

DEPARTMENT OF ENVIRONMENTAL PROTECTION
Bureau of Water Standards and Facility Regulation

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TITLE: Civil Penalty Calculation Procedure for Pollution Incidents

EFFECTIVE DATE: Upon publication in the *Pennsylvania Bulletin*

AUTHORITY: Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended.

POLICY: To ensure equitable development of penalty assessments to achieve water quality protection when pollution prevention and compliance assistance are inappropriate responses.

PURPOSE: This penalty calculation procedure is to be used for Clean Streams Law violations that involve:

1. Spills and other pollution incidents which affect waters of the Commonwealth.

Section 605 of the Clean Streams Law states that, in assessing civil penalties, the Department shall consider willfulness, damage, cost of restoration, and other relevant factors. The statute also sets a maximum civil penalty of \$10,000 per violation per day.

APPLICABILITY: Can be applied to any pollution incident where pollutants have been discharged to waters of the Commonwealth.

DISCLAIMER: The policies and procedures outlined in this guidance are intended to supplement existing requirements. Nothing in the policies or procedures shall affect regulatory requirements.

The policies and procedures herein are not an adjudication or a regulation. There is no intent on the part of DEP to give the rules in these policies that weight or deference. This document establishes the framework within which DEP will exercise its administrative discretion in the future. DEP reserves the discretion to deviate from this policy statement if circumstances warrant.

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LOCATION: Volume 32, Tab 19

This Guidance deals with the unauthorized discharge of pollutants to waters of the Commonwealth. The polluting substance can be sewage, industrial waste, or generally identified as a polluting substance (as defined by the Pennsylvania Clean Streams Law). The discharge may be from, but not limited to:

- a spill at a fixed facility (either permitted or unpermitted)
- a transportation accident
- discharge of chlorinated drinking water from a water line break
- line cleaning
- manure spill
- Sanitary Sewer Overflow (SSO)
- dry weather Combined Sewer Overflow (CSO), etc.

The total penalty for an incident is based on the number of violations of the Pennsylvania Clean Streams Law (CSL) and the associated regulations. The following Guidance is organized into sections associated with the CSL.

I. Unauthorized Discharges are violations of the CSL. The polluting substance involved determines if this is a violation of Section 201, 301 or 401 of the CSL. This penalty is based on the sum of the following factors:

A. Damage

The **damage factor** considers damages to waters of the Commonwealth or their uses (for example: aquatic life, water supply, recreation and fish consumption or other uses). The *damage* component of the penalty may be so significant as to justify the maximum penalty of \$10,000 just for this factor. For example, if there was a major fish kill over a significant area, the maximum could be used. The extent of the damage should also be considered.

Low Damage – \$100 to \$2000 - (examples, but not limited to: some macroinvertebrate damage, no fish kill, and/or some water quality standards were violated).

Moderate Damage – \$2000 to \$5000 - (examples, but not limited to: macroinvertebrate damage, minor fish kill, and/or significant violations of water quality standards).

High Damage – \$5000 to \$10,000 - (examples, but not limited to: serious damage to macroinvertebrate community, major fish kill, high exceedance of water quality standards, and/or impact on water supply).

B. Willfulness

The **willfulness factor** is divided into four categories: *Accidental*, *Negligent*, *Reckless* and *Deliberate*.

1. *Accidental* – Where a violation is totally beyond the violator’s control there may be no penalty assessed for this factor. The penalty for *accidental* may be \$0.
2. *Negligent* – The conduct of the violator is considered negligent when the violation could have been reasonably foreseen and prevented through the exercise of reasonable care. The following are among the factors that are considered when assigning a value to this factor (from \$1,000 to \$3,000):
 - amount of effort that would have been required to prevent the violation;
 - timeliness of the violator’s actions to resolve the violation;
 - amount of control the violator had over the situation.
3. *Reckless* – The actions of the violator are considered reckless when the actions or inactions of the violator demonstrate a conscious disregard of the fact that the actions or inactions may result in violation of the law. The following are among the factors that should be considered when assigning a value to this factor (from \$3,000 to \$6,000):
 - degree of awareness the violator had, or should have had;
 - previous notifications from the DEP of the violation;
 - the violation is already subject to DEP enforcement actions;
 - the violator’s reactions to DEP directives;
 - the violator knowingly proceeded with an activity that resulted in a violation.
4. *Deliberate* – The actions of the violator are considered deliberate when the actions are intentional and the violator knows that the conduct will result in a violation of the law. The penalty for this category ranges from \$6,000 to \$10,000.

