



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

**SUBJECT:** Approval of the Expedited Settlement Agreement Pilot Program for Industrial Stormwater MSGP Violations Under the Clean Water Act

**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 approves an expedited settlement agreement (“ESA”) pilot to address multi-sector general permit (“MSGP”)<sup>1</sup> violations under the Clean Water Act (“MSGP ESA Pilot Program” or “Pilot” or “ESA”). 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 30 months. Region 2 and OECA’s Water Enforcement Division (WED), in coordination with any Regions that participate in the Pilot, will use the last six months of the Pilot to evaluate its effectiveness and make a recommendation whether the Pilot should be made permanent as written, modified, extended, or rescinded altogether. Thanks to Region 2 for finalizing the Pilot and to the other Regions who assisted in developing it.

**1. Purpose and Goals**

The MSGP ESA Pilot Program is a tool to efficiently resolve cases against industrial facilities that are in violation of permit conditions and limitations in a MSGP. While this ESA will be a new tool for addressing this subset of CWA permit holders, this Pilot borrows elements from preceding ESA policies, such as the Industrial Non-Filer ESA pilot program which was approved for use in 2019 and the 2023 Construction Stormwater ESA. The goal of the MSGP ESA Pilot Program is to expedite resolution of claims concerning violations of MSGPs and to bring more facilities into compliance sooner. The Pilot is meant to test the effectiveness of this expedited approach.

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<sup>1</sup> For the purposes of this Pilot, the term “MSGP” refers to EPA’s 2015 and 2021 MSGPs as well as equivalent state multi-sector general permits for industrial stormwater.

- a. The MSGP ESA Pilot Program 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.* According to EPA’s Compliance Monitoring Strategy, there are approximately 90,000 industrial stormwater permittees nationwide and EPA’s goal is to ensure at least 10% of the universe each year is inspected. The Pilot creates a valuable tool for achieving timely enforcement in situations where MSGP violations identified during inspections are easily and quickly correctible and do not pose a risk of significant harm to health or the environment. This Pilot is intended to reduce the time spent on lengthy proceedings for violations that are small in duration and magnitude and ensure that limited enforcement resources can be focused on cases involving larger and more egregious violations. Regulated industrial facilities range greatly in size from single, one- or two-person operations to large multi-state corporations. While larger facilities may have an outsized individual effect on water quality, the sheer number of smaller industrial stormwater dischargers means that noncompliance at a lot of smaller dischargers can have a significant cumulative impact on water quality. However, cases against small operators can take more relative effort based on factors like the need for compliance assistance and unfamiliarity with legal proceedings. The Pilot creates a tool for expediting the correction of minor MSGP violations, particularly by smaller operators, allowing EPA to address noncompliance without compliance orders and lengthy proceedings, while providing more time and resources to focus on more egregious violators.
  - ii. *Faster return to compliance.* The simplified penalty structure in this Pilot incorporates penalty reductions for permit violations that are minor in magnitude and are not found to be causing serious environmental harm. As with previous ESA policies, these reduced and non-negotiable cash penalties are meant to obviate the need for lengthy legal proceedings. This eliminates some of the steps that most traditional cases must go through to reach resolution and saves both EPA and the respondent time and money. In addition, lower penalty amounts allow operators to spend more resources on compliance. Quicker settlement of these minor cases should allow EPA to establish a bigger field presence and a better overall deterrent effect among all non-compliant operators, particularly with publication of penalties in EPA’s Enforcement and Compliance History Online (“ECHO”) tool. Moreover, the agency’s enforcement resources will be freed up to pursue larger and more complex stormwater cases against the serious violators that the federal government has the unique capacity to pursue. The MSGP ESA Pilot Program will thus support the 2014 ESA Guidance directive to encourage a faster return to compliance.
  - iii. *Increased penalty actions and higher compliance rate for regulated facilities.* Because regulated industrial stormwater dischargers make up roughly one

quarter of all NPDES permittees, the ratio between these facilities and CWA inspectors is much higher than in most other sectors covered by NPDES permits. Notwithstanding this difficulty, EPA has been able to increase the number of penalty actions taken against stormwater violators even with fewer inspectors per facility by utilizing ESA programs where available. For example, over the past five years, Region 2 has initiated enforcement actions following an inspection for approximately a third of the facilities it has inspected for both MSGP facilities and construction sites with a construction stormwater permit. However, in that same time period, the Region has assessed penalties against a significantly lower percentage of MSGP facilities than against permitted construction sites with stormwater violations. A major factor contributing to the disparity in the number of penalty actions between these two permit types is the availability of an ESA for construction stormwater violations. The MSGP ESA Pilot Program would enable case managers to issue an ESA simultaneously with an inspection report to eligible permittees to require timely compliance and the payment of a penalty. This will reduce the time and resources necessary to issue multiple administrative actions under the current process and increase the number of penalty actions that can be taken. More penalty actions should lead to more overall compliance among MSGP facilities.

- b. Duration of the pilot. The Pilot is approved for a period of 30 months.

## **2. Covered Violations and Eligibility**

- a. The Pilot covers only operation, monitoring and recordkeeping violations of MSGPs issued under § 402 of the CWA. The Pilot will not address facilities without an NPDES industrial stormwater permit or unallowable non-stormwater discharges.<sup>2</sup>
- b. To qualify for the ESA, permittees will need to take immediate action to correct the alleged violations identified by EPA and submit evidence of the corrections if requested by the Region. In addition, the following requirements must be met:
  - i. Permittee may not be a Repeat Violator, except as allowed below in Section 4;
  - ii. No evidence of significant harm, including any risk of imminent and substantial endangerment, to human health or the environment; and
  - iii. Penalty, as calculated under this ESA, is no more than \$64,618.<sup>3</sup>

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<sup>2</sup> Unpermitted facilities that should be covered by an NPDES industrial stormwater permit can be addressed under the Expedited Settlement Agreement Pilot for Industrial Stormwater Non-Filers that was approved on September 30, 2019, if they meet the requirements of that ESA.

<sup>3</sup> Both the ESA penalty cap and the penalty tables in Section 5(b)(i) discussed below may be revised when the ESA is reevaluated in two years to account for inflation and other factors as appropriate.

### **3. Timely Return to Compliance**

This Pilot should result in swift resolution of MSGP violations. To ensure this happens, the following measures should be undertaken when an ESA is appropriate:

- a. EPA should generally transmit expedited settlement offers to respondents concurrently with the inspection report.
- b. EPA should give the respondent 30 calendar days from receipt of the ESA offer letter to accept the settlement offer. If a respondent accepts the offer, it must return the signed ESA to EPA before the deadline and certify that the measures noted in the ESA have been completed to return the facility to compliance. If required by the Region, the respondent must provide the documentation requested to demonstrate it has completed the needed measures. Extensions may be granted for up to an additional 60 days (total of 90 days) from receipt, provided a respondent requests the extension in writing and provides a reasonable justification for their request. Extensions must be requested within 30 days from the respondent's receipt of the ESA offer letter and documented by EPA when granted.

### **4. Repeat Violators**

Under this Pilot, Repeat Violators can be offered an ESA if the conditions described below are met. A Repeat Violator is defined as an entity, facility, corporate predecessor in interest, or principal or individual that has:

- a. similar violations of an industrial stormwater permit issued under CWA § 402(p) identified by EPA or a state within the past five years; and
- b. been notified in writing by EPA or a state of such permit violation within the past five years.

This Pilot allows ESAs to be issued to Repeat Violators provided the cumulative penalty amount (both federal and state penalties) over the last five years for all facilities operated by an entity, including the penalty amount in the proposed ESA, does not exceed the ESA cap of \$64,618.

When assessing a penalty for a Repeat Violator, Regions should apply an escalation multiplier to the penalty amount calculated using the Expedited Settlement Offer Worksheet. Regions should apply a 1.25 escalation multiplier to the ESA penalty if it is the second formal enforcement action issued over the previous five years and a 1.5 escalation multiplier if it is the third formal enforcement action issued over the previous five years. An ESA may not be used if it is the fourth or more formal enforcement action to be taken over the previous five years.

EPA can issue multiple concurrent ESAs to an operator for violations at multiple sites discovered at the same time— either through inspections all conducted within 45 days or through responses to the same information request letter sent by EPA to the operator. In this situation, the cumulative penalty cannot exceed \$64,618; however, Regions would not apply an

escalation multiplier since the ESAs would be issued concurrently. This allows EPA to address violations by the same operator at multiple sites when the violations are not sufficiently egregious to warrant a traditional penalty action.

This Repeat Violator scheme is consistent with the 2014 ESA Guidance, which lifted the prohibition on the use of ESAs to remedy violations of Repeat Violators. As described above, the modification does not authorize unlimited issuance of ESAs to Repeat Violators, but establishes parameters for when an ESA is appropriate for a Repeat Violator.

