
**Rules of
Department of Natural Resources
Division 20—Clean Water Commission
Chapter 3—Enforcement**

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**Title 10—DEPARTMENT OF
NATURAL RESOURCES**
Division 20—Clean Water Commission
Chapter 3—Enforcement

**10 CSR 20-3.010 Penalty Assessment
Protocol**

PURPOSE: This rule sets forth the protocol used by the Missouri Clean Water Commission for the assessment of administrative penalties as described in the Missouri Clean Water Law, sections 644.076 and 644.079, RSMo. This rule also establishes procedures that provide for the swift resolution of environmental problems, deterrence, compliance with the law and regulations, and the consistent and equitable assessment of administrative penalties.

(1) Definitions. Words or terms are used as they are defined in section 644.016, RSMo and implementing regulations 10 CSR 20-2.010. For the purposes of this regulation, the following terms shall be defined:

(A) Minor violation means a violation of sections 644.006—644.141, RSMo or a corresponding standard, limitation, order or rule that, upon analysis of the facts, does not represent a clear, present and substantial environmental or public health or safety hazard and which following completion of the process presented in paragraphs (8)(A)1.—3. has a potential for harm point value of twenty-five (25) or less and an extent of deviation point value of forty-five (45) or less;

(B) Habitual violator means a person who has failed to comply with sections 644.006—644.141, RSMo or corresponding standards, limitations, orders or rules, or permits promulgated or issued for a period of time exceeding twelve (12) consecutive months, or who has demonstrated a recurring pattern of noncompliance followed by compliance during a period of at least eighteen (18) consecutive months, which noncompliance does not meet the definition of minor violation. The habitual violator status of a person is discontinued when compliance with the provisions of sections 644.006—644.141, RSMo or corresponding requirement is maintained for twelve (12) consecutive months;

(C) Conference, conciliation and persuasion (CC&P) means verbal or written communications, including meetings, reports, correspondence or telephone conversations between authorized representatives of the department and the operator or owner which address violations and the need to eliminate them;

(D) Major facility means any facility or activity requiring a National Pollutant Discharge Elimination System (NPDES) permit

and classified as such by the director in concurrence with the United States Environmental Protection Agency (U.S.EPA);

(E) Class I/II animal waste facility means any facility or activity as defined at 10 CSR 20-6.015(10)(B)4. and 5; and

(F) Significant noncompliance means violation of one (1) or more provisions of sections 644.006—644.141, RSMo or corresponding standards, limitations, orders or rules, or a term or condition of any permit which meets one (1) or more of the following criteria:

1. Violation of permit effluent limits which the department must report to the U.S.EPA, or would have to report if the facility was subject to noncompliance reporting requirements;

2. An unauthorized bypass;

3. An unpermitted discharge;

4. A pass through of pollutants which causes or has the potential to cause a violation of Water Quality Standards, 10 CSR 20-7.031;

5. Failure of a municipal wastewater treatment facility to implement its approved pretreatment program, including failure to enforce industrial pretreatment requirements as required in the approved program;

6. Violations of any compliance schedule milestones by ninety (90) days or more from the date specified in an enforcement order or a permit;

7. Failure of the permittee to provide reports within thirty (30) days from the due date specified in an enforcement order or a permit;

8. Violations of narrative requirements (for example, requirements to develop spill prevention control and countermeasure plans and requirements to implement best management practices), which are of substantial concern to the regulatory agency; and

9. Any other violation or group of permit violations which the director considers to be of substantial concern.

(2) In accordance with section 644.079, RSMo and upon determination that any provision of sections 644.006—644.141, RSMo or a corresponding standard, limitation, order or rule, or that a term or condition of any permit has been violated, the director may issue an order assessing an administrative penalty.

(3) An administrative penalty shall not be imposed for any minor violation as defined in this rule. An administrative penalty shall not be imposed until the director or an authorized department employee has sought to eliminate the violation through a process of CC&P consisting of at least two (2) communications separated by no fewer than ten (10) consecutive days. At least one (1) of the two (2) required communications must be in writing. An

administrative penalty will not be assessed if the violation is corrected in a time period agreed to by the violator and the department during CC&P, provided that the period does not exceed six (6) months and the violation did not result in significant harm to human safety or health or to the environment.

(4) An order assessing an administrative penalty shall describe the nature of the violation(s), the amount of the administrative penalty being assessed and the basis of the penalty calculation.

(5) An order assessing an administrative penalty shall be served upon the operator, owner, registered agent or appropriate representative through United States Postal Service certified mail, return receipt requested, a private courier or messenger service which provides verification of delivery or by hand delivery to the operator's or owner's residence or place of business. An order assessing an administrative penalty shall be considered as appropriately served if verified receipt is made by the operator, owner, registered agent or appropriate representative. A refusal to accept, or a rejection of certified mail, private courier or messenger service delivery, or by hand delivery of an order assessing an administrative penalty constitutes service of the order.

(6) Administrative penalties may be assessed for each day that a specific violation exists, including all days between separate observations or reports which indicate that an operator or owner is not complying with a particular statutory or regulatory provision if the director finds that, based on all relevant facts and circumstances, including that offered by the violator, the violation continued unabated during that time.

(7) The amount of administrative penalty assessed per day of violation for each violation shall not exceed the amount of the civil penalty specified in section 644.076, RSMo.

(8) Calculation of Penalties. The calculation of administrative penalties may include either or both of the following individual components: gravity-based measure and economic benefit adjustments.

(A) The gravity-based component is a measure of the seriousness of the violation(s) in terms of the occurrence of or the potential for harm and the extent of deviation from a statutory or regulatory requirement(s).

1. Assessment of potential for harm to human health or safety, or the environment.

A. The assessment of the potential for harm resulting from a violation will be based on the risk of adverse effects upon humans or the environment from exposure to water



contaminants as a result of a violator's noncompliance.

B. The potential for harm will be expressed as a point total and evaluated according to the points assessed for criteria contained in the following point-ranking scale:

Receiving Water Characteristics And Sensitivity

Table with 2 columns: Points Assessed, Potential for Harm. Rows include critical aquatic habitats, drinking water lakes, outstanding national and state resource waters, and all other waters.

Facility and Water Containment Characteristics

Agricultural/confined animal feeding (according to size as designated by 10 CSR 20-6.015(11)(D)-(F))

Table with 2 columns: Points Assessed, Potential for Harm. Rows include Class I, Class II, and Other.

Industrial Facilities and Wastewaters

Current average daily flow if known or can be readily estimated; if not, the design flow or approximation of it. (If the violation was due to a bypass, then the volume bypassed per day or an estimate of that volume.)

Process Wastewater Flows

Table with 2 columns: Points Assessed, Potential for Harm. Rows include flow rates from greater than 1 million gal/day to less than 25,000 gal/day.

Cooling Water Only Flows

Table with 2 columns: Points Assessed, Potential for Harm. Rows include flow rates greater than 5 million gallons/day and less than 5 million gallons/day.

Domestic Wastewater Facilities

(Current average daily flow if known or can be estimated; if not, design flow. If the violation was due to a bypass, then the volume bypassed or an estimate of that volume.)

Table with 2 columns: Points Assessed, Potential for Harm. Rows include flow rates from greater than 50 million gal/day to pretreatment programs.

Effects Of Water Contaminant Discharges

Table with 2 columns: Points Assessed, Potential for Harm. Rows describe various discharge effects such as harmful to aquatic life, impairment of beneficial uses, and public nuisance.

2. Assessment of the extent of deviation from statutory and regulatory requirements.

A. The assessment of the extent of deviation from the provisions of sections 644.006-644.141, RSMo or its corresponding regulations, rules, standards, limitations, orders or permits relate to the degree to which the violation departs from or undermines the intended purpose of the specific statutory or regulatory requirement.

B. The extent of deviation will be expressed as a point total and evaluated according to the points assessed for criteria contained in the following point-ranking scale:

Organizational Capability and Sophistication

Table with 2 columns: Points Assessed, Extent of Deviation. Rows include major discharger, nonmajor industrial facility, nonmajor federal and state construction-grant-funded municipality, nonmajor nonconstruction-grant-funded municipality, and all other facilities.

Facility Compliance Status

Table with 2 columns: Points Assessed, Extent of Deviation. Rows include facility in noncompliance more than 67% of time, noncompliance with one or more requirements, and infrequent problem.

