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

NOV 2 4 2014

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Revised Guidance on the Use of Expedited Settlement Agreements

FROM: Cynthia Giles

TO: Regional Counsel
Regional Enforcement Directors
Regional Enforcement Coordinators
Office of Civil Enforcement
Office of Site Remediation Enforcement
Federal Facilities Enforcement Office

The use of expedited settlement agreements (ESAs) has been an important aspect of the Environmental Protection Agency's (EPA's) compliance assurance and enforcement program for many years. The Office of Enforcement and Compliance Assurance (OECA) last issued guidance on the use of ESAs in 2003. *See* "Use of Expedited Settlements to Support Appropriate Tool Selection," J.P. Suarez (Dec. 2, 2003) (2003 guidance).[1] As part of OECA's efforts to increase transaction efficiencies, Headquarters and the Regions reviewed existing guidance and practice to determine if revisions were appropriate. This revised guidance is a result of that review.[2] This document supersedes the instruction provided in the 2003 guidance regarding piloting and approving ESA programs; however, it does not change existing ESA pilots or national ESA programs other than establishing a new periodic evaluation requirement for all ESA programs.[3]

---

[1] OECA has created an intranet site that contains information regarding existing approved ESA pilots and national programs, which will be updated as new ESA pilots or national programs are approved. *See* http://intranet.epa.gov/oeca/oce/esa-docs.

[2] This guidance is intended solely for employees of EPA. It does not constitute rulemaking by the agency and may not be relied on to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The EPA may change this guidance at any time without notice and may take action at variance with this guidance

[3] For example, in addition to providing information on how to develop ESA programs, the 2003 guidance authorized all Regions to implement the Clean Water Act Section 311(j) Spill Prevention Control and Countermeasures (SPCC) ESA program. This guidance does not withdraw or otherwise alter that authorization of the SPCC ESA program.

This revised guidance on the development of ESA pilots and approval of national ESA programs provides more flexibility to the Regions and Headquarters enforcement programs developing future ESA pilots/programs. For example, an ESA pilot may now, under appropriate circumstances, authorize the issuance of an ESA to a repeat violator. As noted above, this guidance does not alter any existing approved ESA pilots or programs, however, if the Regions and/or Headquarters want to revise an existing pilot/program to take advantage of new flexibilities provided in this guidance, they can propose revised ESA documents for discussion and approval.

Importantly, because of the additional flexibility provided in this guidance, a Regional[4] memorandum proposing an ESA pilot should thoroughly set forth all the details of the pilot, and explain why the approaches adopted are appropriate for the relevant program (*e.g.*, why the new ESA pilot's treatment of repeat violators makes sense for the types of violations/violators covered by the ESA pilot). A pilot proposal clearly setting forth the rationale for the characteristics of the pilot will expedite review and foster fruitful discussions between the Region(s) and Headquarters on the proposal. Moreover, such detail will assist Headquarters in not only fully evaluating the merit of a pilot proposal, but also ensuring the appropriate level of national consistency across Regions and programs despite the additional flexibilities provided herein.

For similar reasons, proposed changes to an existing ESA program should be accompanied by a full explanation supporting the recommended changes so that all the relevant Regional/Headquarters enforcement managers can discuss and determine whether the changes are appropriate.[5]

In addition to providing guidance on how future ESA pilots and programs may be created, or existing pilots/programs may be revised, this guidance also establishes a new periodic evaluation requirement for all existing and future ESA programs. This evaluation gives Regional and Headquarters enforcement managers an opportunity to periodically review how the ESA program is being implemented across the country, and will help ensure that an ESA program remains a viable enforcement tool over the long term.

I. Overview of Expedited Settlement Agreements and Their Purpose

ESAs should be part of a compliance and enforcement strategy that encompasses the full range of tools available to the compliance and enforcement program. Regions and Headquarters offices using ESAs must remain committed to using existing administrative and judicial enforcement mechanisms against entities that choose to ignore or reject an ESA offer, and in situations where an ESA is not the appropriate enforcement tool. Traditional enforcement actions should also be pursued for violations where an ESA does not adequately address the level of noncompliance or the nature of the violation. Additionally, EPA always reserves the right not to extend an ESA

[4] For convenience, this guidance discusses Regions submitting ESA pilot proposals, but OECA Headquarters offices may also propose ESA pilots.

