

**CITY OF LEWISBURG  
STORMWATER MANAGEMENT PROGRAM  
ENFORCEMENT RESPONSE PLAN  
AUGUST 2019**



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# **ENFORCEMENT RESPONSE PLAN**

## **1.0 INTRODUCTION**

The City of Lewisburg was mandated by the Tennessee Department of Environment and Conservation (TDEC), Division of Water Pollution Control (WPC) to develop a Stormwater Management Program. Tennessee Code Annotated Section 68-221-1106 states that a municipality may establish by Ordinance that any person who violates the provisions of any ordinance regulating storm water discharges or facilities shall be subject to a civil penalty of not less than fifty dollars (\$50.00) or more than five thousand dollars (\$5,000.00) per day for each day of violation.

The City of Lewisburg has developed and implemented this enforcement response plan (ERP) to assure fair and consistent assessment of civil penalties for violations of the stormwater ordinance. This plan shall contain detailed procedures indicating how the City will investigate and respond to instances of noncompliance. The plan shall, at a minimum:

1. Describe how the City will investigate instances of noncompliance
2. Describe the types of escalating enforcement responses the City will take in response to all anticipated types of violations and the time periods within which responses will take place
3. Identify (by title) the official(s) responsible for each type of response
4. Adequately reflect the City's primary responsibility to enforce all applicable stormwater requirements and standards, as detailed in TCA 68-221-1101.

The ERP outlines the procedures that will be used to identify, document, track and respond to noncompliance. The ERP also provides guidance for selecting the enforcement action most appropriate for a given violation.

## **2.0 PURPOSE**

The purpose of the ERP is to provide consistent enforcement responses for similar violations and circumstances. The ERP describes violations, defines a range of appropriate enforcement actions based on the nature and severity of the violation and other relevant factors, and identifies personnel responsible for finalizing enforcement responses.

## **3.0 ADMINISTRATION AND JURISDICTION**

All entities within the Lewisburg City Limits discharging stormwater to the Municipal Separate Stormwater Sewer System (MS4) are subject to the provisions of the ERP. All entities discharging anything into stormwater or otherwise impacting stormwater discharges are also subject to the provisions of the ERP. The City consistently administers and implements all elements of the ERP. The ERP does not preclude the City from taking any, all, or any combination of actions against a noncompliant entity.

## **4.0 ABBREVIATIONS**

ERP: Enforcement Response Plan

NOC: Notice of Coverage

NOV: Notice of Violation

SWPPP: Storm Water Pollution Prevention Plan

TDEC: Tennessee Department of Environment and Conservation

WPC: Tennessee Division of Water Pollution Control

## **5.0 ENFORCEMENT RESPONSE PLAN**

The ERP designates several enforcement options for each type (or pattern) of noncompliance. The intent of the ERP is to provide direction for appropriate enforcement response and to ensure consistent enforcement for similar violations and circumstances. Factors that will be evaluated when determining the appropriate response are as follows:

- (1) The harm done to the public health or the environment;
- (2) Whether the civil penalty imposed will be substantial economic deterrent to the illegal activity;
- (3) The economic benefit gained by the violator;
- (4) The amount of effort put forth by the violator to remedy this violation;
- (5) Any unusual or extraordinary enforcement costs incurred by the municipality;
- (6) The amount of penalty established by ordinance or resolution for specific categories of violations; and
- (7) Any equities of the situation which outweigh the benefit of imposing any penalty or damage assessment.

### ***5.1 Escalating Enforcement Response***

- Escalating enforcement response will be used for recurring violations and failure to achieve compliance subsequent to informal or formal enforcement. A recurring violation is one in which the same type of violation occurs on a project or on multiple projects by the same operator, or any other pattern of noncompliance is shown.

### ***5.2 Violations Falling Under more than one Category***

- Violations that fall under more than one category in the enforcement response plan will be addressed through the more severe enforcement response. All alleged violations will be included in the more severe response.

