

Guidelines for Characterizing ERP Violations

Introduction

Department of Environmental Protection (DEP) Directive 923 is the Department’s controlling enforcement guidance document. These guidelines are intended to complement Directive 923, and to provide a rational, fair, and consistent method for determining the appropriate amount of civil and administrative penalties. These guidelines should only be used when settling Environmental Resource and Wetland Resource enforcement actions, and should never be cited in a Notice of Violation.

****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	
<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	
<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>)	+ \$1,500	
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 a permit shall be assessed a penalty per violation	\$7,500	403.121(3)(d)
Failure to satisfy financial responsibility requirements	\$7,500	403.121(4)(a)

Guidelines for Characterizing ERP Violations

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	\$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 based on the matrix. These factors include:

- Knowing, deliberate, or chronic violations
- 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
- Ability to pay
- Other unique factors

In-Kind Penalties and Pollution Prevention Projects

In-Kind Penalties and Pollution Prevention Projects are used in lieu of a cash penalty, are assessed at 1.5 times the amount of the penalty if paid in cash and should be considered as provided in Directive 923.

Guidelines for Characterizing ERP Violations

Penalty Calculation Matrix for ERP Violations

Matrix Factor Considerations

The Department’s Penalty Calculation Matrix for ERP (found in Directive 923 and titled: *Penalty Calculation Matrix Extent of Deviation from Requirement, for cases other than PW, HS, or HW*), is reproduced below. Beneath the matrix are tables characterizing specific violations by Environmental Harm and Extent of Deviation. It is important to remember the Major category of Environmental Harm is reserved for violations that actually result in pollution in a manner that represents a substantial threat to human health or the environment. The Moderate category of Environmental Harm is reserved for violations that actually result in, or are reasonably expected to result in, pollution in a manner that represents a significant threat to human health or the environment. The Minor category of Environmental Harm is reserved for violations that actually result in, or are reasonably expected to result in, a minimal threat to human health or the environment.

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 \$750	\$750 ¹⁾	\$750 ¹⁾	

1)– Environmental Education may be an acceptable substitute

Guidelines for Characterizing ERP Violations

Violation—Dredging or Filling in Wetlands without a Permit

Matrix Factor	Environmental Harm	Points or Factor	Acreage in Decimal Fraction	Subtotal
Area: (Decimal Fraction is not multiplied by points)	Less than or equal to a 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: (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, or the area is permanently impacted.	4		
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 Harm	Major: 15 or Greater			
	Moderate: 9-14			
	Minor: 1-8			
Matrix Factor	Extent of Deviation from Requirement			
Major	Construction is not permissible even with modifications.			
Moderate	Construction is permissible only with modifications other than mitigation.			
Minor	Construction is permissible without modifications.			

Guidelines for Characterizing ERP Violations

Violation—Construction of Docks without a Permit

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	Construction of a dock without a permit that actually results in pollution in a manner that represents a substantial threat to human health or the environment.	Construction is not permissible even with modifications.
Moderate	Construction of a dock without a permit that actually results in, or is reasonably expected to result in, pollution in a manner that represents a significant threat to human health or the environment.	Construction is permissible only with modifications other than mitigation.
Minor	Construction of a dock without a permit that actually results in, or is reasonably expected to result in, a minimal threat to human health or the environment.	Construction is permissible without modifications.

Violation— Permit Condition Violations or Failure to Do Required Work Other Than Mitigation or Monitoring

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	[Not applicable]	Failure to comply with General or Specific Permit Conditions, drawings or other permit attachments that result in PERMANENT loss or impact to wetlands, submerged resources or a water quality violation.
Moderate	[Not applicable]	Failure to comply with General or Specific Permit Conditions, drawings or other permit attachments that result in TEMPORARY loss or impact to wetlands, submerged resources or a water quality violation.
Minor	Failure to comply with General or Specific Permit Conditions, drawings or other permit attachments, including BMPs, construction methods, timeline or administrative requirements that actually results in, or is reasonably expected to result in, a minimal threat to human health or the environment	Failure to comply with General or Specific Permit Conditions, drawings or other permit attachments that result in NO loss or impact to wetlands, submerged resources or a water quality violation.

Violation— 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	<ol style="list-style-type: none"> 1. Failure to perform or complete required mitigation or other work that actually results in pollution in a manner that represents a substantial threat to human health or the environment. 2. Failure to satisfy mitigation requirements including the purchase of mitigation credits within the required timeframe that actually results in pollution in a manner that represents a substantial threat to human health or the environment. 	<ol style="list-style-type: none"> 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.

Guidelines for Characterizing ERP Violations

Moderate	<p>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 that represents a significant threat to human health or the environment.</p>	<ol style="list-style-type: none"> 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	<ol style="list-style-type: none"> 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 actually or are reasonably expected to result in a minimal threat to human health or the environment. 	

Violation—Water Quality Standard Violations Associated with Dredging and Filling Activities

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	<ol style="list-style-type: none"> 1. Water quality violations in Class I or Class II waters that caused significant harm and ARE approved or conditionally approved for shellfish harvesting, OFWs and aquatic preserves. 2. Water quality violations in Class III waters that caused significant harm and impact an area that exceeds ¼ mile (1320 linear feet) in creeks, canals and other confined waterways or ¼ acre (10,890 ft²) in all other waterbodies. 3. Turbidity violations that actually result in pollution, silting/sedimentation that represents a substantial threat to human health or the environment. 	<ol style="list-style-type: none"> 1. Turbidity violations greater than 15 NTUs above background in an OFW or greater than 290 NTUs above background in any waterbody. 2. Violations of other water quality parameters exceeding 10 times the standard or the violation was willful and intentional.
Moderate	<ol style="list-style-type: none"> 1. 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 ft² in all other waterbodies. 2. Turbidity violations that actually or are reasonably expected to result in pollution, silting/sedimentation in a manner that represents a significant threat to human health or the environment. 	<ol style="list-style-type: none"> 1. Turbidity violations less than or equal to 15 NTUs above background in an OFW or between 290 and 50 NTUs above background in any waterbody. 2. Violations of other water quality parameters exceeding less than 10 times the standard but greater than 5%.

Guidelines for Characterizing ERP Violations

Minor	<ol style="list-style-type: none"> 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. 3. Turbidity violations that actually or are reasonably expected to result in a minimal threat to human health or the environment. 	<ol style="list-style-type: none"> 1. Turbidity violations less than 50 NTUs above background in any waterbody other than an OFW. 2. Violations of other water quality parameters exceeding less than 5%.
--------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Violation—Testing, Reporting and Record Keeping Violations

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	<ol style="list-style-type: none"> 1. Submittal of fraudulent data or information intended to conceal a violation that caused significant harm to human health or the environment. 2. Permit violations that actually result in pollution that represents a substantial threat to human health or the environment. 	<ol style="list-style-type: none"> 1. Failure to perform testing, reporting or submittal required by permit or rule. 2. Notice of abnormal occurrences or system failures not reported when required by permit or rule. 3. Submittal of fraudulent data or information.
Moderate	<ol style="list-style-type: none"> 1. All testing requirement violations such as inappropriate frequency, location, parameter, etc. that actually result in, or are reasonably expected to result in, pollution in a manner that represents a significant threat to human health or the environment. 2. Failure to conduct or report analytical data requirements. 	<ol style="list-style-type: none"> 1. Reporting or record keeping requirements are only completed after being requested by the Department. 2. Required reports are submitted more than 60 days late.
Minor	<p>All non-data reporting or record keeping violations that actually, or are reasonably expected to, result in a minimal threat to human health or the environment.</p>	<p>Required reports are submitted less than 60 days late.</p>

Guidelines for Characterizing ERP Violations

Violation—Construction of Shoreline Hardening Structures Without a Permit

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	<ol style="list-style-type: none"> Structure extends greater than 24 inches waterward of the uplands or of the previous seawall location and actually results in pollution in a manner that represents a substantial threat to human health or the environment. Structure consists of greater than 50% deleterious materials that actually result in pollution in a manner that represents a substantial threat to human health or the environment. 	Structure deviates from the requirements of the law by a significant extent (i.e. is not permissible), or the violation was willful and intentional.
Moderate	<ol style="list-style-type: none"> Structure extends 18-24 inches waterward of the uplands or of the previous seawall location and actually results in, or are reasonably expected to result in, pollution in a manner that represents a significant threat to human health or the environment. Structures consist of 10 - 50% deleterious materials that actually result in, or are reasonably expected to result in, pollution in a manner that represents a significant threat to human health or the environment. 	Structure deviates from the requirements of the law significantly; however, the structure is permissible with structural modifications such as removal of deleterious material, planting at toe, addition of filter fabric, etc.
Minor	<ol style="list-style-type: none"> Structure extends less than 18 inches waterward of the uplands or of previous seawall location and actually or are reasonably expected to result in a minimal threat to human health or the environment. Structures consist of less than 10% deleterious materials that actually or are reasonably expected to result in a minimal threat to human health or the environment. 	Structure deviates somewhat from the requirements of the law but most of the requirements are met and the project is permissible as placed without modification.

Guidelines for Characterizing ERP Violations

Violation—Stormwater Violations of Permitted or Unpermitted Facilities

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	<ol style="list-style-type: none"> 1. Complete system failure that results in a catastrophic or continuous release of untreated stormwater that actually results in pollution in a manner that represents a substantial threat to human health or the environment. 2. Failure of a stormwater treatment system or failure to use BMPs resulting in impacts in waters in the state or wetlands, that actually results in pollution in a manner that represents a substantial threat to human health or the environment. 3. Construction of a new stormwater management system for a site greater than one acre of total area or greater than 0.5 acre of impervious area without a permit. 	<p>Construction deviates from the requirements of the law by a significant extent (i.e. is not permissible as constructed), or the violation was willful and intentional.</p>
Moderate	<ol style="list-style-type: none"> 1. Partial system failure that results in FREQUENT releases of inadequately treated stormwater that actually results in, or is reasonably expected to result in, pollution in a manner that represents a significant threat to human health or the environment. 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. 	<ol style="list-style-type: none"> 1. Structure deviates from the requirements of the law significantly; however, the structure is permissible with further modifications. 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 implement erosion/sedimentation controls during construction to retain sediments onsite. 4. Failure to meet exemption requirements. 5. Failure to maintain a stormwater management system.
Minor	<p>Partial system failure that results in INFREQUENT releases of inadequately treated stormwater that actually or is reasonably expected to result in pollution in a manner that represents a minimal threat to human health or the environment.</p>	<p>Structure deviates somewhat from the requirements of the law but most of the requirements are met and the project is permissible as constructed without modification.</p>

Guidelines for Characterizing ERP Violations

Violation— Mangrove Violations

Matrix Factor	Environmental Harm	Points	Subtotal
Percent Violation of Total Trimmed Area	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	
Area 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 trunk diameter	1	
	1 – 3" base trunk diameter	2	
	Greater than 3" but less than 5" base trunk diameter	3	
	Greater than 5" but less than 7" base trunk diameter	4	
	Greater than 7" base trunk diameter	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 Harm (Divide total points by the number of categories used)	Major: 4.1 – 5.0		
	Moderate 2.1 – 4.0		
	Minor: 1.0 – 2.0		
	Minor: 1.0 – 2.0		
Matrix Factor	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 responsible party (excluding conservation easement or mitigation area)		
Minor	Activity complies with General Permit criteria.		