



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

SEP 30 2019

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Expedited Settlement Agreement Pilot for Industrial Stormwater Non-Filers Under the Clean Water Act

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

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

This memorandum serves to approve an expedited settlement agreement (ESA) pilot to address industrial stormwater non-filers under the Clean Water Act (CWA) (Industrial Non-filer Pilot or Pilot). The Pilot was proposed by Region 9, however I am approving the Pilot nationwide for optional 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. OECA, in coordination with any region that participates in the Pilot, will use the last six months of the pilot to evaluate its effectiveness and make a recommendation about next steps. Questions about implementation and/or assessment of the Pilot should be directed to Kristine Karlson in Region 9 and/or Caitlin Cunningham in OCE.

1. Purpose and Goals

The Industrial Non-Filer Pilot is intended as a tool to more efficiently resolve cases against small industrial facilities who are discharging stormwater without authorization under the CWA. While an ESA is a novel tool for addressing this subset of CWA respondents, this Pilot borrows elements from preceding ESA policies, such as the Construction Stormwater Expedited Settlement Offer Policy that has been in place nationwide since 2003. The goal of the Industrial Non-filer Pilot is to expedite resolution of claims concerning unauthorized discharge of industrial stormwater to waters of the United States (WOTUS). The Pilot will test the effectiveness of this expedited approach and make adjustments as needed to a final ESA program for industrial non-filers.

- a. Reinforcing the general principles for ESA Pilots outlined in the 2014 ESA Guidance.
 - i. *Conservation of resources for use on more significant cases.* Data suggest a large compliance gap between facilities that should be regulated under the CWA versus those that are actually permitted to discharge stormwater. Regulated industrial facilities range greatly in size from single, one- to two-person operations, to large multi-state corporations. Larger facilities may have an outsized individual effect on water quality, but the vast majority of industrial

stormwater dischargers are small and therefore can have a significant cumulative impact on water quality. The proposed Industrial Non-filer Pilot creates a tool for addressing noncompliance by smaller, less sophisticated operators, allowing EPA to address widespread noncompliance without lengthy proceedings, while allowing more time to focus on cases against larger and/or more egregious violators.

- ii. *Faster return to compliance.* The simplified penalty structure in this policy incorporates penalty reductions for small operators whose facilities are not found to be causing serious environmental harm. As with previous ESA policies, the ESA process skips some of the steps 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 smaller cases should allow EPA to have a greater field presence and a better overall deterrent effect among small, non-compliant operators. In turn, the agency's resources are freed up to pursue larger and more complex stormwater cases against the kinds of serious violators that the federal government has the unique capacity to pursue. The Industrial Non-Filer Pilot will thus support both the 2014 ESA Guidance directive to support a faster return to compliance, and the FY 18-22 Strategic Plan's national goal to "reduce the average time from violation identification to correction."
 - iii. *Higher compliance rate for regulated facilities.* Experience with previous ESA policies has shown that the increased field presence, increased volume of enforcement actions, and more effective press coverage that can result from use of ESA policies can have a significant and measurable effect on compliance rates.
- b. Duration of the pilot. The Pilot is approved for an initial period of 24 months.

2. Covered Violations and Eligibility

- a. Industrial Stormwater Non-Filers Only. The Pilot covers only the discharge of industrial stormwater without authorization under §301 of the CWA. The actions needed to address unauthorized discharge of industrial stormwater are straightforward: operators must take action to cease unauthorized discharges such that they are no longer a "non-filer." This may mean adjusting operations to meet "no exposure" or "non-applicability" criteria and applying for a permit waiver; or it may mean creating a Stormwater Pollution Prevention Plan and applying for full permit coverage. This Pilot addresses only facilities' status as non-filers, and not permit non-compliance.
- b. Eligibility Criteria. Owners or operators of facilities must meet the following criteria for eligibility to be considered for an ESA under this Pilot:
 - i. First-time violator of CWA industrial stormwater requirements
 - ii. Not an existing stormwater permittee
 - iii. No unauthorized, unallowable, non-stormwater discharges (such as industrial wastewater) detected at the facility
 - iv. No evidence of significant environmental harm
 - v. Small businesses only, as determined by number of employees (<100)

vi. Penalty as calculated under this policy is less than or equal to \$40,000

3. Timely Return to Compliance

This Pilot should ensure swift resolution of unauthorized discharges, due to the following measures:

