



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

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: 2023 Construction Stormwater Expedited Settlement Agreement Program

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

TO: Regional Counsels
ECAD Directors

With this memorandum, I am approving the 2023 Construction Stormwater Expedited Settlement Agreement Program ("2023 Construction Stormwater ESA Program" or "2023 Construction Stormwater ESA" or "ESA"). The 2023 Construction Stormwater ESA is a tool to more efficiently resolve cases that involve certain construction stormwater violations of the Clean Water Act ("CWA"). By finalizing the 2023 Construction Stormwater ESA, we are concluding the 2019 Construction Stormwater ESA Pilot Program ("2019 Pilot ESA" or "Pilot") that was approved on September 4, 2019. The 2023 Construction Stormwater ESA Program incorporates all the changes from the Pilot with two modifications related to the ESA penalty cap and the definition of Repeat Violator. It is consistent with the 2014 Revised Guidance on the Use of Expedited Settlement Agreements. The 2023 Construction Stormwater ESA Program rescinds and replaces the May 2006 Construction Stormwater ESA Program.

1. Purpose and Goals

The 2023 Construction Stormwater ESA Program allows EPA to maintain a broader and more timely enforcement presence while also allowing the Agency to focus its resources on those cases that have the most significant impact on human health and the environment. EPA has had an expedited settlement agreement program for construction stormwater since 2003, which has provided an efficient, "real time" enforcement mechanism that complements our informal and traditional enforcement mechanisms.¹ The 2023 Construction Stormwater ESA Program includes several modifications to the May 2006 Construction Stormwater ESA Program that were first introduced in the 2019 Pilot ESA, such as the increased maximum penalty cap, the ability to utilize the ESA with Repeat Violators, and the extension of the time allowed between the discovery of a violation by EPA and the offer of an ESA to a Respondent. In addition, the 2023 Construction Stormwater ESA Program further raises the maximum penalty cap to \$64,618 and narrows the definition of Repeat Violators to only include operators with previous violations of a construction

¹ The original 2003 expedited settlement agreement program was rescinded in 2006 and replaced with the May 2006 Construction Stormwater ESA Program.

stormwater NPDES permit. These modifications will allow the Regions to resolve more cases with ESAs than the previous construction stormwater expedited settlement agreement program.

2. Covered Violations

The 2023 Construction Stormwater ESA covers the full range of possible violations of the terms and conditions of a construction stormwater NPDES permit, including those relevant to EPA's 2022 Construction General Permit "(2022 CGP)". The ESA also covers stormwater violations at a construction site where construction should have been conducted under a construction stormwater NPDES permit, but the operator did not have permit coverage.²

The limiting criteria, however, include:

- The total penalty calculated using the Expedited Settlement Offer Worksheet ("Worksheet") for an ESA, along with any other ESAs issued concurrently to the same operator, is no more than \$64,618, which is equal to the maximum statutory amount, as adjusted for inflation in 2023, for the lesser Class 1 administrative penalties found in the CWA.³
- For Repeat Violators, the total cumulative penalties paid by a single operator over the last five years for construction stormwater violations cannot exceed \$64,618, including the penalties assessed in the new ESA to be offered to the Respondent. Further explanation of the Repeat Violator conditions is found below.
- There is no evidence of significant harm to human health or the environment or an imminent and substantial endangerment from the violations.

3. Return to Compliance Timeliness

A major assumption of an ESA program is that identified violations can be corrected easily and quickly. The Agency therefore expects operators to correct violations as expeditiously as possible after being notified of a violation. Respondents are given 30 days to return a signed 2023 Construction Stormwater ESA to the Agency; by signing an ESA, a Respondent is certifying that it has returned to compliance. If a Respondent does not return the signed ESA within 30 days, it is automatically withdrawn without prejudice, and EPA may institute a more traditional enforcement action for noncompliance.

Upon request of the Respondent, discretion may be exercised to extend the offer for good cause shown, but an extension may not be granted beyond 90 days after the alleged violator's receipt of the ESA offer. It is anticipated that extensions will be limited to allowing resolution of disagreements between enforcement staff and the Respondent on technical issues related to violations pled in the ESA.

² Since 2019, EPA has been piloting a separate expedited settlement agreement for industrial facilities that have not applied for coverage under an industrial stormwater NPDES permit, referred to as the Industrial Stormwater Non-Filer ESA. Stormwater violations at unpermitted construction sites are not eligible for resolution under an Industrial Stormwater Non-Filer ESA, but may be resolved under a 2023 Construction Stormwater ESA.

³ See 88 Fed. Reg. 986 (January 6, 2023).

4. Increased Penalty Cap

The penalty cap for the 2023 Stormwater Construction ESA is increased to \$64,618. This maximum penalty cap will not be adjusted annually to reflect inflation.⁴

5. Repeat Violators

A 2023 Construction Stormwater ESA may be offered to Repeat Violators under the conditions described below. This revision to the Repeat Violator conditions allows ESAs to be used to address a larger universe of violators, provided all other ESA criteria are met (e.g., no evidence of significant environmental harm, violations can be quickly corrected). The 2023 Construction Stormwater ESA Program is consistent with the 2014 Revised Guidance on the Use of Expedited Settlement Agreements, which lifted the prohibition on the use of ESAs to remedy violations by Repeat Violators. The 2023 Construction Stormwater ESA Program does not authorize unlimited issuance of ESAs to Repeat Violators, but establishes parameters for when an ESA is appropriate.

The conditions for Repeat Violators are:

- For the purposes of the 2023 Construction Stormwater ESA Program, a Repeat Violator is an operator of a construction site who was issued a formal enforcement action, with or without penalties, for violations of a NPDES construction stormwater general permit or similar individual construction stormwater NPDES permit. This includes discharge violations where the operator should have had coverage under a construction stormwater NPDES permit, but did not. Prior formal enforcement actions also include both EPA and/or state actions, such as an ESA or an administrative order, against the same Respondent whether at the same or different construction sites.
- A Repeat Violator is eligible for an ESA provided the cumulative penalty amount from EPA and/or state formal enforcement actions for construction stormwater violations over the last five years, including the penalty amount in the new ESA to be offered to the Respondent, does not exceed the ESA cap of \$64,618.
- When assessing a penalty for a Repeat Violator, an escalation factor is applied to the penalty amount calculated using the Expedited Settlement Offer Worksheet. A 25% escalation factor is applied to the ESA if it is the second formal enforcement action issued over the previous five years, and a 50% escalation factor is applied if it is the third or more formal enforcement action issued over the last five years. For example, if the penalty calculated using the Worksheet is \$10,000, the final penalty amount would be \$12,500 and \$15,000 if this was the second or third formal enforcement action, respectively, over the last five years.
- EPA can also issue multiple concurrent ESA offers to an operator for violations at multiple sites discovered by EPA within 45 days of each other; however, the concurrent ESAs would not render the operator a Repeat Violator if the operator has not been the subject of a formal enforcement action in the past five years for construction stormwater violations. In this situation, the cumulative penalty cannot exceed \$64,618, but an escalation factor would not be applied. This allows violations to be resolved against the same operator that were identified by

⁴ Both the ESA penalty cap and the stipulated penalty amounts in the Expedited Settlement Offer Worksheet may be revised in the future to account for inflation and other factors as appropriate.

EPA during a round of inspections at multiple sites or in the responses to the same information collection request letter sent to the operator.

6. Increased Time between Discovery of a Violation and Issuance of an ESA Offer

The 2023 Construction Stormwater ESA continues with the increased time period for issuing an ESA that was used with the 2019 Pilot ESA. Regions may take up to a maximum of 60 calendar days from the date of an inspection, or receipt of information pursuant to an information request letter, to send out an ESA offer to a Respondent. This increased time allows Regional staff more time, when needed, to follow-up on any potential enforcement issues, such as whether waters of the United States are involved.

7. Updated Expedited Settlement Offer Worksheet

The 2023 Construction Stormwater ESA Program updates the Expedited Settlement Offer Worksheet to reflect the citations from EPA's 2022 Construction General Permit.

8. Penalty Reductions

Enforcement staff will use an Expedited Settlement Offer Worksheet to calculate penalties. This is a line-item Excel worksheet where each type of violation is assigned a specific penalty amount. These amounts are based on EPA's experience calculating penalties under the applicable penalty policy, the Supplemental Guidance to the 1995 Interim Clean Water Act Settlement Penalty Policy for Violations of the Construction Stormwater Requirements, but penalties are reduced for the ESA to encourage quick resolution. The penalty amounts in the Worksheet are based on the risk to public health and the environment for each violation, as well as the expected economic benefit from noncompliance. Economic benefit is not a separate component of the penalty calculated under the 2023 Construction Stormwater ESA Program, but economic benefit will always be recovered because the ESA can only be used for violations that are easily correctible, which means the delayed and avoided costs are low.

9. Model ESA Documents

Attached to this memorandum is a package of model ESA documents that Regions can use with appropriate Regional modifications (e.g., Regional contact) when implementing the 2023 Construction Stormwater ESA Program. The package includes a model ESA form, the Expedited Settlement Offer Worksheet that staff will use to determine an appropriate penalty amount, and a detailed guidance for the Regions to follow when using the 2023 Construction Stormwater ESA. A Region may not modify any substantive aspects of the model ESA form (e.g., the deadline for responding to an ESA offer) or the amounts in the penalty Worksheet when revising these for Regional use.

10. 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.

11. Further Questions

Questions about the ESA may be directed to Ivy Koberlein at koberlein.ivy@epa.gov or Bruce Fergusson at fergusson.bruce@epa.gov, both with OECA's Water Enforcement Division.

Attachments:

- Model 2023 Construction Stormwater ESA Form
- Expedited Settlement Offer Worksheet
- Guidance for the 2023 Construction Stormwater ESA Program