## 5. Penalties

- a. Rationale for penalty structure. Penalties in industrial stormwater cases are currently calculated using EPA’s September 8, 2016 “Supplemental Guidance to the 1995 Interim Clean Water Act Settlement Penalty Policy for Violations of the Industrial Stormwater Requirements” (“Industrial Stormwater Penalty Policy” or “ISPP”). To expedite settlements and encourage a timely return to compliance, this Pilot provides a penalty calculation approach that should reduce penalties for eligible cases, compared to the ISPP. Reduced, but still appropriate, penalties along with the reduced time needed to process an ESA should lead to quicker resolution of 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. Underlying both this ESA and the ISPP is the March 1995 CWA Interim Settlement Penalty Policy (“1995 Penalty Policy”), which sets forth two main penalty components, economic benefit and gravity, for calculation of a penalty. The 1995 Penalty Policy and ISPP also include adjustments to the gravity component of the penalty based on additional factors, like recalcitrance, litigation risk, quick settlement of the allegations, and inflation. The MSGP ESA Pilot Program considers the economic benefit and gravity components when determining the base penalty amount and then adjusts the base penalty amount in a similar, but simplified framework commensurate with the potential for harm to the environment from the violations and the characteristics of the facility and the business. While the economic benefit from the violations is not specifically determined for each facility, the size of the final penalty under the ESA will always recapture any possible economic benefit because of the types of permit violations and facilities that are eligible to be covered by an ESA and consideration of the cost of compliance for each permit category when we developed the base penalty amounts, as well as several penalty adjustment factors that are roughly correlated with likely economic benefit from the violations. This Pilot begins with a base penalty for each category of permit violation ranging from \$100 to \$3,000, depending on the corresponding permit violation and the duration and magnitude of the violation as discussed in subsection (i.) below, and then applies the adjustment factors discussed in subsections (ii.) through (vi.) below to reach an appropriate penalty.
  - i. *Duration and Magnitude (D)* – Consistent with the ISPP, duration and magnitude of the violation are the two factors that determine the base penalty amount. The

duration and magnitude may be either quantitative or qualitative. Where a violation is quantitative, the duration and magnitude are calculated by starting with the first month the violation(s) occurred or the 5-year statute of limitations, whichever is later. The number of instances in which a required element is missing or in violation, expressed as a percentage of the number of times the required element should have been performed during the relevant time period, yields a duration and magnitude percentage. Where the duration and magnitude of the violation requires a qualitative assessment, the assessed violation may be either minimal, moderate, or significant based on how long the violation went on for and the deviation from meeting the permit requirement. The quantitative or qualitative assessment of the duration and magnitude corresponds to a base penalty amount for each permit section that has been violated, which are then added together for a total base penalty referred to as the “D” factor in the penalty calculation equation.

The penalty amounts assessed per permit section violated as adjusted for duration and magnitude are set out in the two tables below for both quantitative and qualitative-type violations.

Permit Violation Type	Quantitative			
	< 5% <sup>4</sup>	5-24%	25-49%	≥ 50%
Routine Facility Inspections	\$100	\$250	\$500	\$1,000
Quarterly Visual Assessment of Stormwater	\$100	\$250	\$500	\$1,000
Benchmark Monitoring	\$250	\$500	\$1,000	\$2,500
Effluent Limitation Monitoring	\$300	\$750	\$1,500	\$3,000
Impaired Waters Monitoring	\$300	\$750	\$1,500	\$3,000

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<sup>4</sup> The percentages in this row represent the number of instances in which a required element is missing or in violation during the relevant time period expressed as a percentage of the number of times the required element should have been performed. For example, if routine facility inspections should have been performed 20 times in the relevant time period, but were correctly performed only 15 times, then the violation percentage would fall within the “25-49%” range:

$$\frac{(20 - 15)}{20} \times 100\% = 25\%$$

Permit Violation Type	Qualitative			
	Minimal	Moderate	Significant	Failure to Develop
Control Measures Selection and Design	\$250	\$500	\$1,000	
Non-Numeric Technology-Based Effluent Limits	\$250	\$500	\$1,000	
Corrective Actions	\$350	\$750	\$1,500	
Monitoring Procedures	\$250	\$500	\$750	
Additional Implementation Measures	\$500	\$1,000	\$2,000	
Stormwater Pollution Prevention Plan	\$500	\$1,000	\$1,500	\$3,000
Reporting and Recordkeeping	\$100	\$250	\$500	

- ii. *Exposure (E)* – The ISPP and 1995 Penalty Policy use potential or actual environmental harm as one of the gravity adjustment factors. This Pilot adjusts the base penalty amount using the physical area of industrial activities exposed to stormwater as an indicator of potential environmental harm, as well as an indicator of the economic benefit from noncompliance since larger exposed industrial areas generally require more stormwater controls. This Pilot uses the number of exposed acres and applies the adjustment factors listed below to the base penalty.

Exposure:	<u>&lt;1 acre</u>	<u>1 - &lt;5 acres</u>	<u>5 - &lt;10 acres</u>	<u>10 - &lt;25 acres</u>	<u>25 - &lt;50 acres</u>	<u>≥50 acres</u>
Multiplier:	1	1.25	1.5	1.75	2	2.5

- iii. *Environmental Harm (H)* – In addition to the “exposure” adjustment factor discussed in subsection (ii), this Pilot considers the types and quantities of pollutants that could end up in stormwater and number of discharge events to characterize the environmental harm factor as none, low or medium (note that violations that lead to a “high” environmental harm are ineligible for this ESA) as another adjustment factor. This Pilot then applies the adjustment factors listed below.

Environmental Harm	<u>None</u>	<u>Low</u>	<u>Med</u>
Multiplier:	1	1.25	1.5

- iv. *Receiving Water Quality (WQ)* – The ISPP and 1995 Penalty Policy use the quality of the receiving waters to adjust the environmental harm component. The Pilot uses the same criteria listed in the 1995 Penalty Policy to distinguish between high, medium, and low-quality receiving waters. The water quality designation will depend on factors that include the designated or actual use of the receiving waters. Note that a receiving water that is a 303(d) listed water, or subject to a Total Maximum Daily Load (“TMDL”), is considered a high-quality water according to the 1995 Penalty Policy and for the purposes of this assessment. This Pilot then applies the adjustment factors listed below.

Receiving Water Quality	<u>Low</u>	<u>Med</u>	<u>High</u>
Multiplier:	0.75	1	1.25

- v. *Size of Business (FTE)* – This Pilot is intended to impose lower penalties on smaller businesses to encourage businesses with fewer resources to spend them on compliance rather than penalties. In addition, because larger businesses are expected to spend more on complying with the MSGP, the size of the business is also an indication of the possible economic benefit from the violations. Accordingly, this Pilot utilizes the number of full-time employees (FTE) at a site to adjust the base penalty amount using the size of the business as noted in the table below.

FTE:	<u>1-9</u>	<u>10-24</u>	<u>25-49</u>	<u>50-99</u>	<u>100-249</u>	<u>≥250</u>
Multiplier:	1	1.25	1.5	1.75	2	2.5

- vi. *Industry Sector (S)* – The ISPP also considers the type of industry and potential pollutants associated with that industry. Industries are categorized as high, medium, and low priority based on the types of pollutants that may potentially be discharged in stormwater from the particular industrial sector. The 1995 Penalty Policy delineates which sectors fall within the high, medium, and low category, and this Pilot assigns an adjustment factor that corresponds to each designation as noted in the table below, with high priority sectors having a greater adjustment factor. Some sectors can be either medium or high priority depending on other factors, which are set forth in more detail in the 1995 Penalty Policy.

Sector	<u>Low</u>	<u>Med</u>	<u>High</u>
Multiplier:	1	1.25	1.5

In summary, the above factors will determine the penalty through the following equation:

$$\text{Penalty} = \mathbf{D} \times \mathbf{E} \times \mathbf{H} \times \mathbf{WQ} \times \mathbf{FTE} \times \mathbf{S}$$



## **6. Model ESA Documents**

Attached to this memorandum is a package of model ESA documents prepared by Region 2 that any Region can use with appropriate Regional modifications (e.g., contact) when implementing the Pilot. The package includes a model ESA and an Expedited Settlement Offer Worksheet (“Worksheet”) with examples. A Region may not modify the penalty numbers in the Worksheet or any substantive aspects of the Pilot (e.g., deadline for responding to ESA offer) when revising these models for the Region.

## **7. Unique Statutory Requirements**

Under Clean Water Act Section 309(g) and 40 CFR Part 22.45, Clean Water Act 309(g) administrative enforcement actions are subject to state consultation and public notice requirements before assessment of a penalty. Consistent with the CWA and the regulations, within 30 days following the respondent’s acceptance of the ESA offer the Region should provide a copy of the proposed ESA to the relevant state authority and publish the docket number and required details of each offer. The ESA may then be finalized 40 days from the date of providing it to the state and public notice of it, unless, based on state consultation or the public comments received, EPA determines that additional time is needed to consider the appropriateness of the ESA or that the ESA should not be finalized.

## **8. 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.

## **9. Further Questions**

Questions about implementation and/or assessment of the Pilot should be directed to Patrick Whalen ([whalen.patrick@epa.gov](mailto:whalen.patrick@epa.gov)) in Region 2 and/or Bruce Fergusson ([fergusson.bruce@epa.gov](mailto:fergusson.bruce@epa.gov)) in WED.

### **Attachments:**

- Model MSGP ESA Pilot Program Form
- Expedited Settlement Offer Worksheet