### ***5.3 Timeframes for Enforcement Responses***

- All violations will be identified and documented within ten days of receiving compliance information.
- Initial enforcement responses (informal or formal) will occur within 15 days of identifying a violation.
- Follow up actions for continuing or recurring violations will be taken within 60 days of the initial enforcement response or within 15 days of determining that the violation is continuing or recurring.
- Violations which threaten health, property, or environmental quality are considered emergencies and will receive immediate response such as the issuance of a stop work order.

### ***5.4 Requirements for Chronic Violators***

- Chronic violators shall be defined as any person that repeats violations of the Stormwater Ordinance at least three times in a one year period. The violations are tied to the person rather than a project or site, meaning that the violations do not have to occur on the same project. The violations do, however, need to be of a similar nature, such as all violations of the

construction standards or all violations involving illicit discharges. Once an operator has been labeled as a chronic violator they will remain as such until they have operated for a one year period with no documented violations of the Stormwater Ordinance. Chronic violators will be treated differently than other operators. The Department will inspect all projects on which chronic violators are involved at a higher frequency than other projects. The Department will also double the civil penalties issued to chronic violators, as long as it can do so and stay within the maximum penalty allowed by the Ordinance and T.C.A. The Department will also escalate enforcement responses for chronic violators. This means that for a given violation that would normally result in just a Notice of Violation, the chronic violator will likely receive a civil penalty or at least be called in for a Show Cause Hearing. A violator that meets the criteria of this section will be notified of such in the Notice of Violation or other enforcement documentation that is sent to the violator for the third and qualifying violation.

## **6.0 PERSONNEL RESPONSIBILITIES**

**6.1 Stormwater Coordinator:** The Stormwater Coordinator is responsible for the day-to-day implementation and enforcement of the stormwater management program. The enforcement responses carried out by the Stormwater Coordinator are as follows:

- informal notices (verbal and written)
- notices of violation
- informal meetings
- show cause hearings – consent agreements
- referrals to the city attorney for civil litigation
- referrals to WPC or the EPA for criminal action

**6.2 Stormwater Consultant** – The City utilizes the assistance of a stormwater consultant in implementing its stormwater management program. The stormwater consultant assists in conducting compliance inspections and documentation of violations. The stormwater consultant assists the Stormwater Coordinator in the determination of appropriate enforcement responses and with the conducting of enforcement related meetings such as show cause hearings.

**6.3 Stormwater Board of Appeals** – The Stormwater Board of Appeals consists of a three member board, that is confirmed by the Lewisburg Board of Mayor and Alderman, that serves the function of hearing appeals of civil penalties issues by the City.

**6.4 City Attorney** - The City Attorney will provide legal consultation as requested by the Stormwater Coordinator on consent agreements and on all referrals for civil litigation and City initiated criminal investigations. The City Attorney will provide guidance to the stormwater board of appeals, as necessary.

## **7.0 IDENTIFYING AND INVESTIGATING INSTANCES OF NONCOMPLIANCE**

There are many activities associated with the identification and investigation of noncompliance. A brief description of these activities is provided in this ERP. The activities that facilitate the identification and investigation of noncompliance are as follows:

**7.1 Routine Permit Inspections** – The City issues stormwater protection permits for certain construction activities taking place within the city limits of Lewisburg. Once a permit is issued for a project, routine compliance inspections are conducted of the project to assure that the provisions of the permit, the ordinance, and the stormwater pollution prevention plan (SWPPP), if applicable, are being met. Any violations documented during routine inspections will initiate enforcement activities.

**7.2 Complaint Investigation** – The City investigates all stormwater related complaints. Complaints are received in a number of ways. Complaints are received on the City’s stormwater hotline, via the City’s stormwater web page, and are often called in by other city departments. The City will initiate complaint investigations within seven days of the receipt of the complaint. Violations documented as a result of complaint investigations will initiate appropriate enforcement activities.