[5] The Regions and relevant Headquarters Division can raise ideas about changes to existing ESA programs in a variety of forums, including periodic enforcement manager calls and meetings.

offer to any particular violator (*e.g.*, where the extent of noncompliance has given the violator a significant economic benefit).

A. Overview of ESAs

An ESA is a valuable tool that offers timely enforcement in situations where violations can be corrected and a penalty is obtained in a short amount of time. The ESA approach generally is appropriate for easily correctible violations that do not cause significant health or environmental harm, and provides a discounted, non-negotiable settlement offer in lieu of a more formal, traditional administrative enforcement process. An ESA is typically a brief settlement agreement that the recipient[6] may accept, at the offered penalty amount, within a specific amount of time. When the recipient accepts the offer in exchange for a reduced penalty and minimized transaction costs, the recipient agrees to waive its opportunity for a hearing[7] and certifies, under penalty of perjury, that the violation(s) and harm from the violation(s) have been corrected, or will be corrected within a limited period of time as required by the EPA in the ESA, and, in some instances, that the recipient has taken steps to prevent future violations.

B. Why ESAs Make Sense

The EPA must continue to increase efficiencies regarding how it ensures compliance with laws that protect public health and the environment. The use of ESAs is one way to maintain an enforcement presence while also allowing the agency to focus its attention on those cases that have the most significant impact on public health or the environment. Importantly, the goal of an ESA program is to effectively focus limited enforcement resources on more significant public health and environmental violations, while also maintaining an effective enforcement presence for ensuring compliance with the EPA's full spectrum of public health and environmental protection laws.

An ESA program offers benefits to public health and the environment, as well as cost-savings to the agency. When used appropriately, ESAs may result in regulated entities returning to compliance and paying penalties more quickly than could be accomplished through traditional enforcement, such as an administrative order. Because ESA documents are standardized and their terms non-negotiable, the EPA saves resources that otherwise would be deployed in commencing and pursuing a more formal administrative action. Additionally, the ESA approach allows the EPA to increase its enforcement presence to address violators or sectors of the regulated community that the EPA previously was unable to reach due to resource constraints. ESAs may also benefit members of the regulated community because ESAs allow them to quickly and efficiently resolve enforcement cases which, in the absence of an ESA, could take much more time to resolve and involve a greater penalty.

An ESA program may be particularly useful when the universe of regulated entities is large compared to available enforcement resources. For example, the EPA estimates that the Lead-

[6] This guidance uses the terms recipient and violator interchangeably.
[7] In a case involving a federal facility, the federal agency must also waive its opportunity to confer with the Administrator.

Based Paint (LBP) Renovation, Repair and Painting (RRP) Rule applies to approximately 200,000 entities, and 8.4 million projects annually.[8] An ESA program may also be appropriate when the EPA needs to increase its enforcement presence due to widespread noncompliance. For example, immediately after the RRP Rule became effective during April 2010, the EPA noticed that non-compliance with the Rule was very high, much greater than fifty percent in some areas. It may also make sense to develop an ESA program in order to maintain the current level of enforcement presence in a more effective manner (*e.g.*, to ensure no increase in noncompliance), such as for the Underground Storage Tank (UST) program that has existed for a long time and is constantly seeking better ways to deploy enforcement resources.

An ESA is not always the appropriate response to every violation. For example, it may not adequately address the level of noncompliance or the nature of the violation. Additionally, the ESA approach is never appropriate for entities that deliberately conceal evidence of noncompliance, or that fail or refuse to provide records or access necessary to determine compliance. In determining whether a particular violator should be eligible for an ESA, Regions should consider whether the duration of noncompliance is significant, and whether the violator has gained significant economic benefit as a result of the delayed compliance.

