

Guidelines for Characterizing NPDES Stormwater 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 NPDES Stormwater 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 stipulated by statute. For additional details, see DEP Directive 923 and Section 403.121 of the Florida Statutes (F.S.). NPDES stormwater violations are not specifically listed in Section 403.121(3), F.S., so the ELRA base penalty amounts and adjustment factors that are potentially applicable to NPDES stormwater violations are limited to the following violations, as listed in Sections 403.121(4) and (5), F.S.

Violation (Statutory Language)	Base Penalty	Cite (F.S.)
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 conduct required release detection		
Failure to construct in compliance with a permit		
Failure to maintain required staff to respond to emergencies	\$1,500	403.121(4)(e)
Failure to conduct required training		
Failure to prepare, maintain, or update required contingency plans		
Failure to adequately respond to emergencies to bring an emergency situation under control		
Failure to submit required notification to the Department		

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Violation (statutory language)	Base Penalty	Cite (F.S.)
Failure to prepare, submit, maintain, post, 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.

"Other Unique Factors" for NPDES stormwater violations include:

- Resource considerations—Is the receiving water an Outstanding Florida Water or Aquatic Preserve? Is it a Class I or Class II water body? Is it an impaired water body with an established or adopted total maximum daily load (TMDL) for one or more pollutants?
- Frequent ownership changes—Did the problem result from new owners not fully aware of their permit requirements? Were the previous owners responsible for the violations?
- Multiple responsible parties—Were the developers, subcontractors, property owners, or all parties responsible for the violation?
- Construction project turnaround time—Has the project been completed and the soil stabilized before the penalty can be issued?
- 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.

In-Kind Penalties and Pollution Prevention Projects

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

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Penalty Calculation Matrix

Matrix Factor Considerations

The Department’s Penalty Matrix for cases other than Potable Water, Hazardous Substances, or Hazardous Waste, found in Directive 923, is reproduced below. Below the matrix are tables identifying what types of violations fall into what range of the matrix. It is important to remember that to place a violation in the ‘Major’ category for Environmental Harm the violation must have actually resulted in pollution in a manner that represents a substantial threat to human health or the environment. Moderate violations are those 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. Minor violations are those violations that actually 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*	\$750*	

* Environmental Education may be an acceptable substitute

Matrix Factors—Permit Violations

The potential for harm for permit violations is related to the type and size of the facility/site. The extent of deviation depends on whether the facility/site was operating without a permit or with an expired permit.

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	Multiple required permits which caused significant harm to the environment or human health	No permits
Moderate	MSGP or large CGP	Permit expired for more than one year
Minor	NEX or small CGP	Permit expired for one year or less

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Matrix Factors—Inspections, Plans, and Reports (Facility Site Review)

Plans and reports for the CGP include the Stormwater Pollution Prevention Plan (SWPPP) and the weekly/0.5 inch rainfall event inspection reports. Plans and reports for the MSGP include the SWPPP and records of quarterly visual monitoring, annual comprehensive site compliance evaluations, annual employee training, and other sector-specific inspections or monitoring. The extent of environmental harm for violations involving inspections, plans, and reports is linked to the facility's overall operation and maintenance as evidenced by the inspector's facility site review.

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	Significant offsite discharge of polluted stormwater runoff which results in significant environmental harm	Plans and reports are totally incomplete, missing, or not prepared
Moderate	Offsite discharge of polluted stormwater runoff causing or reasonably expected to cause measurable environmental harm	Plans and reports are partially complete (less than 50% complete) and up to date
Minor	Offsite discharge of polluted stormwater runoff with evidence or reasonably expected to cause minimal environmental harm	Plans and reports are mostly complete (50% or more complete) and up to date

Matrix Factors—Best Management Practices (Condition of Receiving Water)

The extent of environmental harm for Best Management Practices (BMPs) violations is linked to observed off-site impacts on receiving waters. The extent of deviation is a function of the number of BMP systems in violation (e.g., "perimeter controls" would count as a single BMP in violation, as opposed to counting each section of a damaged silt fence). Extent of deviation is also decided by whether the violations consisted of minor, correctable problems; BMPs that were not routinely inspected and maintained; or BMPs that were simply not installed.

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	Sampling results documenting polluted runoff (e.g., turbidity readings 29 NTU above background) which results in significant environmental harm	Multiple BMPs that are not installed
Moderate	Visible observation of polluted runoff (e.g., turbidity plume, sediment, oily sheen, floating trash or debris, etc.) causing or reasonably expected to cause measurable environmental harm.	<ul style="list-style-type: none"> • Multiple BMPs that are not maintained (i.e., major corrections are needed) • Single BMP that is not installed

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Minor	Evidence of off-site impacts (e.g., staining, discoloration, trash, etc.) causing or reasonable expected to cause minimal environmental harm.	<ul style="list-style-type: none"> • One or more BMPs with minor problems that are easily corrected • Single BMP that is not maintained (i.e., major corrections are needed)
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Matrix Factors—Phase I Municipal Separate Storm Sewer System Violations

The extent of environmental harm for Phase I Municipal Separate Storm Sewer System (MS4) violations is based upon which program element of the permit is in violation (e.g., detecting illicit discharges versus controlling fertilizer applications). The extent of deviation depends on whether the individual program element was in place, and, if in place, whether there were minor or major corrections necessary to return to compliance.

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	Violations which result in significant environmental harm involving failures of: <ul style="list-style-type: none"> • Maintenance schedule for structural controls • Operating and maintaining public streets • Detecting and removing illicit discharges • Monitoring and controlling pollutants, landfills, hazardous waste sites, high-risk industrials • Structural and non-structural BMPs for construction runoff 	Program element not in place
Moderate	Violations which caused or are reasonable expected to cause environmental harm involving failures of: <ul style="list-style-type: none"> • Monitoring and identifying priorities for discharge from municipal waste facilities • Controlling pollutants related to pesticides, herbicides, and fertilizer applications 	Program element in place, but mostly out of compliance (major corrections needed)

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Minor	<p>Violations with evidence of or are reasonable expected to cause minimal environmental harm involving:</p> <ul style="list-style-type: none"> • Planning processes (controls on new development and significant re-development) • Ensuring flood projects consider water quality 	Program element in place, and mostly in compliance (minor corrections needed)
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Matrix Factors—Phase II Municipal Separate Storm Sewer System Violations

The extent of environmental harm for Phase II MS4 violations is based upon which minimum control measure of the permit is in violation (e.g., detecting illicit discharges versus educating the public). The extent of deviation depends on whether the minimum control measure was in place, and, if in place, whether there were minor or major corrections necessary to return to compliance.

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	<p>Violations which result in significant environmental harm involving:</p> <ul style="list-style-type: none"> • Illicit discharge detection and elimination • Construction site stormwater runoff control • Municipal operation pollution prevention and good housekeeping 	Control measure not in place
Moderate	<p>Violations which caused or are reasonable expected to cause environmental harm involving failed:</p> <ul style="list-style-type: none"> • Public education and outreach 	Control measure in place, but mostly out of compliance (major corrections needed)
Minor	<p>Violations with evidence of or are reasonable expected to cause minimal environmental harm involving:</p> <ul style="list-style-type: none"> • Public participation and involvement 	Control measure in place, and mostly in compliance (minor corrections needed)