**7.3 Industrial Inspections** – All industrial facilities in the City of Lewisburg are inspected for compliance with local and state stormwater regulations. Violations documented during these inspections can initiate enforcement activities, if appropriate.

All violations are clearly documented and addressed in accordance with the Enforcement Response Plan.

## **8.0 DESCRIPTION OF ENFORCEMENT ACTIONS**

### ***8.1 Informal Notice***

#### **Verbal Notification:**

- Verbal notifications by telephone or in person provide an immediate notification of violations. In general, verbal notifications are used for minor isolated violations or as an initial step leading to an escalated enforcement response. All verbal notifications related to enforcement or the investigation of suspected violations are documented on an inspection report and placed in the respective project file.

#### **Written Notification:**

- Written notification may include the copying of an inspection report to a site operator. This could be accomplished by simply leaving a copy of the inspection report at the site (within a safe location) for the operator to find, handing a copy of the report to the operator or a representative that is present at the site, or forwarding a copy of the report to the operator by fax or e-mail. The inspection report will document any compliance issues that need to be addressed at the site. This written notification may or may not be followed up with a more formal means of notification, such as a Notice of Violation.

### ***8.2 Notice of Violation:***

- A Notice of Violation (NOV) is a written notice to the noncompliant operator that a stormwater violation has occurred. A NOV includes a statement detailing the legal authority under which the City issued the NOV, a description of the violation(s), and the date(s) the violation(s) occurred. The NOV may require a response from the Operator that details the causes of the violation(s), and the corrective actions taken to correct the violation and to prevent similar violations from occurring. A NOV is used to notify the Operator and document the violation. The NOV may assess civil penalties or a damage assessment and may require a specific remedial action of the user. The NOV should always be sent via certified mail so that a record of the Notices receipt is documented.

### ***8.3 Show Cause Hearing***

- A Show Cause Hearing is a formal meeting requiring the Operator to appear, explain its noncompliance, and show cause as to why more severe enforcement actions against the user should not go forward. The meeting may also serve as a forum to discuss corrective action and compliance schedules. An example of when a Show Cause Hearing will be utilized would be

when a requirement is not completed on time and a civil penalty is being considered. The City is not, however, required to hold a Show Cause Hearing prior to assessing a civil penalty.

#### ***8.4 Stop Work Order***

- A Stop Work Order is an order issued to the Operator by the City requiring that all work at the site cease until such time as the violation is corrected. The stop work order can be posted at the site or can be sent as part of a Notice of Violation. A stop work order will generally be utilized when the nature of the violation is such that it is imperative that the correction of the violation take place prior to any further work being conducted on the site.

#### ***8.5 Civil Penalties***

- A civil penalty is a punitive monetary charge assessed by the City rather than a court. The penalty amount must be authorized in the stormwater ordinance. The purpose of the penalty is to recover the economic benefit of noncompliance and to deter future violations. The range of penalties allowed by the Lewisburg Stormwater Management Ordinance and by TCA Section 68-221-1106 is a minimum of fifty dollars (\$50.00) to a maximum of five thousand dollars (\$5,000) per day of violation. When assessing a civil penalty the following factors are considered:
  - (1) The harm done to the public health or the environment;
  - (2) Whether the civil penalty imposed will be substantial economic deterrent to the illegal activity;
  - (3) The economic benefit gained by the violator;
  - (4) The amount of effort put forth by the violator to remedy this violation;
  - (5) Any unusual or extraordinary enforcement costs incurred by the municipality;
  - (6) The amount of penalty established by ordinance or resolution for specific categories of violations; and
  - (7) Any equities of the situation which outweigh the benefit of imposing any penalty or damage assessment.
- Please refer to Appendix 1 for more information regarding penalty calculations.

#### ***8.6 Civil Litigation***

- Civil Litigation is the formal process whereby the City files a lawsuit against the Operator to secure court ordered action to correct violations and to secure penalties for the violations including recovery of costs to the City for the noncompliance. Civil litigation also includes enforcement measures which require involvement or approval of the court, such as injunctive relief.

## 9.0 Enforcement Response Guide Table

The following table provides a sampling of common types of stormwater violations and a range of appropriate responses. The table is in no way meant to be all inclusive in either violation types or possible responses.

Category of Violations	Type of Violation	Circumstances	Range of Enforcement Responses
Permit Violations	Stormwater Discharge or Land Disturbance without Permit	Operator unaware of permit requirements; no harm to MS4 or environment	Informal Notice; Notice of Violation
		Operator aware of permitting requirements; sedimentation or other pollutants affect MS4 or waters of the state	Notice of Violation; Show Cause Hearing; Stop Work Order; Civil Penalty; Civil Litigation
	Operator does not comply with Permit Provisions	Operator attempts to comply with permit but overlooks certain provisions	Informal Notice; Notice of Violation
		Operator makes no attempt to comply with any permit provisions	Notice of Violation; Stop Work Order; Civil Penalty; Civil Litigation
	Sedimentation Control Violations	Sedimentation Controls have not been installed as required by Permit	Sedimentation Controls were installed but were not installed properly; No harm to MS4 or Environment
Sedimentation Controls were installed but were not installed properly; Immediate harm to MS4 or Environment			Notice of Violation Stop Work Order; Civil Penalty
No attempt was made to install sedimentation controls; No harm to MS4 or Environment			Notice of Violation; Stop Work Order; Civil Penalty
No attempt was made to install sedimentation controls; Immediate harm to MS4 or Environment			Stop Work Order; Civil Penalty; Civil Litigation
Sedimentation Controls were installed initially but were not maintained		Small areas of sedimentation controls are in need of repair	Informal Notice; Notice of Violation
		Majority of sedimentation controls are in need of repair	Notice of Violation; Stop Work Order; Civil Penalty



Administrative Violations	All Provisions of Stormwater Plan or SWPPP not being met	Twice per week inspections not being completed	Informal Notice; Notice of Violation
		SWPPP not Maintained at site	Informal Notice; Notice of Violation
		NOC not posted on the site	Informal Notice; Notice of Violation
Illicit Discharges	Unpermitted Discharge of Stormwater or Stormwater Pollutants	Occurrence is ongoing; Facility is aware that discharge is an illicit discharge	Notice of Violation; Civil Penalty; Civil Litigation
		Occurrence appears to be one time occurrence; Facility immediately makes effort to stop the illicit discharge	Informal Notice; Notice of Violation
		Discharge consists of a spill that is the result of an accident; No fault of Operator	Informal Notice; Notice of Violation
		Discharge consists of a spill; Spill is due to negligence of Operator	Notice of Violation; Civil Penalty; Civil Litigation
		Discharge consists of materials being dumped into storm drain.	Notice of Violation; Civil Penalty; Civil Litigation; Referral to WPC
Miscellaneous Violations	Storm Drain or Ditch is Blocked or Altered	Drainage Ditch or Pipe is Blocked temporarily with debris or yard waste	Informal Notice; Notice of Violation
		Drainage Ditch is filled; drainage no longer functions properly	Notice of Violation; Civil Penalty; Civil Litigation
		Drainage Pipe is removed or altered without approval	Notice of Violation; Civil Penalty; Civil Litigation
		Stream Channel is altered without approval	Notice of Violation; Referral to WPC

## **Appendix 1: Penalty Calculation**

How Does the Stormwater Program Prioritize Its Enforcement Work?

It is the City's objective to acknowledge all violations. When determining which types of violations take priority in enforcement, the following criteria are used: Generally, Category 1 receives the highest priority attention while Category 3 receives the lowest priority.

- ❑ Category 1 violations: Actual, imminent or acute threats to public health, the MS4, or the environment.
- ❑ Category 2 violations: Chronic or potential threat to human health, the MS4, or the environment.
- ❑ Category 3 violations: Low potential for threat to public health, the MS4, and/or the environment.

**How Do I Determine the Size of a Penalty?** Use the Penalty Matrix contained in the recommendation for enforcement action and shown in Tables 1 and 2 below, to determine the size of the penalty. There is a decision flow process that you should use with the civil penalty matrix. The decision flow process consists of a series of questions that are found in the matrix and the following guidance on how to select the appropriate answer to the questions. The amount of a penalty is based upon a set of criteria. These are:

### ***1) Did the violation result in a public health risk?***

- ❑ Answer —**no** if there is no evidence to support a claim of public health risk.
- ❑ Answer —**possibly** if a public health risk can be inferred from evidence and knowledge of the effects of the violation.
- ❑ Answer —**probably** if evidence supports a claim of public health risk and there is a plausible connection between this violation and the health or effect.
- ❑ Answer —**definitely** if there is direct evidence linking public health risk or adverse effects with the violation.

### ***2) Did the violation result in environmental damage or damage to MS4?***

- ❑ Answer —**no** if there is no evidence to support a claim of environmental damage or impairment of beneficial uses.
- ❑ Answer —**possibly** if environmental damage or impairment of beneficial uses can be inferred from evidence and knowledge of the effects of the violation.
- ❑ Answer —**probably** if evidence supports a claim of environmental damage or impairment of beneficial uses and there is a plausible connection between this violation and the damage or impairment.
- ❑ Answer —**definitely** if there is direct evidence linking environmental damage or impairment of beneficial uses with the violation.

**3) Was it a knowing violation?**

- Answer—**no** if the violator did not know that the action or inaction constituted a violation.
- Answer—**possibly** if it is likely the violator knew that the action or inaction constituted a violation.
- Answer—**probably** if the violator should have known.
- Answer—**definitely** if the violator clearly knew. If the answer is—definitely, consider consulting with the City Attorney.

**4) Was the responsible party unresponsive in correcting the violation?**

- Answer—**no** if the violation was corrected as soon as the responsible person learned of it.
- Answer—**possibly** if the violation was corrected in a less timely and cooperative fashion.
- Answer—**probably** if the responsible person attempted to correct the problem but did not correct it.
- Answer—**definitely** if the responsible person made no attempt to correct the violation.

**5) Was the violation the result of improper operation and/or maintenance?**

- Answer—**no** if the violation was not the result of improper operation or inadequate maintenance.
- Answer—**possibly** if the facility has an O&M manual, SWPPP or Best Management Practices manual that is out of date or inadequate.
- Answer—**probably** if there is no O&M manual, SWPPP or Best Management Practices manual developed for the facility.
- Answer—**definitely** if the facility has no plans or is not following its plan AND the violation was clearly the result of improper operation or maintenance.

**6) Did the facility obtain necessary permits and approvals to operate?**

- Answer—**no** if the paperwork was complete and appropriate for the job or task that caused the violation.
- Answer—**definitely** if the facility did not have all the required permits and approvals for the job or task that caused the violation.

7) *Did the facility benefit economically from non-compliance?*

- Answer —**no** if it is clear that no one obtained an economic benefit.
- Answer —**possibly** if the facility might have benefited.
- Answer —**probably** if the facility benefited, but the benefit is not quantifiable.
- Answer —**definitely** if the economic benefit is quantifiable.

**Penalty Calculation**

**TABLE 1 Gravity Criteria**

	NO (0)	POSSIBLY (1)
	PROBABLY (2)	DEFINITELY (3)

- 1) Public Health Risk? \_\_\_\_\_
  - 2) Environmental Damage? \_\_\_\_\_
  - 3) Willful or Knowing Violation? \_\_\_\_\_
  - 4) Unresponsive in Correcting Violation? \_\_\_\_\_
  - 5) Improper Operation or Maintenance? \_\_\_\_\_
  - 6) Failure to obtain necessary permits \_\_\_\_\_
  - 7) Economic Benefit from Noncompliance? \_\_\_\_\_
- Total Rating Points \_\_\_\_\_

**TABLE 2 Gravity Component Penalty**

Rating	0	1	2-3	4-5	6-7	8-9
Penalty	\$50	\$100	\$200	\$300	\$400	\$600

Rating	10-11	12-13	14-15	16-17	18-19	20-21
Penalty	\$1000	\$1500	\$2000	\$3000	\$4000	\$5000

If the answer to question #7 in Table 1 is —Definitely, include the estimated dollar amount of economic benefit determined by the EPA BEN computer model or other appropriate method. Attach calculations.

**Does the City have discretion in issuing penalties?** Yes, the City has discretion. The Stormwater Coordinator may deviate from the civil penalty matrix provided that the deviation can be explained. In general, the discretion should be implemented in the answering of the seven penalty questions rather than in

adjusting the penalty amount once the calculation has been completed.

**Are Penalties Mandatory for Some Violations?** Yes, issuance of civil penalties is mandatory in the following general instances.

- ❑ Any Category 1 violation. Category 1 violations pose an actual, imminent or acute threat to public health and/or the environment.
- ❑ A Category 2 or 3 violation is repeated within two (2) years of issuance of a notice of correction, technical assistance site visit notice, penalty, notice of violation or order.
- ❑ A knowing violation, such as falsification of records, or a flagrant disregard of permitting requirements.

**Are There Exceptions to the Mandatory Penalty Guidelines?** Yes, issuance of civil penalties is mandatory in each of the situations noted above, unless:

- ❑ A deviation from these guidelines has been justified in writing by responsible staff and approved by the Stormwater Coordinator.
- ❑ There is insufficient evidence that a violation occurred.
- ❑ A penalty action would jeopardize an ongoing criminal investigation or prosecution.

**Are Public Entities Subject To Penalties?** Yes, public entities are subject to issuance of civil penalties to the same extent as any other individual or organization unless specifically exempted by law. Discretion is allowed on the use of penalties for public entities. Elevation of the issue within the entities' organization could be more effective in achieving compliance than penalties.

Public entities that are experiencing chronic, as opposed to one-time incident, violations, should be provided with formal or informal written notice of their potential liability for civil penalties prior to the initiation of penalty action. Issuing a Notice of Violation to the entity can satisfy this.

**Are Penalties appealable?** Yes. The appeals process will be explained to the user when the penalty is issued.

**When are penalties due?** Penalties are due and payable 30 days from the day they are received; regardless of whether or not the penalty is appealed.

**What happens if the penalty is not appealed and the violator fails to pay the penalty?**

Penalty collection is the responsibility of Accounting. If the violator fails to pay the penalty then the municipality may apply to the appropriate chancery court for a judgment and seek execution of such judgment.

**Escalation.** If a facility, or individual, was penalized for a violation and they repeat that violation the penalty should be escalated to at least two times the amount of the previous penalty. The violation should be the exact same violation for penalty escalation to be employed. Penalties over two years old will not generally be considered for previous penalty escalation, but a longer time period may be justified for some violations.

**Economic Benefit.** In cases where the economic benefit of a violation can be demonstrated it may be included in the penalty calculation as long as the total amount of the penalty does not exceed the statutory maximum of \$5,000.00 per day of violation. The EPA computer models BEN and ABLE may be used to calculate economic benefit but their use is not required.

**Innovative Settlements.** Many times the penalized party will want to use the penalty amount to fix the problem that caused the violation or do other work in their community. There are many reasons this may be considered, but it can only be done with the City Attorney's help after a formal appeal has been made. The settlement moneys cannot be used to meet requirements of a permit or order.