As noted above, it is critical that traditional enforcement be utilized when an ESA offer is rejected. This aspect of the 2003 guidance remains unchanged. If a violator declines an ESA offer, or fails to respond in a timely manner or at all, the EPA must be prepared to escalate the enforcement response by commencing an enforcement proceeding. Without this commitment to escalate, the EPA's failure to pursue more formal action for the violations could significantly detract from the regulated community's incentive to accept ESA offers. Moreover, failure to pursue enforcement in such circumstances would essentially penalize entities that cooperated with the EPA by accepting an ESA offer. While an ESA may be an effective way to resolve a case that the agency would otherwise bring using traditional enforcement approaches, it is not an opportunity to resolve a case that lacks merit, evidence or is otherwise not suitable for traditional enforcement approaches.

II. Issues to Consider When Developing an ESA Pilot or Program

The 2003 guidance separately discussed factors to consider when identifying program areas and the general components of an ESA pilot or program. This guidance combines those separate sections into one section discussing the issues that should be considered when developing a new ESA pilot or a national ESA program.[9]

Notably, a key aspect of this revised guidance is that it provides additional flexibility in the development of new ESA pilots/programs. A single guidance document setting forth one set of terms that must apply to all possible ESAs under the various programs that the EPA enforces would be too prescriptive. However, because of the broad flexibility allowed by this guidance, memoranda requesting approval of a pilot, or approving a pilot or national program, will need to

[8] *See* 73 Fed. Reg. 21692, 21753 (April 22, 2008).

[9] As noted earlier, this guidance does not alter any existing authorized ESA pilots or programs, except to establish a new periodic evaluation requirement. If the Regions or Headquarters wants to revise an existing pilot or program to incorporate opportunities provided in this guidance, they can submit new documents for discussion and approval.

contain detail setting forth the parameters for the ESA program and explaining why such parameters are reasonable for that program; such detailed information will streamline review of pilot proposals and ensure clear implementation of a pilot (or a national program when a pilot is expanded). For example, this guidance acknowledges there may be circumstances when it would be appropriate to issue an ESA to a repeat violator; thus, it would be helpful for a memorandum proposing a pilot ESA program that allows issuance of an ESA to a repeat violator to discuss why it is appropriate for that program to provide ESA relief for repeat violators, define what a repeat violator is for that program, and place appropriate limits on the use of an ESA for repeat violators.

As noted earlier, nothing in this guidance changes or automatically flows through to existing, approved ESA pilots or programs. Existing ESA pilots or programs can be revised to reflect flexibilities provided in this guidance, but only after the Regional and Headquarters enforcement program managers for the ESA program have reviewed the existing program and decide what, if any, of the new flexibilities are appropriate. Then, in order to maintain the appropriate level of national consistency across programs and the country, any changes must be approved by the Office of Civil Enforcement (OCE) Director, or Office of Site Remediation Enforcement (OSRE) Director for ESA cleanup pilots or programs, through the issuance of a revised ESA pilot or program memorandum.

A. Purpose and Goals of Proposed Pilots or National Programs

To help assess an ESA pilot or program proposal, the memorandum requesting approval should state the purpose and goals of the ESA pilot/program. Considerations might include but are not limited to:

- What environmental and/or public health problems will benefit from use of the ESA approach to enforcement?
- What are the resource constraints that will be alleviated by an ESA program?
- What enforcement challenge is being addressed through an ESA approach to enforcement?

In the context of a pilot, the purposes and goals will help Headquarters and the Regions evaluate the success of the pilot, and whether any changes are appropriate in the event the pilot is extended into a national program. Similarly, to allow for assessment of the success of the pilot, a memorandum proposing a pilot should identify other factors to be used to assess whether the pilot accomplished its purpose and achieved the stated goals, and the means by which information to measure effectiveness will be gathered. Also as part of a pilot proposal, the Region should describe how it will gather relevant information and communicate it with Headquarters (*e.g.*, through periodic calls).

