



## OFFICE OF CIVIL ENFORCEMENT

WASHINGTON, D.C. 20460

August 14, 2024

### **MEMORANDUM**

**SUBJECT:** Expedited Settlement Agreement Pilot Program for Spills Violations under Clean Water Act Section 311(b)

**FROM:** Rosemarie A. Kelley, Director  
Office of Civil Enforcement

**TO:** Enforcement and Compliance Assurance Division Directors, Regions 1–10  
Regional Counsels, Regions 1–10

This memorandum establishes an expedited settlement agreement (ESA) pilot (Pilot or Spills Pilot ESA) to address spills violations under Clean Water Act (CWA) Section 311(b). I am approving the Pilot nationwide for use by staff in all the regions and at headquarters. The Pilot is described below and is consistent with the [2014 Revised Guidance on the Use of Expedited Settlement Agreements \(2014 ESA Guidance\)](#). The Pilot is approved for a period of 24 months. The Office of Civil Enforcement’s Water Enforcement Division (WED), in coordination with any regions that participate in the Pilot, will use the last three to four months of the Pilot to evaluate its effectiveness and to recommend whether the Pilot should be made permanent as written, modified, extended, or rescinded altogether. Thank you to the regions who assisted in developing the Pilot. The Pilot rescinds and replaces all prior approved Spills ESA Programs.

#### **1. Purpose and Goals**

The Spills Pilot ESA is a tool to efficiently resolve cases involving discharges (also termed “spills” in this memorandum) of oil or hazardous substances in violation of CWA Section 311(b). While this Pilot will be a new tool for addressing spills violations, it borrows elements from the ESA program issued to address violations related to SPCC plans, the [2023 Spill, Prevention, Control and Countermeasure \(SPCC\) Expedited Settlement Agreement](#). The goal of the Spills Pilot ESA is to expedite resolution of claims concerning spills violations and to bring more facilities into compliance sooner. The Pilot will test the effectiveness of this expedited approach.

- a. The Spills Pilot ESA reinforces the following general principles for ESA programs laid out in the 2014 ESA Guidance.
  - i. *Conservation of resources for use on more significant cases.* The Pilot creates a valuable tool for achieving timely enforcement in situations where Section 311(b) violations are minor and are easily and quickly correctible. The Pilot will help ensure that limited enforcement resources can be focused on cases involving larger, more egregious, and harmful spills violations. As with previous ESA programs, the simplified, reduced, and non-negotiable cash penalties in this Pilot are meant to obviate the need for lengthy legal proceedings. Using an ESA to resolve these violations eliminates some of the steps that most traditional cases must go through to reach resolution.
  - ii. *Faster return to compliance.* To qualify for a Spills Pilot ESA, a respondent must certify that it has cleaned up the spill and taken corrective actions that will prevent future spills. The Pilot is thus intended to encourage respondents to quickly clean up spills and take measures to avoid future spills, so that they may avail themselves of the Pilot's simplified penalty structure and reduced transaction time and expense.
  - iii. *Increased penalty actions and higher compliance rate for regulated facilities.* Experience with previous ESAs has shown that an increased volume of enforcement actions can have a significant and measurable effect on compliance rates. Quicker settlement of these minor spills cases should allow EPA to initiate and resolve more enforcement actions and thus establish a better overall deterrent effect among all spills violators.
- b. Duration of the Pilot. The Pilot is approved for a period of 24 months.

## 2. Covered Violations and Eligibility

- a. Covered Violations. This Pilot covers oil and hazardous substance discharges of up to 125 barrels of oil or hazardous substances above the reportable quantity (RQ) that have a minor impact as defined under the [1998 Civil Penalty Policy for Section 311\(b\)\(3\) and Section 311\(j\) of the Clean Water Act](#) (CWA Section 311 Penalty Policy) and where the violator has done an adequate or superior spill response and clean up.
- b. Eligibility. To be eligible for the Spills Pilot ESA, the following requirements must be met:
  - i. The violator must certify that it has cleaned up the spill and taken corrective actions to prevent future spills;
  - ii. The violator may not be a Repeat Violator, except as allowed below in Section 4;
  - iii. No evidence of significant harm, including any risk of imminent and substantial endangerment to human health or the environment; and

- iv. The penalty, as calculated under this Pilot, is no more than \$15,000.