- a. New inspection template. Region 9 developed an inspection template geared toward non-filers for use with this Industrial Non-filer Pilot to ensure clarity and consistency in determining which facilities need permit coverage. Inspectors should use this template, or a similar one to document potential unauthorized industrial stormwater discharges when available information about a facility suggests the owner or operator may be eligible for an ESA. Use of the inspection report template is not determinative of eligibility for the Industrial Non-filer Pilot.
- b. Feedback during inspection closing conference. Inspectors should provide feedback to the inspected facility at the time of the inspection, including discussing site-specific areas of concern, and providing general materials explaining the stormwater permitting requirements, compliance assistance resources, and potential options for resolution of violations.
- c. ESA issuance in line with inspection report transmittal. EPA should transmit expedited settlement offers to respondents concurrently with the inspection report and issue both in accordance with the agency's policy on inspection report timeliness. At the time of this writing, the timeframe for transmittal of inspection reports is within 70 days of the inspection date.
- d. Response deadline. The respondent will have 30 calendar days from receipt of the ESA offer letter to accept the settlement offer by signing the certification in the ESA that the specific measures noted in the ESA have been taken to return the facility to compliance. Extensions may be granted for up to an additional 60 days (a total of 90 days) from receipt, provided respondents request the extension in writing and provide a reasonable justification for their request. Extensions must be requested within 30 days from the respondent's receipt of the ESA offer letter and acknowledged by EPA to be granted.

4. Repeat Violators

ESAs may not be offered to repeat violators, except in the limited circumstance described below. In evaluating potential repeat violators, case teams should consider as prior violations those of corporate predecessors in interest, or cases where a principal(s) or individual(s) involved in a different business or entity has already resolved violations under an ESA or other state or federal mechanism for similar violations.

For the purposes of this Industrial Non-filer Pilot, a repeat violator is defined as one who has been notified in writing by EPA or the permitting authority of having been in violation of CWA §301 or § 402(p) within the past five years.

An exception to the repeat violator prohibition will be allowed at EPA's discretion in situations in which multiple facilities owned by the same owner/operator are inspected and found eligible for ESAs within a short time frame (for example, during the same season). Owners or operators of such facilities should not necessarily be considered repeat violators, as they may still be building their awareness of the

stormwater requirements. In such situations, EPA has the discretion to issue multiple ESAs to the same owner/operator until the penalty cap of \$40,000 is reached for a given operator.

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). One of the main factors in determining a penalty under the ISPP is the duration of the violation. Under the ISPP, facilities that have discharged stormwater for some months without a permit face higher penalties for similar on-the-ground deficiencies than permitted ones. These factors ensure that less compliant operators pay the most. Although the ISPP does consider the size and sophistication of an operator in determining an appropriate bottom-line penalty, in some cases the smaller, least sophisticated operators may face relatively high fines under the ISPP’s penalty structure because the facilities have never obtained permit coverage and have never implemented, or adequately implemented, appropriate stormwater controls or pollution prevention activities. To expedite settlements with these smaller operations and encourage a timely return to compliance, this Industrial Non-filer Pilot provides a penalty calculation approach that should reduce penalties, compared to the ISPP.
- b. Penalty Structure. The Pilot uses a matrix penalty structure in which there is a base penalty for the underlying violation, adjusted upward or downward based on five factors. Underlying both this policy 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 Industrial Non-Filer Pilot considers these components in a simplified structure that assumes eligible facilities (as determined by the case developer) would have lower compliance costs for their small facilities, and that they would also have limited financial resources to resolve non-compliance. The matrix uses a base penalty of \$10,000 for unauthorized discharge of industrial stormwater at eligible facilities, and applies the adjustment factors below to reach an appropriate penalty:

- i. *Duration (D)* – In accordance with the ISPP, duration of the unauthorized discharges is among the factors that determines the penalty amount. While duration is considered as part of the proposed penalty calculation here, its impact is reduced. Starting with the first month during which there is a 0.5” rainfall event at unpaved facilities, or the first month during which a 0.25” rain event occurs at paved facilities, the number of months without a permit determines the multiplier applied to the base penalty as outlined below:

Duration:	<u>0-1 Year</u>	<u>1-2 Years</u>	<u>2-5 Years</u>
Multiplier:	0.2	0.5	1

- ii. *Exposure (E)* – The ISPP and 1995 Penalty Policy use potential or actual environmental harm as one of the gravity adjustment factors. This policy proposes the physical area of industrial activities exposed to stormwater as an indicator of both the potential for environmental harm and the potential cost of a company’s return to compliance.