Similarly, a memorandum authorizing a national ESA program (based on a tested ESA pilot) should contain similar information that will promote ongoing evaluation of the ESA program. As discussed in Section IV below, periodic evaluation of ESA programs by the Regions and Headquarters will ensure that ESA programs remain effective enforcement tools.

B. Types of Violations

1. Easily detected

OECA's position on this factor has not changed from the 2003 guidance. ESAs are most appropriate for violations that an inspector can witness at the time of inspection or that can be reasonably determined through simple information requests, on-site document review, or readily-accessible data sources. For example, violations eligible for an ESA under the Spill Prevention Control and Countermeasure (SPCC) ESA program must be witnessed by the inspector at the time of inspection. Firm certification violations under the pilot RRP ESA can be determined simply by using EPA and/or state RRP databases to figure out if a company currently working on a pre-1978 property is RRP Firm-certified or not. If development of the case takes significant resources and effort, then a traditional case following the penalty policy is more appropriate. Everything about an ESA case should be expedited, not just the resolution.

2. Easily corrected

Again, this guidance does not significantly alter the approach on this issue from the 2003 guidance. Covered violations should be easy to fix, such that the violator can take measures to ensure compliance within the time frame provided in the ESA offer. The recipient should also be able to certify compliance within the timeframe set forth in the ESA offer.

This revised guidance differs from the 2003 guidance in its approach to the timeframe for correcting a violation. The 2003 guidance required that violations be fixed within 30-45 days of the recipient's receipt of the ESA offer, although the Region could extend the deadline for up to a total of 60-90 days from date of receipt. This guidance recognizes that a reasonable timeframe for correcting a covered violation will depend on the program, the violator and the type of violation to be corrected. Thus, there is no rigid 30-45 day initial deadline prescribed in this guidance. Nonetheless, because ESAs are supposed to ensure expeditious resolution of a violation, the rebuttable presumption is that an ESA should require compliance, including any extension, no later than 90 days after receipt of the ESA offer. As with all the other factors discussed herein, any memorandum requesting approval of an ESA pilot, or approving a pilot or national ESA program, should set forth the appropriate timeframe for correcting the violations covered by the ESA and explain why the timeframe, including any opportunity for an extension, is reasonable for that program.

3. No significant impact

Consistent with the 2003 guidance, violations must be less egregious and not result in significant harm to human health or the environment, or present an imminent and substantial endangerment. While the 2003 guidance referred to recordkeeping and reporting violations as examples, existing ESA programs recognize that there are a variety of "minor" violations that could be covered by an ESA.

C. Treatment of Repeat Violators

One of the most significant changes made in this guidance is that it lifts the 2003 prohibition on the use of ESAs to remedy violations of "repeat violators." The 2003 guidance defined a repeat violator as "a violator who, in the past five years, has had the same or closely-related violations: 1) at the same facility where the instant violation occurred; or 2) at multiple facilities, i.e., three or more facilities, under the ownership, operation or control of the violator." The five-year period began when a federal, state, local or tribal government gave notice to the violator of a specific violation, without regard to when the original violation actually occurred.

The original prohibition resulted from a determination that a violator who had recently been informed of his/her legal requirements, and perhaps already received a reduced penalty for that type of violation via a prior ESA, would generally not be deserving of further accommodation regarding penalty for the same or a similar violation. Although it still generally remains inappropriate to provide an ESA for a repeat violator, there may be circumstances where an ESA may be suitable. For example, a program may apply to less sophisticated entities, yet contain a myriad of requirements; the mere fact that the violator may have been informed about some requirements three years ago may not be reason to prohibit the use of an ESA for a subsequent violation of the same or similar requirement(s).

While this guidance no longer prohibits the development of an ESA program that allows the issuance of an ESA to a repeat violator, it also is not authorizing unlimited issuance of ESAs to repeat violators. Thus, it is important that any ESA pilot proposal that would authorize the issuance of ESAs to repeat violators clearly set forth the parameters regarding when an ESA would be an acceptable enforcement response for a repeat violator, and explain why such treatment is appropriate. This detail will not only help review of the pilot proposal, but ensure that the staff implementing the pilot understand when it may or may not be appropriate to issue an ESA to a repeat violator.