### 3. Timely Return to Compliance

A major assumption of an ESA program is that identified violations can be corrected easily and quickly. Accordingly, as stated above, to qualify for a Spills Pilot ESA, a respondent must certify, subject to civil and criminal penalties for making a false submission to the United States Government, that it has investigated the cause of the spill, has cleaned up the spill, and has taken corrective actions that will prevent future spills. Pursuant to the Model Expedited Settlement Agreement, which is included as Attachment B to this memorandum, the Respondent has 30 calendar days from the date of issuance of the final order to pay the penalty.

### 4. Repeat Violators

A Spills Pilot ESA may be offered to repeat violators as described in this section. The Pilot is consistent with the 2014 ESA Guidance, which outlines when ESAs can be used to remedy violations by repeat violators. The Pilot does not authorize unlimited issuance of ESAs to repeat violators but establishes parameters for when an ESA is appropriate.

For purposes of this Spills Pilot ESA, a Repeat Violator is an entity that, in the past five years, has been assessed an administrative or judicial penalty regarding:

- a. spill(s) at the same facility where the relevant violation occurred or
- b. spill(s) at multiple facilities that it owns, operates, or controls.

Where the spills being addressed by the Spills Pilot ESA are *similar to* previous spills (i.e., arise from the same or a very similar cause) at the facility at issue or at multiple facilities owned or operated by the Repeat Violator, the region should escalate the penalty by a factor of up to 75% when issuing an ESA. However, if multiple facilities owned or operated by the same entity have similar spills within a 120-day period, regions may issue a Spills Pilot ESA to each facility without applying an escalation factor. This discretionary 120-day timeframe recognizes those situations where the individual discharges are not egregious and the violator cleaned them up but may not have had time to address the root cause of the discharges.

Where an escalation factor applies, regions have discretion to determine the appropriate percentage escalation up to 75% based on the facts of the specific case and should document the reasons for choosing a particular percentage escalation in the case file.

Where the spills being addressed by the Pilot ESA are *distinct from* previous spills (i.e., arise from different causes) at the facility at issue or at multiple facilities owned or operated by the Repeat Violator, no penalty escalation is necessary and the regions should refer to the Pilot's penalty structure in setting the appropriate ESA penalty. *See* Section 5.

No more than two ESAs may be issued to address spills at the same facility of an owner or operator.

The total combined penalties for all ESAs issued to a single owner or operator for violations at multiple facilities may not exceed the then current Class I penalty under Section 311(b)(6)(B)(i) of the CWA, as amended for inflation at the time of the violations.<sup>1</sup> If the total for multiple ESAs exceeds the Class I penalty maximum, then the region should pursue traditional enforcement.

## 5. Penalties

- a. Rationale for penalty structure. Penalties in spills cases are currently calculated using EPA's CWA Section 311 Penalty Policy. To expedite settlements and encourage a timely return to compliance, this Pilot provides a simplified penalty calculation approach that will reduce penalties for eligible cases, compared to the CWA Section 311 Penalty Policy. Reduced, but still appropriate, penalties along with the reduced time needed to process an ESA should lead to quicker resolution of spills enforcement cases. Reduced case resolution time will allow EPA to take more enforcement actions and will also free up EPA resources to focus on enforcement cases against more egregious violators. Accordingly, the Pilot should result in an increase in both compliance and deterrence.
- b. Penalty structure. The CWA Section 311 Penalty Policy sets forth two main penalty components, economic benefit and gravity, for calculation of a penalty. The preliminary gravity component is based on the following factors: seriousness, culpability, mitigation, and history of prior violations. The CWA Section 311 Penalty Policy also includes adjustments to the gravity component of the penalty based on additional factors, such as other penalties for the same incident, other matters as justice may require, and the economic impact of the penalty on the violator. The economic benefit component in a Section 311(b) case is comprised of the violator's avoided spill prevention costs, which may include capital costs, operation and maintenance costs, and training costs.

The Spills Pilot ESA penalty structure prescribes a specific penalty based on the amount discharged. This differs from the CWA Section 311 Penalty Policy, which provides a range of penalties for a corresponding range of quantity of oil or hazardous substances discharged. For example, the current penalty policy range for minor spills between 20 and 125 barrels/RQ as adjusted for inflation in 2024 is \$9,380 to \$37,521.<sup>2</sup> In contrast, the simplified penalty structure in this Spills Pilot ESA provides five specific penalty amounts between \$2,500 and \$15,000 for five specified spill ranges between 1 and 125 barrels/RQ. These non-negotiable penalties are meant to obviate the need for the respondent and EPA to negotiate over penalty amounts and encourage a quick settlement.

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<sup>1</sup> The Class I statutory maximum penalty amount as of January 2024 is \$57,617. See 88 Fed. Reg. 89309, 89312 (December 27, 2023), amending 40 C.F.R. Part 19.

<sup>2</sup> See CWA Section 311 Penalty Policy at 11, giving \$5,000 as the lowest amount for a minor spill in the 20 to 79 barrel/RQ range and \$20,000 as the highest amount for a minor spill in the 80 to 125-barrel/RQ range, and Table A of the January 10, 2024, Amendments to Account for Inflation, giving a multiplier of 1.87605. The quantity of oil is measured by the number of barrels (one barrel equals 42 gallons). The quantity of hazardous substances is measured in RQ, which are listed for each substance in 40 C.F.R. Part 117. CWA Section 311 Penalty Policy at 12. For example, ammonia has an RQ of 100 lbs. Therefore, to qualify for the minor spill range of the Penalty Policy, a maximum of 7,900 lbs of ammonia could be spilled.

The Spills Pilot ESA’s penalty structure was developed by a group of CWA Section 311 practitioners who evaluated the total penalties issued in cases where the Agency had taken traditional administrative enforcement for minor discharges under the CWA Section 311 Penalty Policy. They used this information to determine appropriate penalty ranges that would lead to quick settlement while still providing effective deterrence.

The Pilot’s discharge and penalty structure is as follows:

Spill Volume	Spills Pilot ESA Penalty
Up to 20 barrels/RQ	\$2,500
Up to 50 barrels/RQ	\$5,000
Up to 70 barrels/RQ	\$7,500
Up to 100 barrels/RQ	\$10,000
Up to 125 barrels/RQ units:	\$15,000 (Penalty cap for this Pilot)

## 6. Model ESA Documents

Attached to this memorandum are a Model Expedited Settlement Agreement and Model Cover Letter that any region can use, with appropriate regional modifications (e.g., contact information) when implementing the Pilot. A region may not modify the penalty amounts or any substantive aspects of the Pilot (e.g., the deadline for responding to an ESA offer) when making region-specific modifications to the models.

Although the 2014 ESA Guidance allows for penalties to be collected either at the time the facility accepts the ESA or once the Regional Judicial Officer issues the final order, recent guidance from a number of Regional Judicial Officers and the Cincinnati Finance Center only allows for payment after issuance of a final order. The attached model documents reflect this guidance.

## 7. Disclaimer

Please note that this document identifies internal Agency policies and recommended procedures for EPA employees in coordinating Agency enforcement activities. This document is not a rule or regulation, and it may not apply to a particular situation based upon the circumstances. This document does not change or substitute for any law, regulation, or any other legally binding requirement and is not legally enforceable. It does not create any judicially enforceable rights or obligations substantive or procedural in any person and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. EPA reserves the right to act at variance with this policy and to change it at any time without public notice.

## 8. Further Questions

Questions about implementation and/or assessment of the Spills Pilot ESA should be directed to Kelly Brantner at [brantner.kelly@epa.gov](mailto:brantner.kelly@epa.gov) with OECA’s Water Enforcement Division.

**Attachments:**

Attachment A- Spills ESA Model Cover Letter (Word Document)

Attachment B- Spills ESA Model Expedited Settlement Agreement (Word Document)