Exposure:	<u>< 0.5 acre</u>	<u>0.5 – 2 acres</u>	<u>>2 – 5 acres</u>
Multiplier:	0.5	1	2

- iii. *Size and Sophistication of Business (S)* – This Pilot is geared toward reducing penalties for the least sophisticated businesses, with fewer resources to spend toward compliance. This policy adapts the three-tiered assessment of company sophistication set forth by the 2016 ISPP, in a simplified form. Here, a company’s relative level of sophistication is categorized based on only two factors: the number of full-time employees (FTEs), and the number of industrial facility locations controlled by the same owner/operator. A simple matrix sets forth which Tier would be assigned based on these overlapping factors:

# of FTEs	One Location Under Same Owner/Operator	> 1 Industrial Location Under Same Owner/Operator
1-10	Tier 1	Tier 1
11-50	Tier 1	Tier 2
51-99	Tier 2	Tier 3

	<u>Tier 1</u>	<u>Tier 2</u>	<u>Tier 3</u>
Multiplier:	0.5	1	2

- iv. *Pollution Control (P)* – Unpermitted industrial facilities are generally less controlled by management practices or structural controls that address the facility’s pollution potential; accordingly, this factor assumes a default value of “1” for a “somewhat dirty” site. Particularly polluted facilities (<25% controlled through Best Management Practices) that still meet eligibility criteria can be assigned a higher multiplier, while particularly clean facilities (>75% controlled) may warrant a penalty reduction. Case developers would use the below criteria to assess pollution control, then would assign the corresponding multiplier.

% Pollution Control	Description of category:
>75%	No significant, visible spills onsite. All categories of BMPs present. BMPs maintained in effective operating condition (e.g., no full-capacity accumulations of oil or sediment, no broken berms, no un-stocked spill kits). Proper cover and/or secondary containment provided as needed. Overall clean and orderly facility appearance.
25-75%	BMPs may be present but are not adequately sized or maintained (e.g., broken berms, un-stocked spill kits, inadequate cover). Some evidence of spills onsite, and not timely addressed. Overall disorganized facility appearance.
<25%	Few or no BMPs onsite, or BMPs present but largely inadequate or unmaintained. Unaddressed spills present. Overall dirty appearance.

% Pollution Control:	<u>>75%</u>	<u>25-75%</u>	<u><25%</u>
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Multiplier: 0.5 1 2

- v. *Prior Notice (N)* – Consistent with previous penalty policies, this adjustment to the penalty incorporates a limited amount of culpability into the equation, to accommodate situations in which a company has been individually notified by EPA or the permit authority that permit coverage is needed at the subject facility. This penalty adjustment factor can be applied if EPA has specific knowledge of such notification. General compliance assistance materials disseminated as part of a broad outreach effort do not constitute Prior Notice for the purpose of this Pilot.

Received Individual Notification. (Y)	2
Did not receive such notification. (N)	1

Assuming the owner or operator meets all other eligibility criteria in Part 2.b.i-vi, the penalty adjustment factors outlined above determine the penalty through the below equation. If the calculated penalty is less than or equal to the \$40K threshold, the case may be handled using the ESA Pilot policy at EPA's discretion.

$$\text{Penalty} = \$10,000 \times D \times E \times S \times P \times N$$

6. Model ESA Documents

Attached to this memorandum is a package of model ESA documents prepared by Region 9 that any region can use, with appropriate regional modifications (e.g., contacts), when implementing the Industrial Non-filer Pilot. The package includes a model ESA, inspection report template, and penalty calculation sheet. A region may not modify the penalty calculation sheet, or any substantive aspects of the Industrial Non-filer Pilot (e.g., deadline for responding to ESA offer) when revising these models for the region.

7. Unique Statutory Requirements

Under 40 CFR Part 22.45, Clean Water Act 309(g) enforcement actions are subject to public notice requirements before assessment of a penalty. Consistent with the regulations, within 30 days following the respondent's acceptance of the offer (ESA) EPA will publish the docket number and required details of each offer. The ESA may then be finalized 40 days from the date of public notice.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 9 - 75 Hawthorne St San Francisco, CA 94105
EXPEDITED SETTLEMENT AGREEMENT

Docket Number: CWA-09-2020-[docket no.], NPDES No. ["Unpermitted"]

[operator name] ("Respondent") is a "person," within the meaning of Section 502(5) of the Clean Water Act ("Act"), 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.