C. History

- No Prior Violations – The penalty amount is \$0.
- Prior Incidents – The violator had some minor incidents, Notice of Violations (NOVs), or other notifications. The penalty range is \$500 - \$3,000.

- Prior Enforcement – The violator has been issued orders, penalties, or had been in a Consent Order and Agreement for previous violations. The penalty range is \$3,000 to \$10,000.

II. Violations associated with the unauthorized discharge – In addition to the penalty assessed for the unauthorized discharge, separate penalties may be assessed for violations of Sections 91.33(a), 91.33(b), 91.34(a), 91.34(b), 92.51(4), 93.6, and 95.2, using the guidelines discussed below, where the facts of the individual case support such violations.

The penalty calculations for the following regulations will be calculated by multiplying the appropriate percentage by the unauthorized discharge. These amounts will then be added to the unauthorized discharge penalty for the total penalty amount.

The above procedure will be appropriate for most pollution incidents. However, there will be cases when the violations of the regulations in this section may be assessed independently of the unauthorized discharge penalty. In those cases, the penalty range may be \$100 to \$10,000 for each section.

A. Violations of Section 91.33(a) – Failure to Report

Section 91.33(a) requires the responsible party “...to immediately notify the Department by telephone of the location and nature of the danger and, if reasonably possible to do so, to notify known downstream users of the waters.” Penalties will be assessed for violations of this section.

The penalty for this section will use the unauthorized discharge penalty as the basis for calculation of this section. The severity of the incident will be reflected in that penalty and will set the basis for this ‘failure to report’ penalty. The range is from 0% to 100% of the unauthorized discharge penalty. The amount of the penalty is related to the culpability of the violator, the timeliness of the notification, and the extent of damage that could have been prevented by the prompt notification.

Factors to use when assessing this penalty:

Factors to Consider	Percent of Unauthorized Discharge Penalty
Timely reporting of incident	0%
Violator unaware of incident, delayed reporting	33%
Violator aware of incident, delayed reporting	66%
Violator aware of incident and did not report	100%

B. Violations of Section 91.33(b) – Failure to Mitigate

Section 91.33(b) of the CSL requires “...a person shall immediately take or cause to be taken steps necessary to prevent injury to property and downstream users of the waters from pollution or a danger of pollution and, in addition thereto, within 15 days from the incident, shall remove from the ground and from the affected waters of this

Commonwealth to the extent required by this title the residual substances contained thereon or therein.”

Penalties will be assessed for violations of this section. The penalty is an additional penalty to the unauthorized discharge penalty (Section 201, 301, or 401). The penalty for this section will use the unauthorized discharge penalty as the basis for calculation of this section. The severity of the incident will be reflected in that penalty, and will set the basis for this ‘failure to report’ penalty. The range is from 0% to 100% of the unauthorized discharge penalty. The amount of the penalty is related to the culpability of the violator, the timeliness of the notification, and the extent of damage that could have been prevented by the prompt notification.

Factors to use when assessing this penalty:

Factors to Consider	Percent of Unauthorized Discharge Penalty
Action immediately taken and no additional adverse effects	0%
Violator delayed action and no additional adverse effects	20%
Violator delayed action and there were additional adverse effects	50%
Violator did not take action and there were no additional adverse affects	80%
Violator did not take action and there were additional adverse effects	100%

C. Violations of Section 91.34(a) – Failure to Take Preventative Actions

This section requires the persons involved in an activity involving polluting substances “shall take necessary measures to prevent the substances from directly or indirectly reaching waters of the Commonwealth, through accident, carelessness, maliciousness, hazards of weather or from another cause.” The penalty is an additional penalty to the unauthorized discharge penalty (Section 201, 301, or 401).

The penalty for this section is calculated as a percentage of the unauthorized discharge penalty and is added to the previous penalty values. The factors for this penalty consider the development, implementation and effectiveness of preventative measures. The percentage will range from 0% to 100% of the unauthorized discharge.

Factors to use when assessing this penalty:

Factors to Consider	Percent of Unauthorized Discharge Penalty
Effective measures prevented polluting substance from reaching 'waters of the Commonwealth'	0%
Measures somewhat effective, minor discharge	20%
Measures in place but not effective	50%
Measures not in place, minor discharge	80%
Measures not in place, significant discharge	100%

D. Violations of Section 91.34(b) – Failure to Develop a Pollution Prevention Contingency (PPC) Plan

The section stipulates that “Upon notice from the Department and within the time specified in the notice, the person shall submit to the Department the report or plan setting forth the nature of the activity and the nature of the preventative measures taken to comply with subsection 91.34(a).” To assess a penalty for this section, the Department has to have previously notified the party that they were required to develop a PPC Plan. The penalty is an additional penalty to the unauthorized discharge penalty (Section 201, 301, or 401).

Factors to use when assessing this penalty:

Factors to Consider	Percent of Unauthorized Discharge Penalty
Effective PPC Plan in place	0%
Inadequate PPC Plan	50%
No PPC Plan in place	100%

E. Violations of Section 92.51(4) – Operation and Maintenance (O&M)

This section, regarding a facility’s O&M protocol, specifies that “The permittee shall maintain in good working order and operate as efficiently as possible facilities or systems of control installed by the permittee to achieve compliance with the terms and conditions of the permit.” Penalties will be assessed for violations of this section.

To assess a penalty for this section, the Department must demonstrate evidence of improper operation, maintenance, or both. For example, unless there is contact with the available operator, an uncertified, or an inappropriately certified operator must use Standard Operating Procedures (SOP) to make and implement process control decisions at the system. Therefore, in this example, to illustrate that an effluent violation occurred due to improper operation, the Department may refer to the treatment facility’s SOPs, or other acceptable documentation. To establish that an effluent violation occurred specifically due to improper maintenance on a particular piece of treatment equipment,

the Department may refer to the manufacturer’s instructions, recommended maintenance schedule, or other acceptable documentation.

The penalty is an additional penalty to the unauthorized discharge penalty (Section 201, 301, or 401). The range is from 0% to 100% of the unauthorized discharge penalty. The amount of this penalty is related to the culpability of the violator, established O&M procedures, and the extent of damage that could have been prevented by implementing proper O&M procedures.

Factors to use when assessing this penalty:

Factors to Consider	Percent of Unauthorized Discharge Penalty
Effective O&M procedures prevented polluting substances from reaching ‘waters of the Commonwealth; or no discharge	0%
O&M procedures somewhat effective, minor discharge	20%
O&M procedures established but not effective	50%
O&M procedures not established, minor discharge	80%
O&M procedures not established, significant discharge	100%

F. Violations of Section 93.6 – Violating General Water Quality Standards

“(a) Water may not contain substances attributable to point or nonpoint source discharges in concentration or amounts sufficient to be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life. (b) In addition to other substances listed within or addressed by this chapter, specific substances to be controlled include, but are not limited to, floating materials, oil, grease, scum and substances that produce color, tastes, odors, turbidity or settle to form deposits.” A penalty for this violation will be calculated as a percentage of the unauthorized discharge penalty. When assessing this penalty consider the following:

Factors to use when assessing this penalty:

Factors to Consider	Percent of Unauthorized Discharge Penalty
No floating materials, scum, grease, etc.	0%
Small amount of noticeable floating materials, scum, grease, etc.	33%
Moderate amount of floating materials, scum, grease, etc.	66%
Large amount of floating materials, scum, grease, etc .	100%

G. Violation of Section 95.2 – Causing Sheen

This section prohibits any discharge that causes a “film or sheen upon or discoloration of the waters of this Commonwealth or adjoining shoreline.” The penalty is an additional penalty to the unauthorized discharge penalty (Section 201, 301, or 401). A penalty for

this violation will be calculated as a percentage of the unauthorized discharge penalty. When assessing this penalty consider the following:

Factors to use when assessing this penalty:

Factors to Consider	Percent of Unauthorized Discharge Penalty
No Sheen	0%
Small sheen or noticeable color sheen along stream bank only	33%
Moderate sheen or distinctive color plume from bank to mid-channel	66%
Large sheen or distinctive color plume mid to whole channel	100%

III. Department Costs

Actual costs to DEP will be added on to the penalty. These costs may include: salaries, laboratory costs, transportation, lodging, etc. Penalties will be assessed for all the appropriate violations in addition to the penalty for the unauthorized discharge. Each individual violation cannot exceed \$10,000 per day.

This Guidance is expected to be appropriate to develop penalties for the majority of routine spills, and pollution incidents including unauthorized discharges from SSOs and other bypasses. However, each event is unique and the Department is not restricted to this Guidance.