

Guidelines for Characterizing ERP Violations

Introduction

Department of Environmental Protection (DEP) [Directive 923](#) is the Department's controlling enforcement document. These guidelines are intended to complement Directive 923 to determine the appropriate amount of civil and administrative penalties to seek when settling enforcement actions. These guidelines are intended to provide a rational, fair, and consistent method to determine the appropriate enforcement response for Environmental Resource and Wetland Resource violations.

****While as a general matter, Florida does recognize that “the statute of limitations in environmental contexts where there is a continuing invasion of rights does not begin to run until the wrongful invasion of rights that constitutes the violation ceases,” instances where violations are approaching the 4 year mark should be reviewed as soon as possible with the Office of General Counsel to preserve all legal options.**

Administrative Penalties (ELRA)

Under the Environmental Litigation and Reform Act (ELRA), the Department can issue an administrative penalty for certain violations through a Notice of Violation (NOV). Administrative penalty amounts are set by statute. For additional details, see DEP Directive 923 and Section 403.121 of the Florida Statutes (F.S.).

Violation (Statutory Language)	Base Penalty	Cite (F.S.)
Unpermitted/unauthorized dredging/filling or unauthorized construction of a stormwater management system	\$1,500	403.121(3)(c)
<i>Add-On 1</i> – If the dredging/filling occurs in an aquatic preserve, OFW, conservation easement, or Class I or II surface water	+ \$3,000	403.121(3)(c)
<i>Add-On 2</i> – If the area dredged or filled is greater than 0.25 acre but less than or equal to 0.50 acre	+ \$1,500	403.121(3)(c)
<i>Add-On 3</i> – If the area dredged or filled is greater than 0.50 acre but less than or equal to 1.0 acre (add \$1,500 for <i>Add-On 2</i> and an additional \$1,500 for <i>Add-On 3</i>) Note: If wetland impact area is greater than 1 acre, then ELRA cannot be used for penalty calculation.	+ \$1,500	403.121(3)(c)
Failure to complete required mitigation, failure to record a required conservation easement, or for a water quality violation resulting from dredging/filling activities, stormwater construction activities or failure of a stormwater treatment facility	\$4,500	403.121(3)(c)
Failure to properly or timely construct a stormwater management system serving less than 5 acres	\$3,000	403.121(3)(c)
Contractors and/or agents that conduct unpermitted or unauthorized dredging or filling shall be assessed a penalty per violation	\$7,500	403.121(3)(c)
Contractors or agents that conduct mangrove trimming or alteration without	\$7,500	403.121(3)(d)

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a permit shall be assessed a penalty per violation		
Failure to satisfy financial responsibility requirements	\$7,500	403.121(4)(a)
Failure to install, maintain, or use a required pollution control system or device	\$6,000	403.121(4)(b)
Failure to obtain a required permit before construction or modification	\$4,500	403.121(4)(c)
Failure to conduct required monitoring or testing	\$3,000	403.121(4)(d)
Failure to construct in compliance with a permit	\$3,000	403.121(4)(d)
Failure to conduct required training	\$1,500	403.121(4)(e)
Failure to prepare, maintain, or update required contingency plans	\$1,500	403.121(4)(e)
Failure to submit required notification to the department	\$1,500	403.121(4)(e)
Failure to prepare, submit, maintain, or use required reports or other required documentation	\$750	403.121(4)(f)
Failure to comply with any other departmental regulatory statute or rule requirement not otherwise identified in this section	\$1,000	403.121(5)

Multi-Day Penalties and Adjustment Factors

DEP Directive 923 discusses when and how to assess multi-day penalties. The directive also sets out various adjustment factors to be used when calculating a penalty. The adjustment factors can be used in two ways. After determining the correct box according to the matrix factors (minor, moderate, or major), the adjustments can help determine whether to use the midpoint (default), low end, or high end of the penalty range. In addition, after a penalty amount from the matrix has been determined, adjustment factors can be used to decrease or increase a penalty, down to zero or up to the statutory maximum. These factors include:

- Good faith efforts to comply (or lack of good faith efforts to comply) either prior to or after Department discovery of the violation.
- History of noncompliance.
- Economic benefit of noncompliance.
- Other unique factors.

In-Kind Penalties and Pollution Prevention Projects

In-Kind Penalty Projects and Pollution Prevention Projects should be considered as provided in Directive 923.

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Penalty Calculation Matrix

Matrix Factor Considerations

The DEP 923-defined levels for environmental harm and extent of deviation are found in the table below and should be applied when evaluating environmental resource permitting (ERP) violations for penalty calculation. This table can be referenced when considering unique violations and should be used in the absence of a program specific matrix table for the violation.

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	Violations that actually result in pollution in a manner that represents a substantial threat to human health or the environment.	The violator deviates from the requirements of the law by a significant extent (e.g. an order of magnitude or more) or the violation was willful and intentional.
Moderate	Violations that actually or are reasonably expected to result in pollution in a manner that represents a significant threat to human health or the environment.	The violator deviates from the legal requirements of the law significantly but for a short period of time and/or most of the requirements are implemented as intended.
Minor	Violations that actually or are reasonably expected to result in a minimal threat to human health or the environment.	The violator deviates somewhat from the requirements of the law but most of the requirements are met.

The Department's Penalty Matrix for ERP cases is found below.

E N V I R O N M E N T A L H A R M	EXTENT OF DEVIATION FROM REQUIREMENT			
		MAJOR	MODERATE	MINOR
	MAJOR	\$15,000 to \$12,000	\$11,999 to \$9,000	\$8,999 to \$6,900
	MODERATE	\$6,899 to \$4,800	\$4,799 to \$3,000	\$2,999 to \$1,800
	MINOR	\$1,799 to \$1250	\$1,249 to \$750*	\$750*

*Environmental Education may be an acceptable substitute.

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DREDGING OR FILLING IN WETLANDS WITHOUT A PERMIT

Matrix Factor	Environmental Harm	Points
Area Decimal fraction is not multiplied by points.	Less than or equal to 0.25 acre.	1
	Greater than 0.25 acre but less than or equal to 0.5 acre.	2
	Greater than 0.5 acre but less than or equal to 1 acre.	3
	Greater than 1 acre.	Add an additional 3 points/acre or portion of acre.
Habitat Quality Decimal fraction is multiplied by points.	Low: Greater than 50% coverage by exotic or nuisance vegetation, and/or moderate to major hydrological or other adverse physical alterations.	1
	Medium: 6% – 50% coverage by exotic or nuisance vegetation, and/or minor hydrological or other adverse physical alterations.	3
	High: 5% or less coverage by exotic or nuisance vegetation, and no hydrological impacts or other adverse physical alterations.	5
Permanency Decimal fraction is multiplied by points.	Impacted area can be restored and recover within 1 growing season.	1
	Impacted area can be restored and recover within 2 - 5 years.	2
	Impacted area can be restored and recover within 5 - 10 years.	3
	Impacted area will require greater than 10 years to be restored and recover.	4
	The area is permanently impacted.	5
Waterbody, in or Adjacent Decimal Fraction is not multiplied by points.	Class III, IV, V waters	1
	Class II waters, not approved for shellfish harvesting	2
	Class II waters, approved/conditionally approved	3
	Class I waters	4
	OFW, AP or areas of special protection designation	5
		Total
	Major	≥ 15
	Moderate	9 - 14
	Minor	1 - 8

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Extent of Deviation from Requirement	
Major	Construction is not permissible even with modifications or would require mitigation.
Moderate	Construction is permissible only with modifications other than mitigation. Construction is permissible only with modifications other than mitigation.
Minor	Construction is permissible without modifications.

DREDGING OR FILLING IN WETLANDS WITHOUT A PERMIT – ENVIRONMENTAL HARM MATRIX FACTOR EXAMPLE CALCULATION

1.25 acres of fill in a “medium” quality wetland. The project was permissible but required mitigation. Restoration is expected to be achievable in 2-5 years and it is in Class III, IV, or V waters.

Matrix Factor	Environmental Harm	Points	Total
Area	1.25 acres	3 + 3 (for portion of an acre)	6
Habitat	Medium	3 x 1.25 ac.	3.75
Permanency	Recovery within 2-5 years	2 x 1.25 ac.	2.5
Water Body Classification	Class III, IV, or V waters	1	1
			13.5

A total of 13.5 for the Environmental Harm matrix results in a Moderate determination. The extent of deviation is Major because the construction would require mitigation. The penalty range for a Moderate, Major violation is \$4,800 to \$6,899.

CONSTRUCTION OF DOCKS WITHOUT A PERMIT

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	Construction of a dock without a permit that results in pollution.	Construction is not permissible even with modifications or mitigation is required.
Moderate	Construction of a dock without a permit that results in or is reasonably expected to result in pollution.	Construction is permissible only with modifications other than mitigation.
Minor	Construction of a dock without a permit that does not result in or is not reasonably expected to result in pollution.	Construction is permissible without modifications.

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PERMIT CONDITION VIOLATIONS OR FAILURE TO DO REQUIRED WORK OTHER THAN MITIGATION OR MONITORING

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	Permanent loss or impact to wetlands, submerged resources, or a water quality violation.	Failure to comply with more than one General or Specific Permit Conditions, drawings, or other permit attachments.
Moderate	Temporary loss or impact to wetlands, submerged resources, or a water quality violation.	Failure to comply with a single General or Specific Permit Condition, drawings, or other permit attachments.
Minor	No loss or impact to wetlands, submerged resources, or water quality violations.	Minor deviations from General or Specific Permit Conditions, drawings or other permit attachments.

PERMIT VIOLATIONS INVOLVING FAILURE TO CONDUCT MITIGATION, OTHER REQUIRED WORK INCLUDING CONSERVATION EASEMENT/BINDING AGREEMENT

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	1. Failure to perform or complete required mitigation or other work that results in pollution. 2. Failure to satisfy mitigation requirements including the purchase of mitigation credits within the required timeframe that results in pollution.	1. Required work was not initiated. 2. Failure to execute and record a conservation easement or binding agreement as required by an Environmental Resource Permit or WRP.
Moderate	Failure to perform or complete required mitigation or other work of one acre or less that results in or is reasonably expected to result in pollution.	1. Required work was not completed. 2. Recorded conservation easement or binding agreement is not provided to the Department prior to expiration of construction phase of the permit.
Minor	1. Failure to perform maintenance pursuant to mitigation requirements. 2. Failure to provide a recorded copy of the conservation easement or binding agreement within the required timeframes which create conditions that does not result in or is not reasonably expected to result in pollution.	N/A

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WATER QUALITY STANDARD VIOLATIONS ASSOCIATED WITH DREDGING AND FILLING ACITIVITIES

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	1. Water quality violations in Class I or Class II waters which are approved or conditionally approved for shellfish harvesting, OFWs and aquatic preserves. 2. Water quality violations in Class III waters which impact an area that exceeds ¼ mile (1,320 linear feet) in creeks, canals and other confined waterways or ¼ acre (10,890 ft²) in all other waterbodies.	An exceedance of water quality criteria two times or greater ($\geq 2X$) than the criteria, or the violation was willful and intentional.
Moderate	Water quality violations in Class III waters other than aquatic preserves and OFWs, and Class II waters NOT approved for shellfish harvesting that impact an area less than ¼ mile in creeks, canals and other confined waterways or between 2,000 and 10,889 ft ² in all other waterbodies.	An exceedance of water quality criteria one and a half times ($\geq 1.5X$) but less than two times ($< 2X$) the criteria.
Minor	1. Water quality violation in Class IV or Class V waters. 2. Water quality violations in Class III waters other than aquatic preserves and OFWs, and Class II waters not approved for shellfish harvesting that impact an area less 2,000 ft² in unconfined waters.	An exceedance of water quality criteria less than one and a half times ($< 1.5 X$) the criteria.

FAILURE TO CONDUCT REQUIRED TESTING AND REPORTING

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	Failure to conduct required testing or reporting that results in pollution.	1. Testing and reporting requirements are only completed after being requested by the Department. 2. Submittal of fraudulent data or information.
Moderate	Failure to conduct required testing or reporting that results in or is reasonably expected to result in pollution.	Required reports are submitted more than 60 days late.
Minor	All non-data testing or reporting violations that does not result or is not reasonably expected to result in pollution.	Required reports are submitted less than 60 days late.