There are many options available to a Region developing an ESA pilot that authorizes issuance of an ESA to a repeat violator. For example, the pilot could still prohibit the use of ESAs for repeat violators, but define the term "repeat violator" more narrowly than in the 2003 guidance (see examples below). Another approach may authorize the issuance of ESAs to repeat violators, but only under a discrete set of circumstances. It is important that regardless of what approach is adopted for a particular ESA pilot, the ESA pilot establish separate penalty matrices or escalation factors that apply in order to ensure that repeat violators pay higher penalties than non-repeat violators, and that the calculation of the penalty in an ESA remains objective (see below).

Some questions that Regions evaluating the issuance of ESAs to repeat violators can consider and address in the pilot proposal include:

1. Whether the definition of repeat violator should have one prohibition period for violations at the same facility, and another for other facilities owned/operated by the same company.
2. Whether, given the types of facilities covered by the program, the ESA should clearly define what is meant by "multiple facilities" owned/operated by the same company.

3. Whether the prohibition period should be different for the same, versus closely-related, violations.
4. Whether the type of response to the prior violation(s) is a relevant factor (*e.g.*, whether the applicable Enforcement Response Policy requires the issuance of a Notice of Warning for initial contact, so an ESA is the EPA's first penalty response).
5. Whether the "sophistication" of the violator, and amount of information provided when resolving the initial violation is a relevant factor (*e.g.*, contacts with Lead RRP firms tend to be narrow, so may not alert company to all RRP requirements).
6. What limitations are appropriate regarding the number of prior violations?

D. Return to Compliance

All ESAs must require that the violator be in compliance, or return to compliance, before the EPA will sign and finalize the agreement. Typically, this is done by requiring that the recipient certify, when it signs and returns the ESA offer, that it has come into compliance and provide any appropriate additional information about its compliance efforts. As noted above, because ESAs should focus on violations that are easily corrected, a recipient often will be able to certify that it has returned to compliance before accepting an ESA offer, or will be able to return to compliance shortly after accepting the offer within the timeframe allowed by the ESA.

The 2003 guidance stated that violations that do not require the violator to take any affirmative action, beyond payment of a penalty, are not appropriate for an ESA approach. This guidance removes that prohibition on "penalty-only" ESAs, but provides direction on when a penalty-only ESA would not be appropriate. While it remains a key goal of ESAs, and indeed all enforcement actions, to achieve the environmental benefits gained by returning a source to compliance, there are other key components of an effective enforcement program which a penalty-only ESA could provide. Although a violation may be discovered and remediated by the violator without any involvement by the EPA, a penalty-only ESA could provide a deterrent effect to prevent repeat violations, address actual or potential environmental harm caused by the violation, or help maintain the integrity of the overall regulatory program. Penalty-only ESAs are not appropriate for the purposes of merely increasing the quantity of enforcement actions. As with all ESAs, the Region or Headquarters office should make the determination that an enforcement action is necessary and that it would proceed with a formal administrative case should the violator reject the offer to settle under the ESA. As an example of an appropriate penalty-only ESA, if during document review the EPA discovers that the annual inventory of hazardous chemicals was submitted to the local fire department six months late in the prior year, and that the facility had discovered the violation and submitted the late report on its own accord, there may be no need for injunctive relief (because the report was submitted, albeit late, before the EPA even discovered the violation). However a penalty will provide deterrence against future violations and help maintain the integrity of the program which relies upon accurate and timely information for first responders during an emergency.

An ESA pilot or program that anticipates the regular issuance of "penalty-only" ESA offers should discuss why pursuing penalties is appropriate under the circumstances and is a reasonable use of enforcement resources. For example, if an enforcement program typically gives notice to facilities prior to inspection, the violator may have returned to compliance prior to the EPA

inspection in response to the notice. Because the EPA's enforcement presence led to affirmative action to resolve noncompliance, a penalty may still be appropriate, even if the source returned to compliance prior to the EPA's inspection and no injunctive relief is required.