Facility Responsiveness

Table with 2 columns: Points Assessed, Extent of Deviation. Rows include demonstrated recalcitrance and lack of attention until formal administrative enforcement action.



- 10 Violations continued after responsible party had been clearly informed, on at least three (3) separate occasions, of the noncompliance and the need to correct it
- 0 Other situation

Regulatory Compliance Characteristics

Points Assessed	Extent of Deviation
25	Failure to meet schedule of compliance or attain final limits contained in an abatement order, court order or consent decree
20	Discharge without an NPDES permit or operation without required letter of approval for Class I facilities
15	Discharge fails whole effluent toxicity testing requirement specified in the operating permit
15	Significant noncompliance with effluent limits
10	Failure to meet schedule of compliance or special conditions in an NPDES permit
10	Violations of effluent limits that do not meet the definition of significant noncompliance
10	Failure to submit Discharge Monitoring Reports (DMRs) or other reports required by the operating permit or letter of approval
10	Failure to employ or retain a certified operator if required to do so
5	Construction without a construction permit or letter of approval for construction, or failure to construct in accordance to plans and specifications
5	Failure to comply with subdivision regulations
5	Failure to comply with NPDES standard conditions not previously specified, including failure to provide proper operation and maintenance and do in-plant testing

3. Calculation of base penalty amount. The base amount of a penalty is determined by examining the gravity or severity of the noncompliance in terms of the occurrence of or potential for harm and degree of deviation from statutory or regulatory requirements which, together, compose a profile of the violation.

A. The gravity of noncompliance is described in terms of major, moderate or minor occurrence or potential for harm or deviation from requirements.

B. The levels of gravity of noncompliance are determined by adding all of the point assessed for the individual characteristics specified in subparagraphs (8)(A)1.B. and

(8)(A)2.B. and comparing the resulting sums to the following chart:

	Potential for Harm	Extent of Deviation
Major	51 or more points	101 or more points
Moderate	26 to 50 points	46 to 100 points
Minor	0 to 25 points	0 to 45 points

4. Base penalty determination. The base penalty shall not exceed the amounts established in section 644.076, RSMo.

A. The penalty assessment will be determined by selecting the appropriate cell from the gravity-based assessment matrix. Potential for harm and extent of deviation form the two (2) axes of the matrix. The matrix is composed of nine (9) cells, each of which contains a monetary penalty range and midpoint. For purposes of administrative penalty assessment, the matrix cell which corresponds to minor potential for harm and minor extent of deviation has a value of zero dollars (\$0)

Gravity	Extent of Deviation		
	Major	Moderate	Minor
Major	\$8501—\$10,000 \$9250.50	\$7501—\$8500 \$8000.50	\$6501—\$7500 \$7000.50
Moderate	\$5501—\$6500 \$6000.50	\$4501—\$5500 \$5000.50	\$3501—\$4500 \$4000.50
Minor	\$2501—\$3500 \$3000.50	\$1501—\$2500 \$2000.50	\$0—\$1500 \$750

B. The matrix cell appropriate for a specific penalty assessment will be determined by identifying the appropriate category (for example, major, moderate, minor) for both the potential for harm and the extent of deviation. This results in the penalty being set at the midpoint of the range in the selected matrix cell.

5. Maximum gravity-based penalty. The base penalty amount will be multiplied by the number of days the violation(s) occurred. In any event the penalty calculated shall not exceed the maximums specified in section 644.076, RSMo. The number of days of violation is determined by identifying the number of discrete days the violation was observed or documented or by considering the number of days which have passed since the violation was first observed or documented if a logical basis exists to support the conclusion that the violations were continuing.

6. Adjustment factors. In order to allow some flexibility in the assessment of penalties, several adjustment factors may be considered when developing the final penalty amount. The adjustment factors can increase or decrease the penalty amount to be paid by the violator within the range specified in the

matrix cell. Adjustment of a penalty may take place before the department presents the violator with a penalty demand or after assessment of the proposed penalty as part of the settlement process. Adjustment factors may be used to increase or decrease the base penalty one-third (1/3) of the amount between the midpoint and either the greater or lesser extreme of the range within the matrix cell. It is possible for one (1) adjustment to reduce the penalty amount and another to increase it. The adjustment factors that shall be used are as follows:

A. Good faith efforts. Based upon good faith or lack of good faith efforts on the part of the violator, adjustments may be made which increase or decrease the maximum gravity-based penalty amount. For purposes of this rule, good faith efforts do not include routine or periodic return to compliance;

B. Degree of culpability. The maximum gravity-based penalty amount may be adjusted to reflect the violator's degree of culpability. An upward adjustment may be made in cases where carelessness or disregard of obvious consequences is displayed on the part of the violator. If correction of the environmental problem was delayed by factors which the violator can clearly show were not reasonably foreseeable or were outside of the violator's immediate control, the penalty may be reduced. In no case shall lack of knowledge of the law and regulations be considered a basis for decreased culpability; and

C. History of noncompliance. For purpose of this rule, a history of noncompliance exists when a violator has been the subject of a previous, final administrative order or judicial decree for a similar violation or has been designated as a habitual violator according to the criteria established in this rule. In the case of a municipality or other public entity, changes in administration due to election or hiring do not constitute a change or break in the history of noncompliance. A history of noncompliance can result in only an upward adjustment of the maximum gravity-based penalty amount. No downward adjustment is allowed in relation to this factor.

(B) Calculation of Economic Benefit. Where documented financial gain on the part of the violator is attributable to the violation, an economic benefit component may be calculated. The economic benefit component is to be added to the gravity based component to determine the total penalty that may be assessed. In no event may the total penalty exceed the maximum specified in section 644.076, RSMo. The economic benefit component shall be calculated based upon consideration of the following:



1. Delayed costs which are expenditures that have been deferred by the violator's noncompliance;

2. Avoided costs which are expenditures that should have been made by the violator but because of the violation these costs will never be incurred; and

3. Actual income derived from the non-compliance such as nonperformance of contractual obligations for the disposal of contaminants.

(C) Method for Economic Benefit Calculation. The economic benefit shall be calculated for each violation for which appropriate documentation is available by use of a method which provides a reasonable estimate of the economic benefit of the noncompliance which is the subject of the penalty assessment.

(9) Case Specific Factors. In consideration of administrative penalties, the department may add to or subtract from the total amount of the penalty after consideration of any of the following circumstances:

(A) Recalculation of Penalty Amount. After the issuance of an order assessing a penalty or a demand for a penalty, if new information about a violation becomes available which indicates that the original penalty calculation was incorrect, the department shall evaluate and recalculate the penalty amount in light of that information;

(B) Ability to Pay. When a violator has documented that payment of all or a portion of the penalty will preclude the violator from achieving compliance or from carrying out important remedial measures, the department may waive any of that penalty;

(C) Environmental Projects. The department may consider decreasing a penalty in return for an agreement by the violator to undertake an environmentally beneficial project. The project must involve activities which are in addition to all efforts to achieve compliance with the pending enforcement action. The department may propose a project or review and approve or disapprove of projects proposed by the violator; and

(D) Other Factors. This rule allows for other penalty modifications based on fairness and equity which are not mentioned in this rule and may arise on a case-by-case basis.

(10) Penalty Payment. When a violator has documented an inability to make a lump sum payment of the penalty, the director may exercise one (1) or more of the following options: delayed payment schedule, installment plan with interest, installment plan without interest, penalty reductions and stipulated penalties related to future events or omissions.

(A) The amount of any downward adjustment of the penalty because of the violator's inability to pay depends on departmental review of the information submitted by the violator.

(B) Any downward adjustment which would exceed fifty percent (50%) of the total penalty liability shall receive prior approval of the director.

(11) Civil and Criminal Penalties. Though primarily intended to relate to administrative matters, the procedures and concepts presented in this rule may be used in the development of civil and criminal penalties pursuant to section 644.076, RSMo. When employed in these situations—

(A) The per instance or per day civil or criminal penalty sought on behalf of the state, the department or the commission shall not be less than either the legally stated minimum or the amount of the penalty as determined by the application of this rule, whichever is greater.

(B) The amount of civil or criminal penalty calculated using this rule cannot exceed the current legal maximum specified in section 644.076, RSMo.

(12) The proceeds from any administrative penalty assessed in accordance with the rule shall be paid to the county treasurer of the county in which the violation(s) occurred for the use and benefit of the county schools.

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