Attached is an "Industrial Non-filer Expedited Settlement Worksheet" ("Settlement Form"), which is incorporated by reference. By its signature, Complainant ("EPA") finds that Respondent is responsible for the alleged violations specified in the Settlement Form.

Respondent had unauthorized discharge(s) of stormwater in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311.

EPA finds, and Respondent admits, that Respondent is subject to Section 301 of the Act, 33 U.S.C. § 1311, and that EPA has jurisdiction over any "person" who "discharges pollutants" from a "point source" to "waters of the United States." Respondent neither admits nor denies the specific alleged violations specified in the Settlement Form.

EPA is authorized to enter into this Consent Agreement and Final Order ("Agreement") under the authority vested in the Administrator of EPA by Section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), and by 40 C.F.R. § 22.13(b). The parties enter into this Agreement to settle the civil violation(s) alleged in this Agreement for a penalty of \$[penalty amount]. Respondent consents to the assessment of this penalty and waives the right to: (1) contest the finding(s) specified in the Form; (2) a hearing pursuant to Section 309(g)(2) of the Act, 33 U.S.C. § 1319(g)(2); and (3) appeal pursuant to Section 309(g)(8), 33 U.S.C. § 1319(g)(8).

Additionally, Respondent certifies, subject to civil and criminal penalties for making a false statement to the United States Government, that the Respondent has addressed the alleged violations identified in the Settlement Form by either a) developing and implementing a Stormwater Pollution Prevention Plan and submitting to the permit authority a Notice of Intent to be covered by the applicable industrial stormwater permit; or b) acting to meet eligibility requirements for a waiver from industrial stormwater permit requirements as allowed by the permit authority and submitting the relevant forms (such as the No Exposure Certification form), to the permit authority.

Respondent certifies that it has submitted a bank, cashiers, or certified check, with case name and docket number noted, for the amount specified above, payable to the "Treasurer, United States of America," via certified mail, to:

U.S. EPA, Region 9
Fines and Penalties, Cincinnati Finance Center
In the Matter of: [operator name]
Docket No.: CWA-09-2019- [docket no.]
P.O. Box 979077
St. Louis, MO 63197-9000

This Agreement settles EPA's civil penalty claims against Respondent for the alleged Clean Water Act violation(s) specified in this Agreement. EPA does not waive its rights to take any enforcement action against Respondent for any other past, present, or future civil or criminal violation of the Act or of any other federal statute or regulation. EPA does not waive its right to issue a compliance order for any uncorrected alleged violation(s) described in the Form. EPA has determined this Agreement to be appropriate.

This Agreement is binding on the parties signing below and effective upon filing with the Regional Hearing Clerk.

APPROVED BY EPA:

_____ Date: _____
Amy C. Miller, Director
Enforcement and Compliance Assurance Division

APPROVED BY RESPONDENT:

Name
(print): _____

Title
(print): _____

Signature: _____ Date: _____

More than 40 days have elapsed since the issuance of public notice pursuant to Section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A), and EPA has received no comments concerning this matter.

Having determined that this Agreement is authorized by law,
IT IS SO ORDERED:

_____ Date: _____
Steven L Jawgiel
Regional Judicial Officer, U.S. EPA Region IX

UNPERMITTED INDUSTRIAL FACILITY STORMWATER INSPECTION CHECKLIST

Inspection Date(s):		
Time:	Entry:	Exit:
Weather Conditions:		
Media/Program: Water – CWA § 301, 402 – Industrial SW/NEC		
Operator Name:		
Facility or Site Name:		
Permit ID or Tracking #:		
SIC Code:		
Facility Address:		
(city, state, zip code)		
Geographic Coordinates:		
Mailing address:		
(city, state, zip code)		
County:		
Regular Days/Hours of Operation:		
# of Employees at location:		
Size of Facility (in acres):		
Receiving Water(s):		
Date facility est. @ location:		
Onsite Representative:		
Name	Title	Phone #
		Email:
Authorized Official:	→	Contacted? <input type="checkbox"/> Yes <input type="checkbox"/> No
Name	Title	Phone #
		Email:
Additional Personnel Participating in Inspection:		
Name	Title	
Inspector(s):		
Name(s):	Title	Phone #
Inspection Report Author:		
Name:	Signature:	Date:
Supervisor Review:		
Kristine Karlson	Signature:	Date:

SECTION I – INTRODUCTION

Purpose of the Inspection

The purpose of the inspection was to determine compliance with the industrial stormwater requirements under §§ 301 and 402(p) of the CWA and its implementing regulations found at 40 CFR Part 122.26. The inspection was unannounced and consisted of interviewing facility representatives, recording field observations, and taking photographs to document site conditions throughout the facility at the time of the inspection.

