor, staff should consider whether DEQ issued the Program a consent order or took unilateral action during the previous program compliance review cycle. The history of noncompliance multiple should not be applied if a corrective action agreement was implemented and no subsequent action was taken by DEQ during the previous cycle. The civil charge cannot exceed \$5,000 per day with the maximum amount not to exceed \$20,000 per violation.<sup>34</sup> After the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, the civil charge cannot exceed \$5,000 per violation with the maximum amount not to exceed \$50,000 per order.<sup>35</sup>

*Violations and Frequency:* The violations generally fall into one of the following categories and the frequency is per violation.

#### **1. Ordinances**

Line 1.a.1 should be assessed if the ordinance is missing required items such as the plan and plat notation requirements, performance criteria, etc. In general, this should be assessed as a whole, and a separate violation should not be assessed for each missing item.

#### **2. Comprehensive Plans**

Line 1.a.2 should be assessed if the comprehensive plan is not up to date or is missing elements. In general, this should be assessed as a whole, and a separate violation should not be assessed for each missing element.

#### **3. Performance Criteria Implementation/Enforcement (other than those listed separately on worksheet)**

Line 1.a.3 should be assessed for issues with Performance Criteria implementation and enforcement other than those items listed separately on the worksheet. If the criteria are not incorporated into the comprehensive plans, or ordinances as appropriate then it should be assessed on line 1.a.1 or 1.a.2, not line 1.a.3. In general, deficiencies with each criteria can

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<sup>33</sup> See Va. Code § 62.1-44.15(8).

<sup>34</sup> Va. Code § 62.1-44.15:71.

<sup>35</sup> Beginning thirty days after the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, *see* (19) of 62.1-44.15.

be assessed as an individual violation.

**4. Site-Specific CBPA Determinations**

Line 1.a.4 should be assessed for failure to follow the process for ensuring site-specific delineation of the RPA/on-site determinations of water bodies. This line should also be assessed for issues related to mapping, Resource Protection Areas (RPA), Resource Management Areas (RMA), Intensely Developed Areas and site specific refinement of CBPA boundaries.

**5. Plan of development review process**

Line 1.a.5 should be assessed for issues with the plan of development review process including the failure to follow a POD process for all development that exceeds 2,500 square feet or deficiencies in the process that are not captured in another listed category. In general, this should be assessed as a whole and a separate violation should not be assessed for each deficiency in the process.

**6. Water Quality Impact Assessment (WQIA)**

Line 1.a.6 should be assessed for the failure to require a WQIA when appropriate or failure to require a complete WQIA. In general, this should be assessed as a whole and a separate violation should not be assessed for each missing WQIA or flaw in the WQIA process.

**7. Waivers and Exceptions**

Line 1.a.7 should be assessed for deficiencies with waivers and exceptions. Examples include failure to make the required findings prior to granting exceptions and failure to have a process in place. Deficiencies associated with waivers and deficiencies associated with exceptions should be assessed separately.

**8. Septic tank pump out/Enforcement**

Line 1.a.8 should be assessed for issues with the septic tank pump out requirements including failure to have a process in place to require pump out and failure to have enforcement provisions or take follow up enforcement action for noncompliance with pump out requirements.

**9. Reporting/Submissions**

Line 1.a.9 should be assessed for the failure to submit annual reports or other required reports/updates.

**10. Agriculture/Silvicultural Assessment**

Line 1.a.10 should be assessed for the failure to require an agriculture/silvicultural assessment when appropriate or failure to require a complete agriculture/silvicultural assessment. In general, this should be assessed as a whole, and a separate violation should not be required for each missing assessment or flaw in the process.

## **11. Other**

Line 1.a.11 should be assessed for items that do not have a corresponding category above.

### *Potential for Harm*

In addition to the potential for harm guidance contained in the Introduction of Chapter 4 of DEQ's Enforcement Guidance, this section provides some examples of additional factors to consider when choosing a potential for harm classification.

- The amount of development in Chesapeake Bay Preservation Act areas within the locality
- The amount of RPA located within the locality
- Actual impacts to the RPA or potential impacts to the RPA
- The extent of deviation from the requirement- for example, was the issue noted throughout many of the sites reviewed or was it an occasional error? Are there multiple elements missing from the comprehensive plan or ordinance?
- The length of time of the violation

**CBPA Program Review Civil Charge Worksheet**  
**Va. Code § 62.1-44.15; Va. Code § 62.1-44.15:71**

<i>Locality/Responsible Party</i>	EA No.	NOV No.				NOV Date
	<b>NOV Observation #</b>	<b>Potential for Harm</b>			<i>Amount</i>	
		<b>Serious</b>	<b>Moderate</b>	<b>Marginal</b>		
<b>1. Gravity-based Component</b>						
<b>a. Violations and Frequency</b> (per violation unless otherwise noted)		\$ (x) occurrences	\$ (x) occurrences	\$ (x) occurrences		
(1) Ordinances		3,000 (x) ___	2,000 (x) ___	1,500 (x) ___		
(2) Comprehensive Plans		2,000 (x) ___	1,000 (x) ___	700 (x) ___		
(3) Performance Criteria Implementation/Enforcement (other than those items listed below)		3,000 (x) ___	2,000 (x) ___	1,500 (x) ___		
(4) Site-Specific CBPA Determinations		2,500 (x) ___	1,500 (x) ___	1,000 (x) ___		
(5) Plan of Development Review Process		2,500 (x) ___	1,500 (x) ___	1,000 (x) ___		
(6) WQIA		2,500 (x) ___	1,500 (x) ___	1,000 (x) ___		
(7) Waivers/Exceptions		3,000 (x) ___	2,000 (x) ___	1,500 (x) ___		
(8) Septic Pump Out/Enforcement		2,000 (x) ___	1,000 (x) ___	700 (x) ___		
(9) Reporting/Submissions		2,000 (x) ___	1,000 (x) ___	700 (x) ___		
(10) Agriculture/Silvicultural Assessment		2,000 (x) ___	1,000 (x) ___	700 (x) ___		
(11) Other		2,000 (x) ___	1,000 (x) ___	700 (x) ___		
<b>Subtotal 1.a – Violations and Frequency - Preliminary Subtotal</b>						
<b>b. Aggravating Factors</b>						
<b>(2) Compliance History</b>						
Order or decree <u>in another media program</u> within 60 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) subtotal line 1.a, or \$5,000			
Order or decree <u>in same media program</u> within 60 mo. before initial NOV	Y	N	If yes, add 0.5 (x) subtotal line 1.a (for 1 order in 36 mo.)			
(3) Degree of Culpability ( <i>applied to specific line amount(s) or subtotal line 1.a</i> )	Low = (x) 0		Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
<b>Subtotal 1 b. – Aggravating Factors</b>						
<b>Subtotal - Gravity Based Component Subtotal</b> (Add Subtotal #1.a and Subtotal #1.b)						
<b>2. Economic Benefit of Noncompliance</b>						
<b>3. Ability to Pay</b> (based on information supplied by the locality)						(       )
<b>Total Civil Charge/Civil Penalty</b> (may not exceed \$5,000 per day with the maximum amount not to exceed \$20,000 per violation. Once new regulations go into effect, may not exceed \$5,000 per violation with the maximum not to exceed \$50,000 per order.)						<b>\$</b>

## CONSTRUCTION STORMWATER

The Construction Stormwater Program is a separate VPDES program authorized under the Stormwater Management Act, Article 2.3 of the State Water Control Law, Va. Code §§ 62.1-44.15:24 through -44.15:50.<sup>36</sup> This guidance addresses civil charges and penalties for DEQ enforcement actions for violations of state requirements. Negotiated civil charges and civil penalties are authorized by Va. Code §§ 62.1-44.15:25(6) and 62.1-44.15:48(D)(2) for violations of the Stormwater Management Act, construction stormwater permit, Virginia Stormwater Management Program (VSMP) Regulations, or order of the State Water Control Board or DEQ.<sup>37</sup> The maximum civil charge or civil penalty is \$32,500 per day for each violation.<sup>38</sup>

Staff should calculate an appropriate civil charge or civil penalty using the Worksheet at the end of this section. In calculating the appropriate civil charge, staff assess the gravity-based component of the charge by selecting the appropriate violation category and potential for harm category and multiplying the individual charge noted by the number of occurrences of the violation. Each calendar month of violation is treated as a separate occurrence unless otherwise noted. The Degree of Culpability, History of Noncompliance, Economic Benefit, and Ability to Pay categories are calculated as they are for other Water Programs.

Following the initial NOV, the Site may have ongoing and new violations. Enforcement staff should assess additional occurrences on the worksheet for violations that were included in the initial NOV and are identified in subsequent inspection reports or NOVs as ongoing violations or not adequately addressed by the RP. Enforcement staff should discuss new violations with compliance staff to determine if the new violations are serious enough to assess a civil charge. Examples where

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<sup>36</sup> HB 1250/SB 673 (2016) consolidates the stormwater and erosion and sediment control programs into the Virginia Erosion and Stormwater Management Act, Article 2.3 of the State Water Control Law. Beginning thirty days after the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, some authorities will change or be located in different sections of the Code. Code citations referenced in this guidance are those effective prior to that date.

<sup>37</sup> Note that this guidance is only applicable to land disturbing activities subject to regulation under the Stormwater Management Act. Sites with land disturbances between 10,000 square feet and an acre, not part of a larger common plan of development or sale, are subject to different penalty authorities under the Erosion and Sediment Control Law (ESCL). The Construction Stormwater Civil Charge/Civil Penalty Worksheet should not be used for violations at such sites. For violations of the ESCL, Regulations, and orders of the Board, the ESCL limits penalties to \$1,000 per violation, up to \$10,000 for a series of specified violations arising from the same operative set of facts. Va. Code §§ 62.1-44.15:54, 62.1-44.15:63. For violations of court orders, the ESCL authorizes penalties up to \$2,000 per violation. Va. Code § 62.1-44.15:63. Beginning thirty days after the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, these penalty authorities will be amended by HB 1250/SB 673 (2016). Note that for land disturbing activities subject to regulation under the Stormwater Management Act, erosion and sediment (E&S) control deficiencies typically constitute violations under both the Stormwater Management Act and the ESCL. DEQ addresses such deficiencies with its greater penalty authority under the Stormwater Management Act, and staff should calculate the appropriate civil charge or civil penalty using the Worksheet at the end of this section.

<sup>38</sup> Va. Code §§ 62.1-44.15:25(6) and 62.1-44.15:48(D)(2) incorporate by reference the civil penalty amount from Va. Code § 62.1-44.15:48(A).



new violations could be included in the enforcement action with a corresponding civil charge include repeated observances of non-compliance and non-compliance that results in environmental impacts.

Violations of Construction Stormwater requirements often accompany violations of VWPP Program requirements (unauthorized impacts to wetlands and/or streams). When VWPP violations result from unauthorized discharges of stormwater from land-disturbing activities, the VA Water Protection Program Civil Charge/Civil Penalty Worksheet should be used to calculate the appropriate civil charge or civil penalty for the VWPP violations, and the Construction Stormwater Civil Charge/Civil Penalty Worksheet should be used to calculate the appropriate civil charge or civil penalty for the Construction Stormwater Violations.

### **Potential for Harm Examples**

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

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

#### **b. Potential for Harm for all other Violations**

In assessing the potential for harm for all violations other than unpermitted discharge to state waters or discharge to state waters not in compliance with a permit (line 1.a(2)) and other record or reporting violations (line 1.a.12), DEQ staff should first consider the size of the land disturbing activity as follows:

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

When determining the potential for harm, enforcement staff should consider the amount of land disturbance at the time of the inspections or month where an occurrence is assessed, not the total proposed land disturbance for the project. For example, if an inspection for the month of May indicates that 6 acres of land have been disturbed at the time of inspection, and the site is permitted for 12 acres of land disturbance, occurrences for the month of May would start off as moderate, not serious, pending consideration of additional factors.

Staff may adjust these potential for harm thresholds based on case-specific factors if they provide additional justification. Factors that may impact the potential for harm ranking include, but

are not limited to: proximity of the land disturbance to the receiving water; surrounding land use and cover types; site conditions such as permeability, erodibility, and slope; property degradation; impacts to aquatic and wildlife habitat; fish kills and other impacts to wildlife; unique aspects or critical habitats; location in a Chesapeake Bay Preservation Area, Resource Protection Area, or Resource Management Area; presence of endangered species; water quality; any applicable Total Maximum Daily Loads; impacts to beneficial uses; pollutant content of stormwater; proximity to critical area; and extent of the deviation from the statutory, regulatory, and/or permit requirement. In assessing potential for harm for failure to install or to properly install post construction stormwater management BMPs (line 1(a)(8)) and failure to install or to properly install or maintain E&S controls or other pollution prevention measures (line 1(a)(9)), additional factors that may impact the potential for harm ranking include the number of deficient BMPs, controls, or measures; drainage area of deficient BMPs or controls; and severity of deficiencies.

## **Calculating the Civil Charge**

### **a. Failure to Obtain Permit Coverage**

Line 1.a(1) should be used where the RP fails to obtain permit coverage prior to engaging in land disturbing activities. The frequency is per month, beginning with the first date of land disturbance and enforcement staff should make reasonable efforts to determine the start date of land disturbing activities. If sufficient information is not available to determine the start date, then enforcement staff should use the date that land disturbance is first observed during an inspection or other defensible date. The end date for determining the number of occurrences is the date the RP receives permit coverage; however, if the RP ceases land disturbing activity (except for activity required for corrective action), undertakes efforts to comply with regulatory requirements, and makes a good faith effort to obtain permit coverage, then enforcement staff may use discretion and cease assessing occurrences earlier. Enforcement staff must document the reasoning for the timeframe assessed in the ERP.

### **b. Line 1(a)(2) Unpermitted Discharge to State Waters or Discharge to State Waters not in Compliance with Permit**

Line 1.a(2) should be used where there is a discharge of stormwater from land-disturbing activities, which reaches state waters, either (1) from a site without required construction stormwater permit coverage, or (2) from a site with permit coverage where required treatment, controls, and pollution prevention measures are wholly or almost entirely lacking or deficient, such that stormwater discharged from the site has essentially bypassed treatment or control, or (3) from a site with permit coverage where stormwater discharge due to a violation of permit conditions results in a significant demonstrated environmental impact (*e.g.*, a fish kill). This line should not be used when stormwater discharge results in a measurable volume of sediment accumulation on the bed of the receiving wetland, stream or other surface water (in which case use line 1(i) on the VA Water Protection Program Civil Charge/Civil Penalty Worksheet for unauthorized impacts to wetlands and/or streams). The VWP Worksheet should not be used when an unauthorized stormwater discharge results in turbidity of the receiving surface water without a measurable amount of sediment accumulation in the bed of the receiving water.

**c. Lines 1(a)(3), (4) & (7) Failure to Develop a SWPPP, Incomplete SWPPP, and Failure to Have an Approved E&S Control Plan or Agreement in Lieu of a E& S Control Plan**

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

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

In applying line 1(a)(4) (Incomplete SWPPP), the SWPPP should be considered as a whole, rather than assessing a separate occurrence for each SWPPP component that is missing. When assessing occurrences for failure to have an approved ESC or SWM plan, the frequency is per month beginning with the first date land disturbance occurs without an approved plan. If sufficient information is not available to determine the start date, then enforcement staff should use the date that land disturbance is first observed during an inspection or other defensible date. The end date for determining the number of occurrences is the date the RP receives plan approval; however, if the RP ceases land disturbing activity (except for activity required for corrective action) and makes a good faith effort to obtain plan approval, then enforcement staff may use discretion and cease assessing occurrences earlier.

**d. Line 1(a)(5) Failure to Maintain SWPPP on site**

Line 1(a)(5) should be used when a Site has a SWPPP but it is not on site and notice of the SWPPP's location is not posted. This line should not be used in conjunction with line 1(a)(3) (failure to develop a SWPPP). If the SWPPP is not on site because no SWPPP has been developed, line 1(a)(3) should be used, and not line 1(a)(5). Line 1(a)(5) should be used if there is no SWPPP onsite, and case facts suggest a SWPPP was developed. This line may also be used if a component of the SWPPP, such as the approved ESC plan, has been developed but is not on site at the time of inspection. .

e. **Lines 1(a)(8) & (9) Failure to Install or to Properly Install Post-Construction Stormwater Management BMPs, and Failure to Install or to Properly Install or Maintain E&S Controls or Other Pollution Prevention Measures**

In determining the number of occurrences for Line 1(a)(8) and Line 1(a)(9), deficiencies with post construction management BMPs, E&S controls, and pollution prevention measures should each be assessed cumulatively for the entire site (rather than assessing a separate occurrence for each BMP, control, or measure). For Line 1(a)(9), a separate occurrence should be assessed for each month of noncompliance. Enforcement staff may assess monthly occurrences for ongoing non-compliance between inspections, even if inspectors do not document the non-compliance each month, if site circumstances and documentation supports the assessment. For example, stabilization matting is not installed in January or during a follow-up inspection in April. If the matting is installed in May and there is no documentation in the SWPPP that stabilization was applied in the interim, then occurrences could be assessed for January, February, March, and April. Similarly, if no E&S controls are installed prior to land disturbance, and the controls are not installed between inspections, then enforcement could assess occurrences for the interim months. Deficiencies with E&S controls and deficiencies with pollution prevention measures should be assessed separately.

f. **Line 1(a)(11) Failure to Conduct or Record Inspections, or Incomplete Inspections**

In determining the number of occurrences for Line 1.a(11), enforcement staff should assess a separate occurrence for each month with a missing or incomplete inspection. Enforcement staff should consult the inspector and inspection reports to determine the number of missed inspections. Factors to consider when evaluating the potential for harm include the number of missed or incomplete inspections during that month, the conditions of the site, and the size of the site.

Construction Stormwater Civil Charge/Civil Penalty Worksheet

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

Facility/Responsible Party	EA No.		Per./Reg. No.		NOV Date
	NOV Observation #	Potential for Harm (Environmental Harm and Severity)			Amount
		Serious	Moderate	Marginal	
<b>1. Gravity-based Component</b>					
<b>a. Violations and Frequency</b> (per month unless noted)					
		\$ (x) occurrences			
(1) Failure to obtain permit coverage when required prior to commencing land disturbing activities		5,292 (x) ___	2,646 (x) ___	916 (x) ___	
(2) Unpermitted discharge to state waters or discharge to state waters not in compliance with a permit (per day or per event)		13,229 (x) ___	6,615 (x) ___	1,323 (x) ___	
(3) Failure to develop a stormwater pollution prevention plan (SWPPP)		5,292 (x) ___	2,646 (x) ___	916 (x) ___	
(4) Incomplete SWPPP other than E&S control plan requirements (e.g., lack of approved stormwater management (SWM) plan (or agreement in lieu of SWM plan) or pollution prevention plan)		2,646 (x) ___	1,323 (x) ___	661 (x) ___	
(5) Failure to maintain SWPPP on site (per event)		1,323 (x) ___	712 (x) ___	305 (x) ___	
(6) Failure to have approved annual standards and specifications when required		5,292 (x) ___	2,646 (x) ___	916 (x) ___	
(7) Failure to have an approved E&S control plan or agreement in lieu of a plan		3,967 (x) ___	1,934 (x) ___	712 (x) ___	
(8) Failure to install or to properly install post-construction stormwater management BMPs (per site)		9,362 (x) ___	4,681 (x) ___	916 (x) ___	
(9) Failure to install or to properly install or maintain E&SC controls or other pollution prevention measures		5,292 (x) ___	2,646 (x) ___	916 (x) ___	
(10) Failure to comply with approved annual standards and specifications		5,292 (x) ___	2,646 (x) ___	916 (x) ___	
(11) Failure to conduct or record inspections, or incomplete inspections		2,646 (x) ___	1,323 (x) ___	661 (x) ___	
(12) Other record or reporting violations		1,323 (x) ___	661 (x) ___	265 (x) ___	
(13) Failure to implement permit and/or SWPPP requirements or to comply with SWM plan, E&S control plan, or other requirement, not otherwise listed		2,646 (x) ___	1,323 (x) ___	712 (x) ___	
(14) Failure to submit notice of permit termination		5,292 (x) ___	2,646 (x) ___	916 (x) ___	
(15) Failure to report unpermitted discharge to state waters		13,229 (x) ___	6,615 (x) ___	1300 (x) ___	
<b>Subtotal 1.a – Violations and Frequency</b>					
<b>b. Aggravating Factors</b>					
(1) Compliance History					
Order or decree <u>in another media program</u> within 36 months before initial NOV	Y	N	If yes, add lesser of 0.05 * subtotal line 1.a, or \$5,000		
Order or decree <u>in same media program</u> within 36 months before initial NOV	Y	N	If yes, add 0.5 * subtotal 1.a		
(2) Degree of Culpability (applied to specific line amount(s) or subtotal line 1.a)	Low = (x)*0		Moderate = (x)*0.25	Serious = (x)*0.5	High = (x)*1.0
(3) Natural gas transmission pipeline greater than 36 inches inside diameter (special order under § 62.1-44.15(8g))	Y	N	If yes, add 0.5 * subtotal 1.a		
<b>Subtotal 1 b. – Aggravating Factors</b>					
<b>Subtotal - Gravity Based Component Subtotal</b> (Add Subtotal #1.a and Subtotal #1.b)					
<b>2. Economic Benefit of Noncompliance</b>					
<b>3. Ability to Pay</b> (based on information supplied by the facility)					( )
<b>Total Civil Charge/Civil Penalty</b> (may not exceed \$32,500 per day per violation)					\$

## **EROSION AND SEDIMENT CONTROL PROGRAM**

Staff should calculate an appropriate civil charge or penalty using the Worksheet at the end of this section. In calculating the appropriate civil charge/penalty, staff assess the gravity-based component of the charge by selecting the appropriate violation category and potential for harm category and multiplying the individual charge noted by the number of occurrences of the violation. When using the Worksheet to address multiple violations discovered during the same compliance review, each violation is a separate occurrence. Although not required by statute for local program violations<sup>39</sup>, the Degree of Culpability, History of Noncompliance, Economic Benefit, and Ability to Pay categories are calculated as they are for other Programs (see Chapter 4, pages 7-13). However, the time period that should be considered for the History of Noncompliance is five years which corresponds with the typical frequency of program reviews. When considering this factor, staff should consider whether DEQ issued the Program a consent order or took unilateral action during the previous review cycle. The history of noncompliance multiplier should not be applied if a corrective action agreement was implemented and no subsequent action was taken by DEQ during the previous cycle. The civil charge cannot exceed \$5,000 per day with the maximum amount not to exceed \$20,000 per violation.<sup>40</sup> After the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, the civil charge cannot exceed \$5,000 per violation with the maximum amount not to exceed \$50,000 per order.<sup>41</sup>

*Violations and Frequency:* The violations generally fall into one of the following categories and the frequency is per violation.

### **1. Ordinance**

Line 1.a.1 should be assessed if the ordinance is missing required components or the components are not current and correct. Generally, the ordinance is assessed as a whole instead of assessing an occurrence for each missing or deficient component.

### **2. Administration**

Line 1.a.2 should be assessed for issues with certified personnel and/or any items under program administration other than the ordinance and submissions. Examples include land disturbance without an approved plan or VSMP permit coverage; failure to maintain a copy of approved plans and records of inspections and enforcement actions; and failure to require provision of the name of an individual holding a certificate of competence.

### **3. Plan Review-**

Line 1.a.3 should be assessed for plan review deficiencies. Examples of violations that would be assessed on this line include failure to provide written notice of plan disapproval stating the reasons for disapproval within 45 days; approved plans that do not comply with state

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<sup>39</sup> See Va. Code § 62.1-44.15(8).

<sup>40</sup> Va. Code § 62.1-44.15:71.

<sup>41</sup> Beginning thirty days after the adoption of regulations pursuant to the Virginia Erosion and Stormwater Management Act, *see* (19) of 62.1-44.15.

minimum standards and when an appropriate variance is not granted; other variance issues.

#### **4. Inspections**

Line 1.a.4 should be assessed for inspection deficiencies. Examples of violations that would be assessed on this line include issues with inspection frequency/timing; ESC measures not maintained and are not documented in inspection reports; issues with inspection documentation and notification; completion deadlines are not specified for corrective actions.

#### **5. Enforcement**

Line 1.a.5 should be assessed for issues with enforcement. Examples of items that are assessed on this line are the failure to issue a notice to comply; enforcement actions do not contain corrective actions and deadlines; and advanced enforcement such as a stop work order is not initiated when warranted.

#### **6. Submissions**

Line 1.a.6 should be assessed for failure to submit land-disturbing activity reports or other required reports/updates. Generally, each type of report is treated as a separate occurrence.

#### **7. Other**

Line 1.a.7 should be assessed for violations that do not have a corresponding category above.

#### *Potential for Harm*

In addition to the potential for harm guidance contained in the Introduction of Chapter 4 of DEQ's Enforcement Guidance, this section provides some examples of additional factors to consider when choosing a potential for harm classification:

- The amount of development within the locality
- Actual impacts to nearby water bodies or off site impacts from development
- The extent of deviation from the requirement- for example, was the issue noted throughout many of the sites reviewed or was it an occasional error?
- The length of time of the violation

ESC Program Review Civil Charge Worksheet  
Va. Code § 62.1-44.15; Va. Code § 62.1-44.15:54

<i>Locality/Responsible Party</i>	EA No.		NOV No.		NOV Date	
	NOV Observation #	<b>Potential for Harm</b>			<i>Amount</i>	
		Serious	Moderate	Marginal		
<b>1. Gravity-based Component</b>						
<b>a. Violations and Frequency</b> (per violation unless otherwise noted)		\$ (x) occurrences	\$ (x) occurrences	\$ (x) occurrences		
(1) Ordinance		3,000 (x) ___	2,000 (x) ___	1,500 (x) ___		
(2) Administration		2,500 (x) ___	1,500 (x) ___	1,000 (x) ___		
(3) Plan Review		2,500 (x) ___	1,500 (x) ___	1,000 (x) ___		
(4) Inspections		2,500 (x) ___	1,500 (x) ___	1,000 (x) ___		
(5) Enforcement		2,500 (x) ___	1,500 (x) ___	1,000 (x) ___		
(6) Submissions		1,500 (x) ___	750 (x) ___	500 (x) ___		
(7) Other		1,500 (x) ___	750 (x) ___	500 (x) ___		
<b>Subtotal 1.a – Violations and Frequency - Preliminary Subtotal</b>						
<b>b. Aggravating Factors</b>						
(2) Compliance History						
Order or decree in another media program within 60 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) subtotal line 1.a, or \$5,000			
Order or decree in same media program within 60 mo. before initial NOV	Y	N	If yes, add 0.5 (x) subtotal line 1.a (for 1 order in 36 mo.)			
(3) Degree of Culpability (applied to specific line amount(s) or subtotal line 1.a)	Low = (x) 0		Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
<b>Subtotal 1 b. – Aggravating Factors</b>						
<b>Subtotal - Gravity Based Component Subtotal</b> (Add Subtotal #1.a and Subtotal #1.b)						
<b>2. Economic Benefit of Noncompliance</b>						
<b>3. Ability to Pay</b> (based on information supplied by the locality)						(       )
<b>Total Civil Charge/Civil Penalty</b> (may not exceed \$5,000 per day with the maximum amount not to exceed \$20,000 per violation. Once new regulations go into effect, may not exceed \$5,000 per violation with the maximum not to exceed \$50,000 per order.)						<b>\$</b>



## **Groundwater Withdrawal Program**

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

For the purposes of calculating an occurrence for an unpermitted withdrawal, each new month begins at zero gallons and once a withdrawal reaches 300,000 gallons a permit is required. Once a person withdraws more than 300,000 gallons of water, each additional day of water withdrawn will count as a separate occurrence in that calendar month. For permitted withdrawals, once the monthly, annual, or permit term limit has been exceeded, each additional day of withdrawal should be considered a separate occurrence. Certain permitted withdrawals may violate one or more of the three permitted limits with a single occurrence of a withdrawal of ground water.

### **Potential for Harm Examples**

#### *Volume of Withdrawals*

Serious, Moderate, and Marginal rankings are based on the annual water withdrawals of the withdrawal system and adjusted based on any specific environmental harm assessment. In the case of unpermitted withdrawals, best professional judgment should be used to estimate the annual withdrawal amount where withdrawals were not metered or readings may be suspect.

#### *Environmental Harms*

##### *Serious Classification*

- withdrawal systems permitted to withdraw 1 billion gallons or more annually;
- exceeding annual permitted withdrawal limit greater than 25%;
- unauthorized withdrawal or withdrawal exceedances at or near areas where there are water levels estimated to be below critical surface levels;
- failure to implement a Water Conservation Management Plan or mandatory conservation measures during a declared drought emergency; or
- multiple well pump intakes set below the top of the aquifer;
- Failure to install or maintain monitoring equipment.

##### *Moderate Classification*

- withdrawal systems permitted to withdraw less than 1 billion gallons but more than 10 million gallons annually;
- exceeding monthly and/or annual permitted water withdrawal limits between 10% and 25%; or
- failing to implement a water conservation and management plan.

### *Marginal Classification*

- In the absence of specific environmental harm or areas more sensitive to excess withdrawal, a Marginal ranking is to be used for withdrawal systems permitted to withdraw 10 million gallons or less annually.
- Exceeding monthly and/or annual limits by less than 10%

Staff may adjust the potential for harm thresholds based on case-specific factors such as but not limited to: proximity to other groundwater withdrawals, evidence of land subsidence, incidents/reports of well interference, coastal areas with high risk of saltwater intrusion/increased chloride zones, and populated areas dependent on groundwater.

### **Calculating the Civil Charge**

Line 1(c) through 1(e): When assessing a civil charge or civil penalty for these line items, chose the line item that corresponds with the longest reporting period only. In the event that one or more of these line items is violated, staff should evaluate the potential for harm to determine whether its potential for harm should be increased. When monitoring equipment has not been installed, staff should use best professional judgement when calculating the estimated volume of water withdrawn.

**Groundwater Withdrawal Civil Charge/Civil Penalty Worksheet**  
**Va. Code § 62.1-270(A)**

<b>Facility/Responsible Party</b>	<b>NOV Observation #</b>	<b>Reg./Id. #</b>			<b>NOV Date</b>	
		<b>Potential for Harm</b> (Potential for Harm and Severity)				
		<b>Serious</b>	<b>Moderate</b>	<b>Marginal</b>	<b>Amount</b>	
<b>1. Violations and Frequency</b> ( <i>Severity and Environmental Harm</i> )		\$ (x) occurrences	\$ (x) occurrences	\$ (x) occurrences		
a. Unpermitted withdrawal		12,721 (x) ____	6,360 (x) ____	3,180 (x) ____		
b. Failure to mitigate		12,721 (x) ____	6,360 (x) ____	3,180 (x) ____		
c. Permit Term withdrawal limits (per day)		6,828 (x) ____	3,419 (x) ____	1,710 (x) ____		
d. Monthly withdrawal limits (per month)		3,419 (x) ____	1,710 (x) ____	845(x) ____		
e. Annual withdrawal limits		6,828 (x) ____	3,419 (x) ____	1,710 (x) ____		
f. Failure to implement a Water Conservation Management Plan		5,293 (x) ____	2,646 (x) ____	1,323 (x) ____		
g. <i>Failure to submit, complete Record or reporting</i> ; (per reporting period)		3,1550 (x) ____	1,577 (x) ____	855 (x) ____		
h. Failure to install and/or maintain equipment or other operational deficiencies		3,419 (x) ____	1,710 (x) ____	855 (x) ____		
i. Other, Violation of Permit, Special Exceptions or Special Conditions NOT listed above		3,419(x) ____	1,710 (x) ____	855 (x) ____		
<b>Violations and Frequency Subtotal</b>						
<b>2. Adjustment Factors</b> ( <i>applied to Violations and Frequency Subtotal</i> )						
<b>Compliance History</b> (Compliance History)						
Order or decree <u>in another media program</u> within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or \$5,000			
Order or decree in same media program within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)			
Degree of Culpability ( <i>Severity and Environmental Harm</i> ) ( <i>apply to violation(s)' Amount or to the Violations and Frequency Subtotal</i> )	Low = (x) 0		Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
<b>Adjustment Subtotal</b>						
<b>3. Economic Benefit of Noncompliance</b> ( <i>Economic Benefit</i> )						
<b>4. Ability to Pay</b> ( <i>based on information supplied by the responsible party</i> ) ( <i>Ability to Pay</i> )						(       )
<b>Total Civil Charge/Civil Penalty</b> ( <i>may not exceed \$25,000 per day per violation</i> )						<b>\$</b>

## LAND PROTECTION AND REVITALIZATION PROGRAMS

The Virginia Waste Management Act at Va. Code § 10.1-1455(F) provides for negotiated civil charges in a consent order for violations of the Act, any regulation or order of the Board or Director, or any permit condition. The maximum civil charge is \$32,500 for each violation, with each day being a separate violation.

For this section, the Land Protection and Revitalization Programs include the Solid Waste, the Hazardous Waste, and the Revitalization Programs. Remediation Consent Orders (“RCOs”) under the Remediation Program are based on the authority of the Virginia Waste Management Board under Va. Code § 10.1-1402(19) through (21) which allows the Board to take actions to contain or clean-up sites where substances within the jurisdiction of the Board have been improperly managed. The Board has authority to enforce RCOs as with any other order.

### Potential for Harm Examples: Solid Waste

Each line item in section 1.a of the civil charge worksheet will be classified as outlined in the Chapter 4 Potential for Harm Classifications. Line items 1.a.1 through 1.a.18, below, provide line item specific guidance regarding potential for harm classifications. Many of the line items refer to using the Preliminary and Additional Factors in assessing the potential for harm. Some line items are specific to Solid Waste Permit (“SWP”) and/or Permit by Rule (“PBR”) facilities and use either violation specific potential for harm classification factors and/or only the Additional Factors, without using the Preliminary Factors in the potential for harm evaluation process. Each line item below will describe how the potential for harm evaluation may be conducted. The Preliminary and Additional Factors are as follows:

#### Preliminary Factors to Consider:

This table may be used if the line item below recommends potential for harm classification based on the Preliminary Factors. However, it is important to note that on a case specific basis, the enumerated Additional Factors may warrant a different potential for harm classification.

Type of Facility	Serious	Moderate	Marginal
A violation resulting from a facility operating with a SWP, or a facility that is unpermitted but should have obtained coverage under a SWP.	X		
A violation resulting from a facility operating with a PBR, or an unpermitted facility that should have obtained coverage under a PBR.		X	
A violation resulting from an unpermitted facility that would typically be exempt from permitting, as described in 9 VAC 20-81-95, but failed to comply with the requirements of the exemption.			X

Additional Factors to Consider:

1. Quantity and type of waste;
2. Existence, size, and proximity of receptor populations (e.g., local residents, fish and wildlife, including threatened or endangered species) and sensitive environmental media (e.g., surface waters, wetlands and aquifers);
3. Likelihood or fact of transport by way of environmental media (e.g., air, surface water, and groundwater);
4. Evidence of release (e.g., soil, air, surface water or groundwater contamination);
5. Multimedia impacts (e.g., no other media impacted v. impacts to air/water/wetlands/etc.);
6. Evidence of waste mismanagement (e.g., dumping, burial, improper storage, containment, or response to spills);
7. Adequacy of provisions for detecting and preventing a release (e.g., monitoring equipment and inspection procedures, freeboard measurements);
8. Repeat nature of violation (e.g., 1st occurrence v. 2nd occurrence v. 3rd occurrence, etc.);
9. Pattern, nature, and frequency of violation;
10. Environmental justice impacts (subject to publication and reference of additional guidance).

**1.a.1 Operation of a Solid Waste Management Facility Without a Permit**

This line item will be used for a Responsible Party (“RP”) that is operating without a permit. The potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification.

**1.a.2 Leachate Discharges/Seeps**

If an unauthorized discharge of leachate to surface water, wetlands or a drinking water source is observed, the violation may be classified as having a serious potential for harm. If a leachate seep, spill, or overflow results in leachate outside the landfill’s disposal unit boundary and into a sediment basin but without discharging to surface water, wetlands, or drinking water source the violation may be classified as having a moderate potential for harm. If a leachate seep, spill, or overflow results in leachate outside the landfill’s disposal unit boundary but not into a sediment basin or discharging to surface water, wetlands or drinking water source, the violation may be classified as having a marginal potential for harm.

### **1.a.3 Landfill Slope Failure**

If a landfill slope failure is observed, and waste is deposited outside the disposal unit boundary, the violation may be classified as having a serious potential for harm. If the waste is deposited within the disposal unit boundary but on an unlined area, the violation may be classified as having a moderate potential for harm. If the waste is deposited within the disposal unit boundary on a lined area, the violation may be classified as having a marginal potential for harm.

### **1.a.4 Failure to Extinguish Landfill Fire**

If an RP fails to control and extinguish a landfill fire, surface or subsurface, the violation may be classified as having a serious, moderate, or marginal potential for harm, based on the enumerated Additional Factors.

### **1.a.5 Failure to Implement Landfill Gas Remediation**

If an RP fails to implement landfill gas remediation (ongoing methane compliance level exceedances), the violation may be classified as having a serious, moderate, or marginal potential for harm, based on the enumerated Additional Factors.

### **1.a.6 Failure to Implement Groundwater Corrective Action Remedy**

If an RP fails to implement the groundwater corrective action, the violation may be classified as having a serious, moderate, or marginal potential for harm, based on the enumerated Additional Factors.

### **1.a.7 Failure to Adhere to Closure Plan or Closure Timeframe**

If an RP fails to adhere to a closure plan or closure timeframe, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification.

### **1.a.8 Disposal of Solid Waste Beyond Permitted Landfill Disposal Unit Boundary or Vertical Design Capacity**

If an RP disposes solid waste beyond the permitted landfill disposal unit boundary or vertical design capacity, the violation may be classified as having a serious, moderate, or marginal potential for harm, based on the enumerated Additional Factors.

### **1.a.9 Unauthorized Open Burning of Solid Waste**

If unauthorized open burning of solid waste is observed, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification.

### **1.a.10 Improper Management of Waste**

If improper management of regulated medical waste, asbestos, waste tires, or PCBs is observed, the violation may be classified as having a serious potential for harm, regardless of whether the facility has a SWP, PBR, or is unpermitted. If improper management of waste not described above is observed, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification.

### **1.a.11 Facility Operation**

If the following is observed, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification:

1. Leachate head exceeding 30 cm on bottom liner as a result of design flaws and/or operational deficiencies (excluding sumps and manifold trenches);
2. Exceedance of disposal limit (landfill) or processing limit (PBR facility);
3. Failure to maintain sufficient landfill daily, intermediate, or final cover;
4. Speculative accumulation of solid waste (stockpiles);
5. Operating without a licensed waste management facility operator;
6. Other similar operational deficiencies.

### **1.a.12 Failure to Conduct Groundwater Monitoring or Landfill Gas Monitoring**

If an RP fails to conduct groundwater monitoring or landfill gas monitoring, the violation may be classified as having a serious, moderate, or marginal potential for harm, based on the enumerated Additional Factors.

### **1.a.13 Failure to Comply with Financial Assurance Requirements**

If an RP fails to comply with financial assurance requirements, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification.

### **1.a.14 Failure to Properly Conduct Post-closure Care Maintenance**

If an RP fails to properly conduct post-closure care maintenance, the violation may be classified as having a serious, moderate, or marginal potential for harm, based on the enumerated Additional Factors.

### **1.a.15 Failure to Comply with Site-Specific Permit Condition**

If an RP fails to comply with site-specific permit conditions, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification.

### **1.a.16 Other**

This line item should only be used if the observation does not clearly fit into another line item. The potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification.

### **1.a.17 Record Keeping/Reporting**

If the following is observed, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification:

1. Failure to report noncompliance or unusual condition within 24 hours/5 days (or alternate timeframe in permit);
2. Failure to comply with recordkeeping requirement (*e.g.* Operations Manual, Self-Inspections, Unauthorized Waste Records, Certification/inspection, or other);
3. Failure to submit required plan or report to DEQ (*e.g.* Disclosure Statement, SWIA Report, groundwater or gas monitoring report, or other);
4. Failure to respond to a request for information;
5. Other similar record keeping/ reporting deficiencies.

### **1.a.18 Housekeeping, or Maintenance Issues**

If housekeeping, or maintenance issues (*e.g.* litter, odor, vector, dust, run-on/run-off control, well maintenance, road maintenance, or other) is observed, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification.



## Solid Waste Civil Charge Worksheet

Va. Code § 10.1-1455

Facility/Responsible Party:	EA No.:	Permit No.:	NOV Date:		
	NOV Observation No(s).	Potential for Harm			Amount
		Serious	Moderate	Marginal	
<b>1. Gravity-based Component</b>					
<b>a. Violations and Frequency</b> (x) = number of occurrences		\$ (x)	\$ (x)	\$ (x)	
(1) Operation of solid waste management facility without a permit		13,229 (x)	6,615 (x)	3,307 (x)	
(2) Leachate Discharges/Seeps		13,229 (x)	6,615 (x)	3,307 (x)	
(3) Landfill slope failure		13,229 (x)	6,615 (x)	3,307 (x)	
(4) Failure to extinguish a landfill fire		13,229 (x)	6,615 (x)	3,307 (x)	
(5) Failure to implement landfill gas remediation		13,229 (x)	6,615 (x)	3,307 (x)	
(6) Failure to implement groundwater corrective action remedy		13,229 (x)	6,615 (x)	3,307 (x)	
(7) Failure to adhere to closure plan or closure timeframe		13,229 (x)	6,615 (x)	3,307 (x)	
(8) Disposal of solid waste beyond permitted landfill disposal unit boundary or vertical design capacity		13,229 (x)	6,615 (x)	3,307 (x)	
(9) Unauthorized open burning of solid waste		13,229 (x)	6,615 (x)	3,307 (x)	
(10) Improper management of waste		13,229 (x)	6,615 (x)	3,307 (x)	
(11) Facility Operations		6,615 (x)	3,250 (x)	1,307 (x)	
(12) Failure to conduct groundwater monitoring or landfill gas monitoring		6,615 (x)	3,250 (x)	1,654 (x)	
(13) Failure to comply with financial assurance requirements		6,615 (x)	3,250 (x)	1,654 (x)	
(14) Failure to properly conduct post-closure care maintenance		6,615 (x)	3,250 (x)	1,654 (x)	
(15) Failure to comply with site-specific permit condition		6,615 (x)	3,250 (x)	1,654 (x)	
(16) Other		6,615 (x)	3,250 (x)	1,654 (x)	
(17) Record keeping/Reporting		3,250 (x)	1,654 (x)	826 (x)	
(18) Housekeeping, or maintenance issues (litter, odor, vector, dust, run-on/run-off control, well maintenance, road maintenance, or other)		3,250 (x)	1,654 (x)	826 (x)	
<b>Subtotal 1.a – Violations and Frequency</b>					
<b>2. Degree of Culpability</b>					
Culpability subtotal (apply to violation(s)' Amount or to the sum of 1.a.)	Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
<b>3. Compliance History</b>					
Order or decree <u>in another media program</u> within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) sum of 1 and 2, or \$5,000		
Order or decree <u>in same media program</u> within 36 mo. before initial NOV	Y	N	If yes, add 0.25 (x) sum of 1 and 2 (for 1 order in 36 mo.)		
<b>4. Economic Benefit of Noncompliance</b>					
<b>5. Ability to Pay</b> (based on information supplied by the owner/operator)					(       )
<b>Total Civil Charge/Civil Penalty</b> (may not exceed \$32,500 per day per violation)					

**Potential for Harm Examples: Hazardous Waste**

Each line item in section 1.a of the civil charge worksheet will be classified as outlined in Chapter 4 Potential for Harm Classifications.

Line items 1.a.1 through 1.a.13, below, provide line item specific guidance regarding potential for harm classifications. Most of the line items, below, refer to using the Preliminary and Additional Factors in assessing the potential for harm. The Preliminary and Additional Factors are as follows:

Preliminary Factors to Consider:

This table may be used if the line item below recommends potential for harm classification based on the Preliminary Factors. However, it is important to note that on a case specific basis, the enumerated Additional Factors may warrant a different potential for harm classification.

<b>Type of Generator</b>	<b>Serious</b>	<b>Moderate</b>	<b>Marginal</b>
Large Quantity Generator (“LQG”) <sup>42</sup>	X		
Small Quantity Generator (“SQG”) <sup>43</sup>		X	
Very Small Quantity Generator (“VSQG”) <sup>44</sup>			X

Additional Factors to Consider:

See, “Additional Factors to Consider”, in the “Potential for Harm Examples: Solid Waste”, above.

**1.a.1 Failure to Accurately Identify Waste as Hazardous Waste**

This line item should be used when an RP fails to identify the type of waste maintained. An RP must determine if the waste generated is on a hazardous waste list.<sup>45</sup> Additionally, the RP must also determine if the waste generated is ignitable, corrosive, reactive or toxic in accordance with the Resource Conservation and Recovery Act (“RCRA”).<sup>46</sup> The potential for harm evaluation may be

<sup>42</sup> 40 CFR §§§ 262.13, 262.15, and 262.17

<sup>43</sup> 40 CFR §§§ 262.13, 262.15, and 262.16

<sup>44</sup> 40 CFR §§ 262.13 and 262.14

<sup>45</sup> 40 CFR 261.31; 40 CFR 261.33

<sup>46</sup> 40 CFR 261 subpart C

based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification.

### **1.a.2 Failure to Properly Determine Hazardous Waste Generator Status/ Failure to Obtain an EPA Identification Number**

If an RP fails to determine hazardous waste generator status or fails to obtain an EPA identification number, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification.

### **1.a.3 Failure to Notify and/or Re-notify DEQ of Hazardous Waste Generator Status**

If an RP fails to notify or re-notify DEQ of the facility's generator status, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification.

### **1.a.4 Failure to Comply with Conditions of a Permit/ Failure to Obtain a Permit**

If an RP fails to comply with conditions of a permit, or fails to obtain a permit, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification.

### **1.a.5 Failure to Properly Dispose of Waste**

If an RP fails to properly dispose of waste and/or fails to ship hazardous waste to an approved designated facility, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification.

### **1.a.6 Failure to comply with Satellite Accumulation Area/ Central Accumulation Area/ Universal Waste Requirements**

If the following is observed, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification:

1. For Satellite Accumulation Areas ("SAA"):
  - a. Greater than fifty five (55) gallons of hazardous waste;
  - b. Greater than one quart of liquid acute hazardous waste;
  - c. Greater than one kilogram of solid acute hazardous waste;
  - d. Other SAA deficiencies.
2. For Central Accumulation Areas ("CAA"):
  - a. A LQG that accumulates hazardous waste for more than 90 days;
  - b. A SQG that accumulates hazardous waste for more than 180 days;
  - c. A SQG that accumulates greater than 6,000 kg of hazardous waste;

- d. A VSQG that accumulates hazardous waste for more than 180 days;
  - e. A VSQG that accumulates greater than 1,000 kg of hazardous waste;
  - f. Other CAA deficiencies.
3. For Universal Waste (“UW”):
- a. Accumulation of UW for greater than one year, this will be assessed as a separate violation;
  - b. Other UW deficiencies.

### **1.a.7 Failure to Properly Manage Waste**

If the following is observed, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification:

- 1. Failure to properly label containers containing hazardous waste;
- 2. Failure to mark “Hazardous Waste” or other words that distinctively identify the contents of the container;
- 3. Failure to properly mark the start date of waste accumulation;
- 4. Failure to maintain structural integrity of hazardous waste and UW containers;
- 5. Other hazardous waste management deficiencies.

### **1.a.8 Failure to Comply with Contingency Plan/ Emergency Plan Requirements**

If the following is observed, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification:

- 1. Failure of a LQG to develop and/or update an existing contingency plan that meets the requirements of the regulation (the failure to have a plan may be assessed as a more egregious violation than the failure to update the contingency plan, based on the Additional factors);
- 2. Other contingency plan deficiencies;
- 3. Emergency Plan deficiencies for LQGs:
  - a. Failure to make arrangements with local authorities;
  - b. Failure to provide documentation verifying the attempts of making such arrangements;
  - c. Failure to designate an emergency coordinator;
  - d. Other emergency plan deficiencies;
- 4. Emergency Plan deficiencies for SQGs:
  - a. Failure to comply with emergency procedure requirements (*e.g.*, facility postings).

### **1.a.9 Training**

If an RP fails to train new employees within 6 months of being hired, and/or fails to train employees annually, the potential for harm evaluation may be based on the Preliminary Factors,

however, the enumerated Additional Factors may warrant a different potential for harm classification.

#### **1.a.10 Failure to Comply With Land Disposal Restrictions Requirements**

If an RP fails to comply with Land Disposal Restrictions (“LDR”) requirements, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification.

#### **1.a.11 Failure to comply with Part 265 Subparts AA, BB, and CC Air Emissions Requirements**

If an RP fails to comply with Part 265 Subparts AA, BB, and CC air emissions requirements, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification.

#### **1.a.12 Other**

This line item should only be used if the observation does not clearly fit into another line item. The potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification.

#### **1.a.13 Failure to Submit and Maintain Documentation**

If the following is observed, the potential for harm evaluation may be based on the Preliminary Factors, however, the enumerated Additional Factors may warrant a different potential for harm classification:

1. A LQG’s failure to submit biennial report(s);
2. Failure to file an exception report when a signed copy of the manifest was not received within a specified period of time;
3. Failure to maintain copies of manifests and other required paperwork, inspections, BRs etc. for 3 years;
4. A signed copy of a manifest has not been received within 45 days for an LQG and 60 days for an SQG;
5. Other submittal/ documentation deficiencies.

**Hazardous Waste Civil Charge Worksheet**  
**Va. Code § 10.1-1455**

<b>Facility/Responsible Party:</b>	<b>EA No.:</b>	<b>Permit No.:</b>	<b>NOV Date:</b>		
	NOV Observation No(s).	<b>Potential for Harm</b>			<i>Amount</i>
		<b>Serious</b>	<b>Moderate</b>	<b>Marginal</b>	
<b>1. Gravity-based Component</b>					
<b>a. Violations and Frequency</b> (x) = number of occurrences		\$ (x)	\$ (x)	\$ (x)	
(1) Failure to Accurately Identify Waste as Hazardous Waste		13,229 (x)	6,615 (x)	3,307 (x)	
(2) Failure to Properly Determine Hazardous Waste Generator Status/ Failure to Obtain an EPA Identification Number		13,229 (x)	6,615 (x)	3,307 (x)	
(3) Failure to Notify and/or Re-notify DEQ of Hazardous Waste Generator Status		13,229 (x)	6,615 (x)	3,307 (x)	
(4) Failure to Comply with Conditions of a Permit/ Failure to Obtain a Permit		13,229 (x)	6,615 (x)	3,307 (x)	
(5) Failure to Properly Dispose of Waste		13,229 (x)	6,615 (x)	3,307 (x)	
(6) Failure to comply with Satellite Accumulation Area/ Central Accumulation Area/ Universal Waste Requirements		13,229 (x)	6,615 (x)	3,307 (x)	
(7) Failure to Properly Manage Waste		13,229 (x)	6,615 (x)	3,307 (x)	
(8) Failure to Comply with Contingency Plan/ Emergency Plan Requirements		13,229 (x)	6,615 (x)	3,307 (x)	
(9) Training		6,615 (x)	3,307 (x)	1,654 (x)	
(10) Failure to Comply With Land Disposal Restrictions Requirements		6,615 (x)	3,307 (x)	1,654 (x)	
(11) Failure to comply with Part 265 Subparts AA, BB, and CC Air Emissions Requirements		6,615 (x)	3,307 (x)	1,654 (x)	
(12) Other		6,615 (x)	3,307 (x)	1,654 (x)	
(13) Failure to Submit and Maintain Documentation		3,307 (x)	1,654 (x)	826 (x)	
<b>Subtotal 1.a – Violations and Frequency</b>					
<b>2. Degree of Culpability</b>					
Culpability subtotal (apply to violation(s)' Amount or to the sum of 1.a.)	Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
<b>3. Compliance History</b>					
Order or decree <u>in another media program</u> within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) sum of 1 and 2, or \$5,000		
Order or decree <u>in same media program</u> within 36 mo. before initial NOV	Y	N	If yes, add 0.25 (x) sum of 1 and 2 (for 1 order in 36 mo.)		
<b>4. Economic Benefit of Noncompliance</b>					
<b>5. Ability to Pay</b> (based on information supplied by the owner/operator)					(            )
<b>Total Civil Charge/Civil Penalty</b> (may not exceed \$32,500 per day per violation)					

## **Potential for Harm Examples: Remediation Consent Order**

RCOs are orders with a comprehensive risk-based remedial strategy and schedule tailored to the site. A traditional consent order with a civil charge and/or schedule of compliance will only occur for an RCO if a notice of violation is issued to the party to the RCO for failure to comply with the provisions of the RCO.

Each line item in section 1.a of the civil charge worksheet will be classified as outlined in Chapter 4 Potential for Harm Classifications. As there is no hierarchy of facilities participating in the program (e.g., LQG/SQG/VSQG, SWP, PBR), a violation of an RCO may be classified as having a serious, moderate, or marginal potential for harm, based on the enumerated Additional Factors (*See*, “Additional Factors to Consider”, in the “Potential for Harm Examples: Solid Waste”, above).

## Remediation Consent Order Civil Charge Worksheet

Va. Code § 10.1-1455

Facility/Responsible Party:	ORP Identification No.:	Permit No.:		RCO Effective Date:	
	NOV Observation No(s).	Potential for Harm			<i>Amount</i>
		Serious	Moderate	Marginal	
<b>1. Gravity-based Component</b>					
<b>a. Violations and Frequency</b> <i>(x) = number of days of continuing, discrete violations</i>		\$ (x)	\$ (x)	\$ (x)	
(1) Failure to comply with Schedule of Compliance or Statement of Work.		13,229 (x)	6,615 (x)	3,307 (x)	
(2) Failure to implement Final Selected Remedy.		13,229 (x)	6,615 (x)	3,307 (x)	
(3) Failure to Notify DEQ of change of Ownership.		13,229 (x)	6,615 (x)	3,307 (x)	
(4) Failure to properly conduct Operation and Maintenance of Remedy.		13,229 (x)	6,615 (x)	3,307 (x)	
(5) Failure to implement Institutional Controls		13,229 (x)	6,615 (x)	3,307 (x)	
(6) Failure to comply with terms of Cost Reimbursement Agreement		13,229 (x)	6,615 (x)	3,307 (x)	
(7) Failure to notify DEQ within specified timeframes outlined in the RCO.		6,615 (x)	3,307 (x)	1,654 (x)	
(8) Failure to comply with financial assurance requirements of the RCO.		6,615 (x)	3,307 (x)	1,654 (x)	
(9) Other		6,615 (x)	3,307 (x)	1,625 (x)	
(10) Failure to Record Final Certificate.		3,307 (x)	1,654 (x)	826 (x)	
(11) Failure to provide notice of the RCO to contractors and Agents (14 days after effective date of RCO).		3,307 (x)	1,654 (x)	826 (x)	
(12) Failure to provide access to the Site for DEQ		3,307 (x)	1,654 (x)	826 (x)	
(13) Failure to retain Records for 10 years as required by RCO.		3,307 (x)	1,654 (x)	826 (x)	
<b>Subtotal 1.a – Violations and Frequency</b>					

<b>2. Degree of Culpability</b>					
Culpability subtotal <i>(apply to violation(s)' Amount or to the sum of 1.a.)</i>	Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
<b>3. Compliance History</b>					
Order or decree <u>in another media program</u> within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) sum of 1 and 2, or \$5,000		
Order or decree <u>in same media program</u> within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) sum of 1 and 2 (for 1 order in 36 mo.)		
<b>4. Economic Benefit of Noncompliance</b>					
<b>5. Ability to Pay</b> <i>(based on information supplied by the owner/operator)</i>					(       )
<b>Total Civil Charge/Civil Penalty</b> <i>(may not exceed \$32,500 per day per violation)</i>					



## **NATURAL GAS TRANSMISSION PIPELINES GREATER THAN 36 INCHES INSIDE DIAMETER**

Va. Code § 62.1-44.15(8g) provides statutory authority for the Department to assess higher civil penalties for natural gas transmission pipelines greater than 36 inches inside diameter and outlines procedures for the issuance of a special order. Va. Code § 62.1-44.15(8g) states that persons constructing or operating a natural gas transmission pipelines greater than 36 inches inside diameter who violates the provisions of § 62.1-44.2 *et seq.* may be assessed civil charges/penalties up to \$50,000 per violation, not to exceed \$500,000 per order. These higher civil charges/penalties can only be applied after a Formal Hearing (see criteria below), and do not apply to consent orders. For pipeline consent orders staff should disregard this section and apply the standard penalty guidance in this chapter.

While Va. Code § 62.1-44.15(8g) provides for higher civil penalties for any violations of the State Water Control Law, the most common violations will be violations of the Virginia Water Resources and Wetlands Protection Program, Article 2.2 of the State Water Control Law, Va. Code §§ 62.1-44.15:20 through -44.15:23.1; the Stormwater Management Act, Article 2.3, Va. Code §§ 62.1-44.15:24 through -44.15:50; and the Erosion and Sediment Control Law, Article 2.3, Va. Code §§ 62.1-44.15:51 through -44.15:66.

In order to qualify for higher penalties, the criteria in Va. Code § 62.1-44.15(8g) have to be met:

1. DEQ has issued at least two written notices of alleged violation for violations involving the same pipeline;
2. such violations have not been resolved by a demonstration that there was no violation or by an order issued by the Board or the Director; and
3. there is a finding that such violation occurred after a hearing was conducted (a) before a hearing officer appointed by the Supreme Court, (b) in accordance with §2.2-4020, and (c) with at least 30 days' notice to such person of the time, place, and purpose thereof.

When the criteria for issuance of a special order with higher penalties are met, staff should use the program civil charge/penalty worksheets in this guidance that correspond to the type of violations.<sup>47</sup> In calculating the appropriate civil charge/penalty, staff should follow the guidance accompanying the worksheets to assess the gravity-based component (see special instructions below for construction stormwater and VWPP). Once the gravity-based component is calculated, an aggravating factor multiplier of 50% should be added to the gravity based component of the worksheet. The Degree of Culpability, History of Noncompliance, Economic Benefit, and Ability to Pay categories are calculated as they are for other Water Programs. Staff must provide the Responsible Party the penalty worksheet for the proposed penalty prior to the hearing.<sup>48</sup>

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<sup>47</sup> Va. Code § 62.1-44.15(8g) states: "The actual amount of any penalty assessed shall be based upon the severity of the violation, the extent of any potential or actual environmental harm, the compliance history of the person, any economic benefit realized from the noncompliance, and the ability of the person to pay the penalty."

<sup>48</sup> Va. Code § 62.1-44.15(8g) states: "The Board shall provide the person with the calculation for the proposed penalty prior to any hearing conducted for the issuance of an order that assesses penalties pursuant to this subdivision."

## **VWPP Violations**

Civil charges and civil penalties for VWPP violations are assessed per occurrence. An occurrence is defined as a separate, identifiable, discrete act that results in a discharge of a pollutant to state waters. Separate civil charges are assessed: (1) for impacts to streams and (2) for impacts to wetlands, based on the potential for harm to the environment and the extent of deviation from regulatory program. Wetland type is not considered when determining the number of occurrences, unless the different wetland types were subject to separate discharges of pollutants. Also, an individual stream reach is not considered when determining the number of occurrences, unless there have been separate discharges affecting the same or differing portions of the stream(s).

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

If staff believe that these thresholds should be adjusted staff should provide additional justification by considering the following factors: classification of a wetland type (*e.g.*, PFO, PSS, PEM)<sup>49</sup>; surrounding land use and cover types; nutrient, sediment, and pollutant trapping ability; flood control and flood storage capacity, and flood flow synchronization; erosion control and shoreline stabilization; groundwater recharge and discharge; aquatic and wildlife habitat; unique aspects or critical habitats; water quality; and recreation, education, aesthetics, or other beneficial uses

## **Stormwater Violations**

When calculating a penalty using the Construction Stormwater Worksheet, the frequency for assessing violations is per violation, not per month or per site. Each BMP, ESC measure, or pollution prevention measure that is deficient would be assessed as a separate violation. In assessing potential for harm, staff should not apply the land disturbance thresholds in the construction stormwater penalty guidance section since most natural gas pipelines of this size will exceed the serious threshold. Instead, staff should consider the other factors listed in the guidance that may impact potential for harm, including but not limited to proximity to a receiving water or sensitive feature, erodibility and slope, TMDLs, and drainage area of deficient BMPs. In addition to those factors, staff may also consider the length of time of the violation when evaluating potential for harm.

Line 1.a(2) of the construction stormwater worksheet should be used when there is a discharge which reaches state waters where (1) required treatment, controls, and pollution prevention measures are wholly or almost entirely lacking or deficient, such that stormwater discharged from the site has essentially bypassed treatment or control, or (2) a stormwater discharge results in a

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<sup>49</sup> Under the [U.S. Fish and Wildlife Service Wetland Classification System](#), wetlands are of two basic types: coastal (also known as tidal or estuarine wetlands) and inland, also known as non-tidal, freshwater, or palustrine wetlands which have three classes: palustrine emergent (PEM), palustrine scrub-shrub, (PSS), and palustrine forested (PFO).

significant demonstrated environmental impact (*e.g.*, a fish kill). This line should not be used when stormwater discharge results in a measurable volume of sediment accumulation on the bed of the receiving water (in which case use line 1(i) on the VA Water Protection Program Civil Charge/Civil Penalty Worksheet for unauthorized impacts to wetlands and/or streams).

When determining the number of occurrences on line 1.a.(8) and line 1.a.(9) of the construction stormwater worksheet, deficiencies with post construction management BMPs, E&S controls, and pollution prevention measures should not be assessed cumulatively for the entire site or pipeline project (assess a separate occurrence for each BMP, control, or measure).

## **Pollutant Discharge Elimination System and Pollution Abatement Program**

The State Water Control Law at Va. Code § 62.1-44.15(8d) provides for the payment of civil charges in consent orders for past violations. This statutory section is the basis for negotiated civil charges in the Virginia Pollutant Discharge Elimination System (VPDES) Program, and Virginia Pollution Abatement (VPA) Permit Program. With the exception of consent orders to prevent or minimize sanitary sewer overflows (SSOs),<sup>50</sup> the maximum civil charge is \$32,500 for each violation, with each day being a separate violation.<sup>51</sup>

### **Potential for Harm Examples**

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

#### *Serious Classification*

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

#### *Moderate Classification*

Examples include, but are not limited to: failure to observe Best Management Practices (BMPs) in VPDES permits, chronic late submission of monitoring reports or permit application, or failure to follow an operation & maintenance manual.

#### *Marginal Classification*

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

The following potential for harm factors may be considered when evaluating potential for harm: facility/site conditions, size of facility/site, length of time, number of outfalls, receiving water characteristics and the nature of the discharges from the outfalls. Potential for harm factors identified in this guidance are among the most common encountered in enforcement actions; however, they should not be considered exhaustive and additional investigation may be required.

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<sup>50</sup> Va. Code [§ 62.1-44.15\(8f\)](#) establishes maximum civil charges for SSO violations in consent orders requiring SSO corrective action. Any such order may impose civil penalties in amounts up to the maximum amount authorized in § 309(g) of the Clean Water Act. These limits are subject to change and the Code of Federal Regulations should be consulted.

<sup>51</sup> The maximum amounts for consent civil charges are incorporated by reference from Va. Code [§ 62.1-44.32\(a\)](#).

These additional factors may also be considered, as appropriate:

Line on Worksheet	Potential for Harm Factors
Line 1.a.1	Extent of deviation from the effluent limits, the nature of parameter exceeded, storm event, flood conditions, mixing zones, receiving water impairments, receiving water size, frequency of exceedances, and impacts to the environment ( <b>see section below for additional explanation</b> ).
Line 1.a.2	Number of areas exposed to pollutants, impact of discharges from site
Line 1.a.3	<p>Whether previous monitoring indicates an issue at the site, whether performing monitoring earlier would have led to controls being installed sooner, whether there is a waste load allocation for the site, the number of performance/documentation deficiencies.</p> <p>For violations that are assessed per SWPPP review, the number of monitoring events/examinations that were not performed or number of deficiencies with performance should be considered when assessing potential for harm. Generally, for missed monitoring, 1 = marginal; 2-3 = moderate; and 4+ = serious.</p>
Line 1.a.4	Length of time of discharge, discharge composition, amount discharged, size of the storm event, instream concentration of the SSO relative to the stream flow, stream class designation, frequency of bypasses/overflows to receiving water, receiving water impairments, downstream uses (withdrawals, drinking water intake locations), and loss of other downstream beneficial uses (recreational, agriculture). <b>See additional information below for SSOs.</b>
Line 1.a.5	Length of delay, the number of deficiencies with the submission,
Line 1.a.6	Length of time without permit coverage, actions taken while there was no coverage
Line 1.a.7	Length of time prior to report, whether corrective action would have occurred sooner
Line 1.a.8	Length of time without maintenance/installation of BMPs; length of time in taking corrective action once notified (e.g. Inspection Reporting), nature of triggering event, number of measures not implemented
Line 1.a.9	<p>The number of missed inspections, the number and severity of performance/documentation deficiencies.</p> <p>For violations that are assessed per SWPPP review, the number of inspections/examinations that were not performed/documented may be considered when assessing potential for harm. Generally, for missed inspections, 1 missed inspection = marginal; 2-3 missed = moderate; and 4+ is serious.</p>
Line 1.a.10	Length of time without a SWPPP/O&M Manual

Line 1.a.11	The length of time since permittee monitoring revealed an exceedance of benchmark value, the magnitude of the exceedance, the number of monitoring periods with an exceedance and no corrective action, the nature of the modifications that permittee has/will take, the length of time since the department notified the permittee that the facility is a source of a specified pollutant of concern for which a TMDL allocation has been approved, length of time measures not incorporated into SWPPP/O&M Manual
Line 1.a.12	Amount of biosolids spilled, amount of biosolids that reach state waters, number of deficiencies with securing biosolids, magnitude of driver error
Line 1.a.13	Magnitude of increase in nutrient and sediment load, nature of expansion

### Line 1.a.1 Effluent Limits

When evaluating the potential for harm for effluent limit exceedances, enforcement staff should first determine if the parameter is a Group I or Group II pollutant. For purposes of this guidance, Group I includes ammonia, biochemical oxygen demand, chemical oxygen demand, total oxygen demand, dissolved oxygen, total organic carbon, total suspended solids, total dissolved solids, inorganic phosphorous compounds, inorganic nitrogen compounds, oil and grease, calcium, chloride, fluoride, magnesium, sodium, potassium, sulfur, sulfate, total alkalinity, total hardness, aluminum, cobalt, iron, vanadium and temperature. Bacteria (ex. fecal coliform and *E. coli*) and pH are calculated using logarithmic scales and are assessed separately using the table at the bottom. All other pollutants are classified as Group II (ex. total residual chlorine, cyanide, metals not listed in Group I).

Using the table below, the enforcement representative assigns the corresponding potential for harm to the violation. The potential for harm may be adjusted based on other case-specific relevant factors such as the size of the storm event, flood conditions, mixing zones, receiving water impairments, receiving water size, frequency of exceedances, impacts to the environment, and regulatory harm.

Effluent Limitation Potential for Harm Chart				
Percentage by which effluent limit exceeded			Potential for Harm	
Monthly	7-day	Daily	Group I	Group II
1-20	1-30	1 – 50	Marginal	Marginal
21-40	31-60	51 – 100	Marginal	Moderate
41-100	61-150	101- 200	Moderate	Moderate
101-300	151-450	201-600	Moderate	Serious
301 - >	451 - >	601- >	Serious	Serious
Percent Exceedance of Bacteria Limit		Standard Units above or below pH	Potential for Harm	
0-100		0-1.0	Marginal	
101-500		1.0-3.0	Moderate	

500 +	3.0 +	Serious
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### Line 1.a.4 Spills/Unpermitted Discharges

In assessing the potential for harm for wet weather sanitary sewer overflows/bypasses to state waters, DEQ staff should first consider the size of the discharge as follows:

For small waterbodies (creeks, runs, tributaries, etc.)

- A Serious ranking generally should be used for large discharges that result in discharges of greater than or equal to 250,000 gallons.
- A Moderate ranking generally should be used for discharges that result in overflows of greater than or equal to 50,000 gallons and less than 250,000 gallons.
- A Marginal ranking generally should be used for smaller discharges that result in overflows up to 50,000 gallons.

For large waterbodies (rivers)

- A Serious ranking generally should be used for large discharges that result in discharges of greater than or equal to 500,000 gallons.
- A Moderate ranking generally should be used for discharges that result in overflows of greater than or equal to 100,000 gallons and less than 500,000 gallons.
- A Marginal ranking generally should be used for smaller discharges that result in overflows up to 100,000 gallons.

The potential for harm may then be adjusted after considering additional factors, where the information is available, such as the size of the storm event (for wet weather bypass/overflow), instream concentration of the SSO relative to the stream flow, stream class designation, frequency of bypasses/overflows to receiving water, receiving water impairments, downstream uses (withdrawals, drinking water intake locations), and loss or impact to other downstream beneficial uses (recreational, agriculture).

### Calculating the Civil Charge

*Gravity Based Component*

Staff identifies all of the violations being addressed in the gravity-based component section of the Worksheet and calculates the civil charge separately for each violation. The gravity-based component covers two areas: (a) violations and frequency; and (b) aggravating factors as multipliers. Staff should mark the data column for each type of violation and apply the appropriate multiplier in the Worksheet, depending on the number of occurrences and whether the violation is classified as Serious, Moderate, or Marginal potential for harm. The charge is then entered into the “Amount” column of the Worksheet. After calculating charges for each violation category, staff add the charges to arrive at a subtotal. Aggravating factors are then considered and added as appropriate.

Compliance program point windows should be considered when determining the noncompliance period. For example, for VPDES programs with a six month rolling point window, the noncompliance period should generally include the six months prior to the date of the referral

NOV and any non-compliance following the NOV. Enforcement staff may cease assessing civil charges for ongoing violations that require upgrades or time to resolve if the RP is cooperating with enforcement staff to resolve the noncompliance and agree to an enforceable schedule.

*Violations and Frequency:* The violations generally fall into one of the following categories and the frequency is per month, unless otherwise noted:

<b>Line on Worksheet</b>	<b>Examples of Violations</b>	<b>Frequency</b>
1.a.1 Effluent Limits	Exceedance of effluent limit	Per effluent limit, per month, or longer, specified interval
1.a.2 Operational Deficiencies	Employee training	Per SWPPP review/inspection
	Good housekeeping	Per inspection
1.a.3 Monitoring	Visual monitoring/examinations	Per SWPPP review
	Benchmark monitoring, impaired waters monitoring, Chesapeake Bay TMDL monitoring	Per parameter and highest frequency that is not performed. Each DMR is evaluated separately
	Effluent Limit monitoring	Per parameter and highest frequency that is not performed. Each DMR is evaluated separately
1.a.4 Spills/Unpermitted Discharges	Discharges not composed entirely of stormwater and not authorized by Permit	Per day or per event
1.a.5 Submissions	Annual report for Chesapeake Bay TMDL action plan	Per report
	Facility stormwater load calculations	Per calculation
	Chesapeake Bay TMDL action plan	Per action plan
	Exceedance report	Per report
	Reports not signed properly/no authorization	Per SWPPP review or per report
	Late DMR	Per report
1.a.6 No Permit	Failure to obtain coverage/submit a new registration statement to continue coverage	Per month



1.a.7 Failure to Report	Failure to report an unpermitted discharge	Per event or per month
1.a.8 Control Measures/BMPs not implemented or maintained	Failure to take corrective action/implement measures in response to an inspection or exceedance	Per corrective action or per inspection
	Failure to implement measures required by the Permit to eliminate or minimize exposure.	Per inspection
	Failure to correct deficiencies in the implementation of the SWPPP	Per inspection that identifies deficiencies
	Failure to repair/maintain control measures	Per inspection
	Failure to observe all control measures at least annually when a stormwater discharge is occurring to ensure that they are functioning correctly	Per SWPPP review
1.a.9 Perform/Record Inspections	Routine inspections	Per SWPPP review
	Annual evaluation of stormwater outfalls	Per year/annual evaluation
1.a.10 No SWPPP/O&M Manual	Failure to develop a SWPPP/O&M manual	Per SWPPP/O&M review
1.a.11 Incomplete O&M Manual/Incomplete SWPPP/SWPPP not on site	Incomplete O&M manual	Per SWPPP/O&M review <sup>52</sup>
	Failure to modify SWPPP in response to exceedance of benchmark values	
	Failure to complete revisions to the SWPPP within 60 days	
	Failure to properly document control measure modifications or additions in response to deficiencies	
	Failure to keep records in SWPPP/on site	
	Failure to incorporate measures/controls into SWPPP	

<sup>52</sup> Incomplete SWPPP and O&M items for line 1.a.11 are typically consolidated and assessed together per SWPPP/O&M review. Potential for harm increases as the number and severity of missing items increases. If a fillable form is used, and there are multiple items for incomplete SWPPP that were documented during a single SWPPP review, the appropriate violation boxes should be checked for each item. However, a corresponding penalty is only selected on one line of the fillable form and an explanation should be provided with the civil charge analysis form.

	to comply with TMDL requirements	
	Failure to have a complete and updated SWPPP with all of the contents required by the Permit.	
	Failure to update SWPPP to reflect addition/removal of outfall(s)	
1.a.12 Biosolids transport violation	Vehicle wreck or spill as a result of failure to properly secure or driver error while biosolids are transferred from plant to land application site or routine storage location	Per vehicle or per event
1.a.13 Other	Failure to meet the no net increase of stormwater nutrient and sediment load as a result of the expansion of the industrial facility	Per SWPPP review
	Failure to provide information/records	Per request

When the frequency is described as “per SWPPP review” or “per SWPPP/O&M review”, it indicates enforcement representatives should assess a violation for every DEQ inspection where a DEQ inspector reviews the SWPPP/O&M manual and identifies non-compliance with that permit requirement (ex. missing/incomplete quarterly visual monitoring examinations, missing routine inspections) instead of assessing occurrences for every missed evaluation/inspection by the permittee. Each inspection type/permit requirement should be assessed as a separate violation, unless otherwise noted in this guidance. For example, missing routine inspections would be assessed separately from missing quarterly visual monitoring. These non-compliance items are usually kept with the SWPPP/O&M manual, not submitted to DEQ throughout the permit term, and are identified during the SWPPP/O&M review portion of an inspection. If DEQ does a follow-up inspection, and the permittee is still not doing these examinations/inspections, enforcement staff should assess another occurrence to capture the non-compliance since the last inspection unless the case has progressed to a point where including additional occurrences in the enforcement action is not practical (example, there is a signed order going to PN).

When the frequency is described as per monitoring period, it means that enforcement staff should assess a violation for every monitoring period of non-compliance. Generally, enforcement staff should only consider the six (6) monitoring periods leading up to the NOV when determining the number of violations. If a permittee continues to have instances of non-compliance after the referral NOV, enforcement staff should assess additional occurrences unless the case has progressed to a point where including additional occurrences in the enforcement action is not practical (example, there is a signed order going to PN).

The frequency applied to annual reporting requirements is per year. Enforcement staff should only consider the three (3) years leading up to the NOV when determining the number of violations. If the permittee continues to have instances of non-compliance after the referral NOV, enforcement staff should assess additional occurrences unless the case has progressed to a point where including additional occurrences in the enforcement action is not practical (example, there is a signed order going to PN).

#### Line 1.a.1. Effluent Limits

When determining the number of occurrences for the penalty calculation, each effluent limit is treated as a separate occurrence. For example, quantity average, quantity maximum, concentration minimum, concentration average, and concentration maximum limits for the same parameter are treated as separate occurrences. However, if the daily, weekly, and monthly effluent limits are the same for the same parameter, then it is considered one occurrence on the worksheet. Additionally, violations of the same limit at different outfalls are counted separately.

#### Line 1.a.3. Monitoring

For missed Discharge Monitoring Reports (DMRs) or incomplete DMRs, enforcement staff should assess occurrences for each missed parameter and the number of occurrences depends on the highest frequency that is not performed for that parameter. For example, if TSS monthly average (frequency of 1/week) and monthly max (1/month) are not submitted and there are four weeks in the month, then 4 TSS occurrences are assessed. If the RP submits a DMR with 2 of the 4 TSS monthly average samples, then the number of occurrences will be 2. The parameters should not be combined into one occurrence for the DMR as a whole. Each DMR is evaluated separately and individual outfalls are assessed separately.

#### Line 1.a.4 Spills/Unpermitted Discharges

Multiple discharges from a sanitary sewer system to the same waterbody may be consolidated per day or per event, and assess based on total volume.

#### Line 1.a.5 Submissions

With regards to a late submission or failure to submit, it should only be assessed as a violation for the month when the report was due. The potential for harm can be increased as appropriate to capture the length of time the report was delayed or the importance of the report if it was never submitted. If a DMR is submitted late or not at all, then an occurrence would be assessed on this line, per late DMR. For incomplete and missed DMRs, occurrences are also assessed on line 1.a.3 for the monitoring that was not completed.

*Aggravating Factors as Multipliers:* Aggravating factors are:

- *Major Facility:* If a VPDES facility is classified as "major" using EPA criteria, this factor applies. However, this multiplier does not apply to civil charges for SSOs from a collection system associated with a major facility.

*Flow Reduction Factor:* The gravity-based component total may be reduced for small sewage treatment plants (STPs) or wastewater treatment facilities (WWTFs). The reduction is discretionary and is based on good faith efforts to comply. The factor relies on actual average daily flow<sup>53</sup>, as follows:

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

If the reduction is being considered for a non-municipal STP or WWTF, staff should ensure that neither the facility nor the parent company employs more than 100 individuals. In using the flow reduction factor, staff multiply the gravity-based component total by the appropriate percentage figure (*e.g.*, for a facility with less than 5,000 gpd average daily flow, the reduction is 50%) to obtain the reduction amount. If flow at the facility fluctuates from month to month, then the percentage reduction will vary depending on the facility’s flow during the months of violation. If the permit flow is monthly, divide by 30.4 to get the gpd. Using the appropriate Worksheet, staff subtract the reduction amount from the gravity-based component total to obtain the flow-adjusted gravity-based component total.

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<sup>53</sup> “Flow” means monthly average daily flow from the facility for the month in which the violation(s) occurred.

**VPDES & VPA Civil Charge/Civil Penalty Worksheet**

**Va. Code § 62.1-44.15**

*(For Violations Other Than VWPP, Article 9, Article 11, Surface Water/Ground Water Withdrawal, AFO/Poultry and Const. Stormwater Programs)*

Facility/Responsible Party	EA No.		Per./Reg. No.		NOV Date	
	NOV Observation #	Potential for Harm			Amount	
		Serious	Moderate	Marginal		
<b>1. Gravity-based Component</b>						
<b>a. Violations and Frequency</b> (x = number of occurrences)		\$ (x) occurrences	\$ (x) occurrences	\$ (x) occurrences		
(1) Effluent Limits		1,323 (x)	712 (x)	305 (x) ___		
(2) Operational Deficiencies		1,323 (x)	712 (x)	305 (x) ___		
(3) Monitoring/		509 (x) ___	254 (x)	102 (x) ___		
(4) Spills/Unpermitted Discharge Discharges of oil must be assessed using the Article 11 worksheet.		13,229 (x)	6,615 (x)	1,323 (x) ___		
(5) Submissions		1,323(x)	712 (x)	305 (x) ___		
(6) No Permit		5,292 (x)	2,646 (x)	916 (x) ___		
(7) Failure to Report		13,229 (x)	6,615(x)	1,323 (x) ___		
(8) Control measures/BMPs not implemented or maintained (stormwater)		6,615 (x)	2,646 (x)	1,323 (x) ___		
(9) Failure to record inspections		1,323 (x)	661 (x)	265 (x) ___		
(10) No SWPPP/O&M		5,292(x) ___	2,646 (x)	1,323 (x) ___		
(11) Incomplete SWPPP/O&M or SWPPP not on site (storm water)		2,646 (x)	1,323 (x)	661 (x) ___		
(12) Biosolids transport violation		6,615 (x)	2,646 (x) ___	1,323 (x) ___		
(13) Other		2,646 (x)	1,323 (x)	712 (x) ___		
<b>Subtotal 1.a – Violations and Frequency</b>						
<b>b. Aggravating Factors</b>						
(1) Major Facility	Y	N	Subtotal #1.a (x) 0.4			
(2) Compliance History						
Order or decree <u>in another media program</u> within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) subtotal line 1.a, or \$5,000			
Order or decree <u>in same media program</u> within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) subtotal line 1.a (for 1 order in 36 mo.)			
(3) Degree of Culpability ( <i>applied to specific line amount(s) or subtotal line 1.a</i> )	Low = (x) 0		Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0	
(4) Natural gas transmission pipeline greater than 36 inches inside diameter (special order under § 62.1-44.15(8g))	Y	N	If yes, add 0.5 * subtotal 1.a			
<b>Subtotal 1 b. – Aggravating Factors</b>						
<b>Subtotal - Gravity Based Component Subtotal</b> (Add Subtotal #1.a and Subtotal #1.b)						
<b>c. Flow Reduction Factor</b> (STP VPDES only) ( <i>discretionary based on good faith efforts to comply</i> )	Y	N	% Reduction		Reduction Amount	( )
<b>Flow-Adjusted Gravity Based Component Subtotal</b> (Subtract Subtotal 1.c from Gravity Based Component Subtotal)						
<b>2. Economic Benefit of Noncompliance</b>						
<b>3. Ability to Pay</b> ( <i>based on information supplied by the facility</i> )						
<b>Total Civil Charge/Civil Penalty</b> ( <i>Not to exceed \$32,500 per day per violation</i> )						\$

## **RENEWABLE ENERGY PROGRAM**

Virginia Code §§ 10.1-1197.5 through -1197.11 require DEQ to promulgate regulations governing small renewable energy projects. To date, DEQ has developed Permit by Rule Regulations for Wind, Solar and Combustion Projects.<sup>1</sup> Va. Code § 10.1-1197.9 provides for negotiated civil charges in consent orders for violations of the Small Renewable Energy Projects law, regulations, orders or permit conditions. A civil penalty cannot exceed \$32,500 for each violation. Each day of violation constitutes a separate offense.

Violations of Renewable Energy Permit by Rule regulations may accompany violations of other DEQ programs, such as VWPP (unauthorized impacts to wetlands and/or streams) or Construction Stormwater Program requirements (unauthorized land disturbing activity). In these situations, staff use separate worksheets to calculate the appropriate civil charge to address the violations in each program.

### **Potential for Harm Examples**

Potential for harm classifications are not used to determine whether a violation warrants formal enforcement, but to evaluate the civil charge in light of the facts of the case already in enforcement. Departure from the examples should be discussed with a Central Office enforcement manager and documented in the Enforcement Recommendation and Plan.

#### *Serious Classification*

Examples include, but are not limited to:

- Solar and wind projects with a rated capacity greater than 80 megawatts (MW);
- Combustion projects with a rated capacity greater than 15 MW;
- Exceeding rated capacity for the permitted project;
- Failure to follow mitigation plan resulting in significant (irreparable) loss of or damage to natural, cultural or historic resources eligible or potentially eligible to the Virginia Landmarks Register and the National Register of Historic Places;
- Potential for harm to any threatened or endangered state or federal species.

#### *Moderate Classification*

Examples include, but are not limited to:

<sup>1</sup> Current regulations include Small Renewable Energy Projects (Wind) Permit by Rule, 9 VAC 15-40, Small Renewable Energy Projects (Solar) Permit by Rule, 9 VAC 15-60, and Small Renewable Energy Projects (Combustion) Permit by Rule, 9 VAC 15-70.

- Solar and wind projects with a rated capacity between 5-80 MW;
- Combustion projects with a rated capacity between 5-15 MW;
- Failure to follow mitigation plan, resulting in limited harm to natural, cultural or historic resources;
- Potential for harm to any rare species listed with the Virginia Department of Conservation and Recreation (DCR).

### *Marginal Classification*

Examples include, but are not limited to:

- Failure to provide proper notice to the Department of the construction of a small renewable energy facility with a rated capacity less than 5 MW and a disturbance zone less than 10 acres in accordance Permit by Rule regulations;
- Failure to properly follow mitigation plan, resulting in no harm to natural, cultural or historic resources;
- Potential for harm to any non-listed migratory fish, birds, or wildlife.

### **Calculating the Civil Charge**

Staff should calculate an appropriate civil charge or civil penalty using the Worksheet at the end of this section. The categories are the numbered items (Categories 1 (a) through (i)) that make up the gravity based rows of the Worksheet. When using the Worksheet to address multiple violations discovered during the same compliance activity, staff calculates civil charges for each violation and then combine them to provide the total proposed civil charge. Applicable portions of the Worksheet may be copied to accommodate multiple violations. Staff uses this procedure to determine the appropriate civil charge for each category listed and enter it on the Worksheet.

Line 1(a) – Failure to obtain permit coverage prior to commencing activity – this line item should be used to assess the effect on, and the extent of deviation from, the regulatory requirements, e.g. avoiding the permitting and evaluative process which ensures the appropriate avoidance and minimization options and alternative sites were fully explored.

Line 1(b) – Exceeding coverage authorized under a Permit by Rule – This line item should be used when a Responsible Party has impacted a geographic area beyond what is covered by the Permit by Rule. This line should be used to assess the extent of the deviation from the regulatory requirements.

Line 1(c) – Failure to implement mitigation plan – This line item should be used to capture the failure to perform or complete mitigation plan requirements;

Line 1(d) – Failure to implement design and installation standards. This may include adjustment to the interconnection or entry points for the small renewable energy project or other changes to the project that require permit modification;

Line 1(e) – Exceeding rated capacity covered by Permit by Rule;

Line 1(f) – Failure to conduct post-construction mitigation monitoring;

Line 1(g) – Failure to comply with a consent order or other order. In this category, DEQ assesses civil charges for consent or other order violations;

Line 1(h) – Failure to keep required records or meet reporting requirements;

Line 1(i) – Other violations.

### **Length of Time Factor Category**

The longer a violation continues uncorrected, the greater the potential for harm. The Worksheet addresses this consideration in the category labeled “Length of Time Factor.” Where separate charges are not assessed for daily, documented violations, DEQ calculates the charge for this factor as follows: (a) multiply the number of days the violation occurred by 0.274 (*i.e.*, 1/365) - this is the Percent (%) Increase Factor; (b) divide this factor by 100 to obtain the decimal expression, which is then multiplied by the Preliminary Subtotal to obtain the additional civil charge.

The time span begins on the day the violation began and ends on the date the source corrects the deficiency addressed by the civil charge, or on the date the source agrees in principle to a set of corrective actions designed to achieve compliance with the regulatory requirement for which the charge was assessed. For violations where the length of time exceeds five years, DEQ calculates the charge based on a length of time of five years (1,826 days). This limitation on length of time does not apply to calculation of economic benefit.

- For construction without a permit, the length of time begins with the start of construction and ends when the source either begins operation of the equipment or the source submits a complete permit application for the small renewable energy project or agrees in principle to a set of corrective actions.
- For operation without a permit, the time span begins with the start-up of the equipment and ends when the source submits a complete permit application for the small renewable energy project.

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

- Calculate the length of time in days that the noncompliance existed. For this example, 200 days elapsed between the beginning day of the noncompliance and



the date the source agreed in principle to a set of corrective actions necessary to return to a state of compliance.

- Multiply the number of days by 0.274. Take 200 and multiply it by 0.274 to get 54.8, which is rounded up to the nearest whole number and divided by 100 to get 55%, or a factor of 0.55.
- Multiply the Preliminary Subtotal (or appropriate portion thereof) calculated on the Worksheet by the Length of Time Factor. Assume for this example that the Preliminary Subtotal is \$1,300. \$1,300 times 0.55 yields \$715.

Renewable Energy Projects Civil Charge/Civil Penalty Worksheet

Va. Code §§ 10.1-1197.5 through -1197.11

Facility/Responsible Party	EA No.		Per./Reg.		NOV	
	NOV Observation #	Potential for Harm (Environmental Harm and Severity)			Amount	
		Serious	Moderate	Marginal		
<b>1. Gravity-based Component</b>						
<b>Violations and Frequency</b>		\$ (x) occurrences				
a. Failure to obtain Permit by Rule coverage prior to commencing activity		13,229 (x) _____	6,615 (x) ____	3,307 (x) ____		
b. Exceeding permitted boundaries		7,938 (x)	3,664 (x) ____	1,832 (x) ____		
c. Failure to implement the mitigation plan		13,229 (x)	6,615 (x) ____	3,307 (x) ____		
d. Failure to implement design and installation standards		2,646 (x) _____	1,323 (x) ____	661 (x)		
e. Exceeding rated capacity covered by the Permit by Rule		5,201 (x)	3,664 (x) ____	1,832 (x) ____		
f. Failure to conduct or submit post-construction mitigation monitoring data		3,664 (x) _____	1,832 (x) ____	916 (x)		
g. Consent Order or other Order condition violated		7,938 (x) _____	3,664 (x) ____	1,832 (x) ____		
h. Other recordkeeping or reporting violations		2,646 (x) _____	1,323 (x) ____	661 (x)		
i. Other violations not listed above		5,291 (x)	2,646 (x) ____	1,323 (x) ____		
<b>Preliminary Civil Charge/Civil Penalty</b>						
<b>Sub total</b>	Days of Violation		Factor %			
<b>2. Length of Time (enter days)</b>						
<b>3. Compliance History</b>						
Order or decree in another media program within 36 months before initial NOV	Y	N	If yes, add lesser of 0.05 * preliminary subtotal or \$5,000			
Order or decree in same media program within 36 months before initial NOV	Y	N	If yes, add 0.5 * preliminary subtotal			
<b>4. Degree of Culpability</b> (applied to specific line amount(s) or preliminary subtotal )	Low = (x)*0	Moderate = (x)*0.25	Serious = (x)*0.5	High = (x)*1.0		
<b>5. Economic Benefit of Noncompliance</b>						
<b>6. Ability to Pay</b> (based on information supplied by the facility)						( )
<b>Total Civil Charge/Civil Penalty</b> (may not exceed \$32,500 per day per violation)						\$

## SURFACE WATER WITHDRAWAL PROGRAM<sup>54</sup>

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

### *Potential for Harm Examples*

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

### *Serious Classification*

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

### *Moderate Classification*

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

### *Marginal Classification*

- Exceeding (daily, monthly, or annual) permitted or excluded water withdrawal limits by less than 10%

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<sup>54</sup> Surface water withdrawals in violation of the Virginia Water Protection Permit Program should not be confused with violations involving Surface Water Management Areas. Violations of this section of the State water control law are to be assessed pursuant to that pursuant to VA Code § 62.1-252(A) which states that, “Any person who violates any provision of this chapter shall be subject to a civil penalty not to exceed \$1,000 for each violation. Each day of violation shall constitute a separate offense.”

- Unauthorized Withdrawal comprises less than 10% of the instream flow at the intake

*Civil Charge Calculations*

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

**Line 1(e) through 1(g): Exceeding a Withdrawal Limit:** When assessing a civil charge for these line items, one or more withdrawal limits may be violated from a single withdrawal. In the event that one or more of these line items is violated, staff should evaluate the potential for harm to determine whether its potential for harm should be increased.

**Surface water Withdrawal Civil Charge/Civil Penalty Worksheet**  
**Va. Code §§ 62.1-44.15:20 through -44.15:23**

<b>Permittee/Responsible Party</b>	<b>NOV Observation #</b>	<b>Reg. No.</b>			<b>Date</b>	<b>Amount</b>
		<b>Potential for Harm</b> <i>(Environmental Harm and Severity)</i>				
		<b>Serious</b>	<b>Moderate</b>	<b>Marginal</b>		

<b>1. Gravity Factors – Surface water Withdrawal (Severity and Environmental Harm)</b>					
<b>Violations and Frequency</b>		\$ (x) occurrences	\$ (x) occurrences	\$ (x) occurrences	
a. Unpermitted withdrawal		13,229 (x) ___	6,615 (x) ___	3,307 (x) ___	
b. Failure to mitigate		13,229 (x) ___	6,615 (x) ___	3,307 (x) ___	
c. Failure to implement a Water Conservation Management Plan		5,292 (x) ___	2,646 (x) ___	1,323 (x) ___	
d. Failure to submit a permit application		5,292 (x) ___	2,646 (x) ___	1,323 (x) ___	
e. Exceedence of withdrawal limit (Daily)		1,323 (x) ___	712 (x) ___	102 (x) ___	
f. Exceedence of withdrawal limit (Monthly)		2,646 (x) ___	1,323 (x) ___	712 (x) ___	
g. Exceedence of withdrawal limit (Annual)		5,292 (x) ___	2,646 (x) ___	1,323 (x) ___	
h. Failure to submit, complete Record or reporting); (Failure to maintain and/or submit are separate occurrences)		2,646 (x) ___	1,323 (x) ___	712 (x) ___	
i. Failure to report (requested application, water audit, new well, etc) (per event)		2,646 (x) ___	1,323 (x) ___	712 (x) ___	
j. Failure to install and/or maintain equipment or other operational deficiencies		2,646 (x) ___	1,323 (x) ___	712 (x) ___	
k. Other Violations; Permit, Special Exceptions, or Special Conditions NOT listed above (per event)		2,646 (x) ___	1,323 (x) ___	712 (x) ___	
<b>Violations and Frequency Subtotal</b>					
<b>3. Aggravating Factors (Severity and Compliance History)</b>					
<i>a History of Noncompliance</i>					
Order or decree <u>in another media program</u> within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or \$5,000		
Order or decree <u>in same media program</u> within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)		
<i>b Degree of Culpability(apply to violation(s)' Amount or to the Violations and Frequency Subtotal))</i>	Low = (x) 0		Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0
<b>Aggravating Factor Subtotal</b>					
<b>Gravity-Based Component Subtotal (1+2)</b>					
<b>4. Economic Benefit of Noncompliance (Economic Benefit)</b>					
<b>5. Ability to Pay (Ability to Pay)</b>					
<b>Total Civil Charge/Civil Penalty</b> (may not exceed \$32,500 per day per violation); a civil penalty not to exceed \$1,000 for each violation in a designated Surface Water Management Area.					\$ ( )

## WATER PROTECTION PERMIT PROGRAM

This section of the enforcement manual addresses unpermitted activities such as wetland excavation; draining, altering or degrading; filling or dumping; permanent flooding or impounding; new activities that cause significant alteration or degradation of existing wetland acreage or functions; or alteration of the properties of state waters.

### Wetland and Stream Impacts

#### Potential for Harm Examples

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

If staff believe that these thresholds should be adjusted, additional justification should be provided through consideration of the following factors: classification of a wetland type (*e.g.*, PFO, PSS, PEM)<sup>55</sup>; surrounding land use and cover types; nutrient, sediment, and pollutant trapping ability; flood control and flood storage capacity, and flood flow synchronization; erosion control and shoreline stabilization; groundwater recharge and discharge; aquatic and wildlife habitat; unique aspects or critical habitats; water quality; and recreation, education, aesthetics, or other beneficial uses.<sup>56</sup>

#### *Calculating the Civil Charge*

The Virginia Water Protection Permit (VWPP) Program is authorized under Va. Code §§ 62.1-44.15:20 through 44.15:23. Negotiated civil charges for Virginia Water Protection Permit (VWPP) violations are authorized by Va. Code § 62.1-44.15(8d). The maximum penalty is \$32,500 per day for each violation.<sup>57</sup>

Civil charges for VWPP violations are assessed per occurrence. An occurrence is defined as a separate, identifiable, discrete act that results in a discharge of a pollutant to state waters. Separate civil charges are assessed: (1) for impacts to streams and/or (2) for impacts to wetlands. Each occurrence of a discharge to streams and wetlands is evaluated based on the potential for harm to the environment and the extent of deviation from regulatory program. Occurrences to wetlands and streams are evaluated separately because these two surface water

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<sup>55</sup> Under the [U.S. Fish and Wildlife Service Wetland Classification System](#), wetlands are of two basic types: coastal (also known as tidal or estuarine wetlands) and inland, also known as non-tidal, freshwater, or palustrine wetlands which have three classes: palustrine emergent (PEM), palustrine scrub-shrub, (PSS), and palustrine forested (PFO).

<sup>56</sup> Va. Water Protection Functional Loss Criteria. *See*, [9 VAC 25-210-80\(B\)\(1\)\(k\)\(1\)](#) and [9 VAC 25-210-116\(A\)](#).

<sup>57</sup> Va. Code § [62.1-44.15](#) incorporates by reference the civil charge amount from Va. Code § [62.1-44.32](#).

types provide different ecosystem services and a different potential for harm may result from a discharge. Wetland type is not considered when determining the number of occurrences unless the different wetland types are subject to a separate occurrence. Wetland type is considered when evaluating the potential for harm. Also, an individual stream reach is not considered when determining the number of occurrences, unless there have been separate occurrences affecting the same or differing portions of the stream(s).

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

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

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

Description	Serious	Moderate	Marginal
Exceedances that: 1) Cause a project to move from requiring a GP to an IP ( <i>i.e.</i> , total project impacts now exceed 2 acres of wetlands or open water or 1,500 LF of streams); or 2) Exceed permitted impacts by 2 or more acres of wetlands or open water, or 1,500 or more LF of stream.	X		
Exceedances that: 1) Cause a project to move from requiring a reporting-only general permit to a full general permit ( <i>i.e.</i> , total project impacts now exceed 0.10 acre of wetlands or open water, or 300 LF of streams.); or		X	

<p>2) Require a major modification of an individual permit (<i>i.e.</i>, changes that cumulatively exceed 0.25 acre but less than 2.0 acres of wetlands/open water, or that cumulatively exceed 100 LF but less than 1,500 LF of stream); or</p> <p>3) Require an additional GP or reauthorization of a GP. This would be change(s) that cumulatively exceed 0.25 acre of wetlands/open water or 100 LF.</p>			
<p>Exceedances that would be equivalent to or less than a minor modification of an IP under <u>9 VAC 25-210-180(F)</u> or a Notice of Planned Change under <u>9 VAC 25-690-80(B)</u>. Thresholds are cumulative increases in acreage of wetland or open water impacts up to 0.25 acre and cumulative increases in stream bed impacts up to 100 LF.</p>			X

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

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

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

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

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

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

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

- i. This line should be used when the Responsible Party has discharged pollutants to state waters (wetlands or streams) per occurrence in order to assess a civil charge for the harm to the environment, and should be used



in conjunction with 1(a) or 1(b) which captures the harm to the regulatory program.

- ii. Where the discharge of pollutants is a result of, but not limited to, the failure of E&S controls and unattenuated stormwater, failure to stabilize disturbed lands, or the failure and/or inadequate use of BMP's, this violation should be used without assessing line 1(a) or line 1(b).

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

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

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

Line 1(m): Failure to Report: Failure to notify DEQ of unpermitted discharge/fill to state waters. This can be assessed for failing to notify within 24 hours upon learning of the discharge or for the RP failing to submit the 5-day follow letter.

## VWPP Civil Charge/Civil Penalty Worksheet

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

Permittee/Responsible Party	NOV Observation #	Reg. No.		Date		Amount
		Potential for Harm <i>(Environmental Harm and Severity)</i>				
		Serious	Moderate	Marginal		
<b>1. Gravity Factors – Surface Water and Wetlands</b> <i>(Severity and Environmental Harm)</i>						
Violations and Frequency		\$ (x) occurrences	\$ (x) occurrences	\$ (x) occurrences	(Comments)	
a. Failure to obtain coverage under an Individual Permit (IP) or a General Permit (GP) prior to commencing activity		6,615 (x) ___	2,646 (x) ___	1,323 (x) ___		
b. Exceeding coverage authorized under an IP or GP		6,615 (x) ___	2,646 (x) ___	1,323 (x) ___		
c. Failure to perform or complete compensatory mitigation		26,549 (x) ___	13,229 (x) ___	6,615 (x) ___		
d. Failure to perform or complete corrective action relative to unsuccessful compensation.		13,229 (x) ___	6,615 (x) ___	2,600 (x) ___		
e. Failure to conduct compensation monitoring or water quality monitoring		6,615 (x) ___	2,646 (x) ___	1,323 (x) ___		
f. Failure to conduct construction monitoring		6,615 (x) ___	2,646 (x) ___	1,323 (x) ___		
g. Failure to submit preconstruction notice		13,229 (x) ___	6,615 (x) ___	2,646 (x) ___		
h. Failure to submit plans and specifications prior to commencing construction		6,615 (x) ___	2,646 (x) ___	1,323 (x) ___		
i. Unauthorized impacts to wetlands and/or streams (wetlands and streams will be assessed separately)		26,549 (x) ___	13,229 (x) ___	6,615 (x) ___		
j. Failure to comply with permit special conditions		6,615 (x) ___	2,646 (x) ___	1,323 (x) ___		
k. Failure to submit a complete, final compensation plan		6,615 (x) ___	2,646 (x) ___	1,323 (x) ___		
l. Record or reporting violations (not otherwise specified)		2,646 (x) ___	1,323 (x) ___	712 (x) ___		
m. Failure to report a discharge		13,000 (x) ___	6,615 (x) ___	1,323 (x) ___		
<b>Violations and Frequency Subtotal</b>						
<b>2. Aggravating Factors</b> <i>(Severity and Compliance History)</i>						
a History of Noncompliance						
Order or decree <u>in another media program</u> within 36 mo. before initial NOV	Y	N	If yes, add lesser of 0.05 (x) Violations and Frequency Subtotal, or \$5,000			
Order or decree <u>in same media program</u> within 36 mo. before initial NOV	Y	N	If yes, add 0.5 (x) Violations and Frequency Subtotal (for 1 order in 36 mo.)			
b Degree of Culpability( <i>apply to violation(s)' Amount or to the Violations and Frequency Subtotal</i> )			Low = (x) 0	Moderate = (x) 0.25	Serious = (x) 0.5	High = (x) 1.0
c. Natural gas transmission pipeline greater than 36 inches inside diameter (special order under § 62.1-44.15(8g))	Y	N	If yes, add 0.5 * 1 Violations and Frequency Subtotal			
<b>Aggravating Factor Subtotal</b>						
<b>Gravity-Based Component Subtotal (1+2)</b>						
<b>3. Economic Benefit of Noncompliance</b> <i>(Economic Benefit)</i>						
<b>4. Ability to Pay</b> <i>(Ability to Pay)</i>						

**APPENDIX A**

**CIVIL CHARGE/CIVIL PENALTY ADJUSTMENT FORM**

*(FOIA-exempt until after a proposed sanction resulting from the investigation has been proposed to the Director of the agency (i.e., public notice (Water or Waste) or presentation for DEQ execution (Air))*

Facility/RP		Per./Reg. No.	Enforcement Action No.		NOV Date
			<b>Data</b>	<b>Amount</b>	
<b>Total Civil Charge/Civil Penalty from Worksheet(s)</b>					
<b>1. Adjustments before Economic Benefit of Noncompliance</b>					
a.	Cooperativeness/Quick Settlement		Y	N	
b.	Promptness of Injunctive Response/Good Faith Effort to Comply		Y	N	
c.	<b>(Air Programs only) – Statutory Judicial Considerations (from Chapter 4)</b>		Y	N	
d.	<b>(Water and Land Protection/Remediation Programs only) – Size/Type/Sophistication of the Owner/Operator</b>		Y	N	
<b>2. Adjustments to Worksheet Total</b>					
a.	Problems of Proof		Y	N	
b.	Impacts or Threat of Impacts (or Lack Thereof) to Human Health or the Environment		Y	N	
c.	Precedential Value of the Case		Y	N	
d.	Probability of Meaningful Recovery of a Civil Charge/Civil Penalty		Y	N	
e.	Litigation Potential		Y	N	
<b>3. Total Adjustments</b>					
<b>4. Increase for continuing or uncorrected violations, economic benefit from delay</b>			Y	N	
<b>5. Adjusted Total Civil Charge/Civil Penalty</b>					

Justification:

Prepared by: \_\_\_\_\_ Date \_\_\_\_\_

DE Concurrence: \_\_\_\_\_ Date \_\_\_\_\_  
(signature, email, or ECM Workflow)

(needed only if reduction >30% of gravity-based amount)

Approved by: \_\_\_\_\_ Date \_\_\_\_\_