E. Penalties and Total Number of Violations

1. Discounted penalties

This guidance does not change the approach in the 2003 guidance regarding discounted penalties. It is important to carefully develop ESA penalties that provide an incentive to the regulated entity to accept the ESA while also ensuring that the EPA levies a penalty appropriate for the type of violation. As such, an ESA pilot proposal should include an expedited settlement penalty matrix or assign specific penalty amounts for the particular types of violations for which it proposes to use ESAs. For example, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) §7 ESA Pilot proposes a matrix under which penalties vary based upon the particular violation, whereas the Lead-based Paint ESA Pilot and the Emergency Planning and Community Right-to-Know Act (EPCRA) § 312 ESA establish a flat penalty rate. Generally, ESA penalties should be below the minimal calculation derived from the penalty policy applicable in a traditional enforcement action, but not so low as to lose deterrent value.

When designing ESA pilots or programs, the Regions may want to consider placing a cap on the cumulative dollar amount for penalties that may be cited in one ESA. For example, the SPCC ESA program currently sets a maximum penalty of $5000. If the cumulative dollar amount of penalties for violations discovered during an inspection (or document review) is above this range, the entity is not eligible for an expedited settlement. In the current Storm Water ESA program, the penalty calculated using the ESA Worksheet must not exceed $15,000 for the entity to be eligible for the ESA.

2. Number of violations

Similarly, a proposed ESA pilot or national program may establish an upper limit on the number of violations that may be cited at the inspection before rendering the entity ineligible for an ESA offer. If such a threshold is set, it should be below the point beyond which the number of violations, regardless of the nature of those violations, suggests that the regulated entity requires a more formal enforcement response. For example, the Lead-based Paint ESA Pilot allows up to twenty violations.

3. Timing of payment of penalty

Under most ESA program model documents, the EPA requires that at the time a recipient accepts and returns the signed ESA offer, he or she must certify that payment has been submitted for the penalty contained in the ESA. *See, e.g.*, Model Emergency Planning and Community Right to Know (EPCRA) ESA offer documents ("By its signature below Respondent certifies. . . (2) Respondent is submitting payment of the civil penalty with this ESA."). However, sometimes the ESA offer allows submission of payment of the penalty after the violator receives notice of the issuance of the final ESA order and/or the order is effective. *See, e.g.*, Model Stormwater ESA

offer documents ("Within THIRTY (30) DAYS from your receipt of the Agreement, you must send the original, signed Agreement, which includes a certification that you will submit your payment within TEN (10) days from the date you receive notice from EPA that the Agreement is effective . . ."). [10] As explained below, either approach generally is acceptable.

Funds received at the designated EPA financial management center before a final order has been issued are held by the EPA on behalf of the respondent in a "liability account" pending completion of compliance activity and entry of a final settlement by the EPA (typically via signature by a Regional Judicial Officer pursuant to 40 C.F.R. 22.31(b) or by a Regional official pursuant to an applicable EPA delegation). Such accounts are designated "liability accounts" because the EPA remains liable to return the funds held on behalf of the depositing respondent until such time as the EPA takes final action to settle the claims. When the EPA takes final action to settle claims, by virtue of the settling respondent's prior agreement to release such funds upon the effective date of the settlement, the funds on deposit become valid accounts receivable of the EPA and the settled matter can be closed.

If the ESA pilot proposes to require submission of payment at the time the ESA offer is accepted, then the model offer documents should explain that the funds provided to the EPA will be held by the EPA pending satisfaction of compliance activity and final EPA approval of the order, and that the recipient agrees to release funds held on deposit as payment to the EPA of a civil penalty upon final EPA approval of the ESA. On the other hand, if the ESA pilot proposes to demand submission payment of the penalty only after EPA approval of the ESA, then the offer should contain instructions regarding when and how such payment should be made.[11]

F. Inspections and Expedited Settlement Agreement Documents

This guidance does not change the basic requirements from the 2003 guidance regarding standard operating procedures for inspections, or the terms required for ESA documents.