Opening Conference

- 1) Brief narrative documenting those present, introductions, presentation of credentials, and explanation of the purpose of the inspection. **Attendees:**

- 2) Credentials presented to: _____

- 3) Facility acknowledged receiving previous outreach materials or correspondence on Permit requirements?
 Yes No Describe:

- 4) Facility has been individually notified by permit authority or EPA that it is subject to stormwater requirements? Yes No Describe:

Overview of Facility (Please include if available):

- a) Aerial of facility with immediate environs, especially any storm drain inlets and surface waters;
- b) Site map showing industrial processes and locations (add to appendices); and
- c) Facility schematics or maps labeling industrial processes occurring onsite:

FACILITY'S OPERATION & PRODUCT DESCRIPTION

Description of business and industrial activities occurring throughout the site. (Include operator's description and note any documentation that further establishes SIC code (permit applications, reports, business registries, website...).

Other industrial facilities owned/operated by same business entity? Yes No Describe:

SECTION II – OBSERVATIONS

SITE EVALUATION

Pollutant Sources	Note location, quantity/size, design issues, any O&M deficiencies (including the nature and extent), potential pollutants, and evidence of exposure to stormwater. Are BMPs in place to minimize or eliminate stormwater discharges from industrial activities?
Loading/Unloading Operations	
Industrial Manufacturing/ Processing Operations	
Industrial Machinery & Equipment Storage	
Storage of Industrial Materials or Products	
Liquid Storage (e.g., Tanks, Liquid Storage Drums)	

Pollutant Sources	Note location, quantity/size, design issues, any O&M deficiencies (including the nature and extent), potential pollutants, and evidence of exposure to stormwater. Are BMPs in place to minimize or eliminate stormwater discharges from industrial activities?
Waste Storage/Disposal Areas (solid and/or hazardous)	
Waste Treatment Facilities (e.g., Pretreatment Systems)	
Fueling Stations/Equipment Maintenance Areas & Cleaning Areas	
Sediment & Erosion Controls	
Spills/Leaks Handling	
Outside Shelters	<input type="checkbox"/> Temporary (Date Established _____) <input type="checkbox"/> Permanent
Evidence of non-stormwater sources/discharges (allowable if permitted under MSGP)?	
Evidence of process wastewater sources/discharges?	

OUTFALL, STORMWATER DISCHARGE & RECEIVING WATER OBSERVATIONS	
Number and description of each potential Stormwater Discharge Point from the Facility	
Evidence of pollutants migrating offsite (stains, deposits, ponding) at discharge points, into Receiving Waters or in MS4	
Evidence of Non-stormwater Discharges leaving site (authorized or unauthorized)	
Description of general gradients/slopes onsite, all apparent discharge points, and discharge pathway from Facility to Receiving Water or MS4 (storm drains, channel, swale, ditches, driveway, pipes, & etc.)	

SECTION III – AREAS OF CONCERN

SECTION IV – CLOSING CONFERENCE

Summary of areas of concern covered, explanation of next steps. **Attendees:**

SECTION V – LIST OF APPENDICES

Appendix A – Photograph Log

Appendix B – Aerial showing location & discharge pathway

Appendix C – Site Map showing exposed industrial areas & discharge points

Industrial Non-Filer Expedited Settlement Worksheet

Version: 9/9/2019



Consult instructions regarding eligibility criteria and procedures before use.

Name and Location of Facility:

Docket #:

Case Developer:

Inspection Date:

Factor 1 - Duration of Alleged Violation (D):

Date of First 0.5" Rainfall, After
Facility Began Operating:

Unpermitted through (Date)

Years Operating w/o Permit
Coverage under CWA §301:

Duration Category:

Factor 2 - Company Size/Sophistication (S):

Tier Level (1-3) from Sheet 2:

Factor 3 - Acreage of Industrial Activity Exposed (E):

Calculated from Aerial:

Exposure Category:

Factor 4 - Pollution Control (P):

Level of Pollution Control (P):

Factor 5 - Notification (N):

Previous written notification?

Expedited Settlement Formula:

$D \times S \times E \times P \times N \times \$10,000$

Total Expedited Settlement Amount:

Instructions: User will enter data in all white cells.

Case Developer Notes: