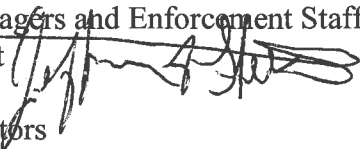


**COMMONWEALTH OF VIRGINIA**  
**Department of Environmental Quality**

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**Subject:** Renewable Energy Program Civil Charge Guidance  
**To:** Central and Regional Office Enforcement Managers and Enforcement Staff  
**From:** Jeffery Steers, Interim Director of Enforcement   
**Date:** July 11, 2019  
**Copies:** Regional Directors and Deputy Regional Directors

**Summary:**

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 (9VAC15-40), Solar (9VAC14-60) and Combustion (9VAC15-70) Projects. 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. This guidance describes the procedures and criteria DEQ will use when calculating a civil charge in administrative enforcement actions.

**Electronic Copy:**

Once effective, an electronic copy of this guidance will be available on:

- The Virginia Regulatory Town Hall under the Department of Environmental Quality (<http://www.townhall.virginia.gov/L/gdocs.cfm?agencynumber=440>);
- The Department's website at <https://www.deq.virginia.gov/Programs/Enforcement/Laws,Regulations,Guidance.aspx>.

**Contact Information:**

Please contact Lee Crowell at [Lee.Crowell@DEQ.Virginia.Gov](mailto:Lee.Crowell@DEQ.Virginia.Gov) or 804-698-4450 with any questions regarding the application of this guidance.

**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.**

## **AMENDMENT: Civil Enforcement Manual Chapter 4 - Civil Charges and Civil Penalties**

### **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:

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<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.
- 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 2 on the Worksheet.

## Small Renewable Energy Projects Civil Charge/Civil Penalty Worksheet

Va. Code §§ 10.1-1197.5 through -1197.11

<i>Facility/Responsible Party</i>	EA No.		Per./Reg. No.		NOV Date		
	<b>Potential for Harm</b> <i>(Environmental Harm and Severity)</i>						<i>Amount</i>
	Data		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	Y	N	13,000 (x) ___	6,500 (x) ___	3,250 (x) ___		
(b) Exceeding permitted boundaries	Y	N	7,800 (x) ___	3,600 (x) ___	1,800 (x) ___		
(c) Failure to implement the mitigation plan	Y	N	13,000 (x) ___	6,500 (x) ___	3,250 (x) ___		
(d) Failure to implement design and installation standards	Y	N	2,600 (x) ___	1,300 (x) ___	650 (x) ___		
(e) Exceeding rated capacity covered by the Permit by Rule	Y	N	5,200 (x) ___	3,600 (x) ___	1,800 (x) ___		
(f) Failure to conduct or submit post-construction mitigation monitoring data	Y	N	3,600 (x) ___	1,800 (x) ___	900 (x) ___		
(g) Consent Order or other Order condition violated	Y	N	7,800 (x) ___	3,600 (x) ___	1,800 (x) ___		
(h) Other recordkeeping or reporting violations	Y	N	2,600 (x) ___	1,300 (x) ___	650 (x) ___		
(i) Other violations not listed above	Y	N	5,200 (x) ___	2,600 (x) ___	1,300 (x) ___		
<b>Preliminary Civil Charge/Civil Penalty Subtotal</b>							
<b>2. Length of Time (enter days)</b>	Days of Violation		Factor				
			%				
<b>Subtotal 1&amp;2 –</b>							
<b>3. Compliance History</b>							
Order or decree <u>in another media program</u> within 36 months before initial NOV	Y	N	If yes, add lesser of 0.05 * <i>subtotal line 1.a.</i> , 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 * <i>subtotal 1.a</i>				
<b>4. Degree of Culpability</b> ( <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> ( <i>Add Subtotal #1.a and Subtotal #1.b</i> )							
<b>5. Economic Benefit of Noncompliance</b>							
<b>6. Ability to Pay</b> ( <i>based on information supplied by the facility</i> )						(      )	
<b>Total Civil Charge/Civil Penalty</b> ( <i>may not exceed \$32,500 per day per violation</i> )						<b>\$</b>	