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CONSTRUCTION OF SHORELINE HARDENING STRUCTURES WITHOUT A PERMIT

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	1. Shoreline stabilization structures, other than riprap, extend greater than 24 inches waterward of the uplands or of the previous seawall location. 2. Structure consists of greater than 50% deleterious materials.	Construction is not permissible even with modifications or mitigation is required.
Moderate	1. Structure extends 18-24 inches waterward of the uplands or of the previous seawall location. 2. Riprap extending more than 10 feet waterward, covers more than 100 square feet of wetland, or the length of riprap extends more than 100 linear feet of shoreline. 3. Structures consist of 10 - 50% deleterious materials.	Construction is permissible only with modifications other than mitigation.
Minor	1. Structure extends less than 18 inches waterward of the uplands or of previous seawall location. 2. Riprap less than 10 feet waterward and covers less than 100 feet of wetland, or the length is less than 100 linear feet of shoreline. 3. Structures consist of less than 10% deleterious materials.	Construction is permissible without modifications.

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STORMWATER VIOLATIONS OF PERMITTED OR UNPERMITTED FACILITIES

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	1. Complete system failure that results in a catastrophic or continuous release of untreated stormwater that results in pollution. 2. Failure of a stormwater treatment system or failure to use BMPs resulting in impacts in waters in the state or wetlands that results in pollution. 3. Construction of a new stormwater management system for a site one acre or greater in total area or 0.5 acre or greater of impervious area without a permit.	Construction is not permissible even with modifications or mitigation is required.
Moderate	1. Partial system failure that results in releases of inadequately treated stormwater that results in or is reasonably expected to result in pollution. 2. Construction of a new stormwater management system for a site less than one acre of total area or less than 0.5 acre of impervious area without a permit.	1. Construction is permissible only with modifications other than mitigation. 2. Failure to complete a stormwater management system in accordance with a Department approved permit prior to completion of construction of the stormwater pollution source. 3. Failure to maintain a stormwater management system.
Minor	Partial system failure that results in releases of inadequately treated stormwater that does not result or is not reasonably expected to result in pollution.	Construction is permissible without modifications.

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MANGROVE VIOLATIONS -1996 MANGROVE TRIMMING AND PRESERVATION ACT

Matrix Factor	Environmental Harm	Points
Percent of Trimmed Area Altered or Defoliated	5 - 25% of the trimmed area	1
	26 - 50% of the trimmed area	2
	51 - 100% of the trimmed area	3
	If mangrove mortality, chemical defoliation, mangrove removal, and/or filling over the trunks	2X above factor
Areal Extent of Impacts	Less than 500 ft ²	1
	500 – 1,000 ft ²	2
	1,001 – 2,999 ft ²	3
	3,000 – 5,000 ft ²	4
	Greater than 5,000 ft ²	5
Average Diameter of Impacted Trees	Less than 1" base (main) trunk diameter at Diameter at Breast Height (DBH)	1
	1 – 3" base (main) trunk diameter at DBH	2
	Greater than 3" but less than 5" base (main) trunk diameter at DBH	3
	Greater than 5" but less than 7" base (main) trunk diameter at DBH	4
	Greater than 7" base (main) trunk diameter or DBH	5
Mangrove Fringe Depth	Less than 25 ft	1
	26 – 50 ft	2
	51 – 100 ft	3
	101 – 250 ft	4
	Greater than 250 ft	5
Total	Divide total points by the number of categories used.	
	Major	4.1 - 5.0
	Moderate	2.1 - 4.0
	Minor	1.0 - 2.0

Extent of Deviation from Requirement	
Major	Activity prohibited in conservation easement, mitigation area, or public lands set aside for conservation pursuant to Section 403.9325(6), F.S. Activity not permissible even with modifications, or the violation was willful and intentional.
Moderate	Activity required a Professional Mangrove Trimmer. Activity occurred on lands not owned or controlled by the responsible party (excluding conservation easement or mitigation area).
Minor	Activity complies with General Permit criteria, but no permit was obtained. Activity deviates from the original permit but did not result in adverse impacts.