1. Inspections

EPA inspectors should continue to use standard methods for conducting inspections, regardless of whether the program may offer an ESA. Thus, inspectors should document violations identified during all inspections in the same manner, regardless of whether the inspector anticipates a particular enforcement response to any violations. An inspection should be performed following the applicable standard operating procedures. Based on the information obtained through the inspection process, and during the case development process, the Region should identify all violations for which there is sufficient evidence and then determine the appropriate enforcement response.

---

[10] Some Regions have adapted model ESA documents to require submission of payment only after the receipt of the fully-executed settlement. *See, e.g.,* Region 3 SPCC ESA offer language from cover letter ("The agreed upon penalty will become due within thirty days of the effective date and must be sent to the EPA Cincinnati Finance Center, …") and ESA offer ("This Settlement Agreement is also subject to the following terms and conditions: …2) The Respondent has sent a certified check in the amount of $XXX.00, … within 30 days of the date of filing with the Regional Hearing Clerk (a.k.a. "effective date")").

[11] The recently approved FIFRA §7 and RCRA UST pilots have language regarding submission of payment at the time the ESA offer is returned to EPA.

Similarly, Regions implementing an ESA should continue targeting their inspections to find the most significant violations and violators, unless the ESA pilot/program was specifically designed to deploy enforcement and compliance resources to a subset of the regulated universe.

2. Leaving ESA documents with the violator following the inspection

In designing an ESA pilot, the Regions can consider whether to authorize an inspector to leave a draft ESA offer form or other documents (*e.g.*, ESA violation checklist) with the facility at the time of the inspection to provide a preview of a potential settlement offer. However, there are many issues to consider before authorizing inspectors to leave draft ESA offers, or other related documents, with a violator.[12]

First, only certain people are authorized to issue ESA documents. For example, while EPA employees can complete an ESA form, EPA contractors and SEE grantees, as well as EPA interns, may not complete ESA forms. Moreover, because draft ESA forms, or checklists with violations noted, could be interpreted as notices of violations, or even informal settlement offers, the Regions should check delegations to ensure that inspectors are delegated the authority to undertake the actions contemplated by the ESA pilot.

Second, even if the inspector leaves a draft form, the Region or Headquarters office retains the authority to make the final determination as to the type of enforcement action to take, if any, for violations observed during the inspection. Thus, it is important to consider whether leaving a draft ESA form could cause the violator to expect not only that an ESA offer will be made, but that it will mirror the draft form left by the inspector; it may be easier to manage expectations if draft ESA offers are not left with the violator.

Finally, if a draft ESA form or checklist may be left with the violator, the inspector must be trained in the ESA program. In addition, consider prominently displaying on the forms that they are "draft" and do not constitute a formal settlement offer.

3. Expedited settlement agreement documents

In most existing ESA programs, the EPA settles cases using the Administrator's delegated authority to institute administrative proceedings under the relevant statute, and 40 C.F.R. § 22.13(b), enabling the EPA to simultaneously commence and conclude an administrative proceeding pursuant to 40 C.F.R. § 22.18(b).[13] In these programs, the ESA document is typically a short form with "Findings, Alleged Violations, and Proposed Penalty" attached and

[12] When not delivered by an EPA employee directly, an official ESA offer should be mailed from the Region and served by certified mail, return receipt requested because the recipient's response period is triggered by its signature on the return receipt. Although 40 C.F.R. § 22.5(b)(2) provides for alternative means of service, it is recommended that Regions use certified mail, return receipt requested, or some other method that provides written verification of delivery and receipt to ensure that service is complete, and that there is no confusion regarding the date on which the deadline for responding starts.

[13] ESAs issued under the Underground Storage Tank Field Citation ESA program and the Clean Air Act mobile sources ESA program are not issued pursuant to 40 C.F.R. Part 22 and thus are not required to comply with its requirements.

incorporated by reference. The ESAs authorized under 40 C.F.R. Part 22 must comply with all applicable provisions in 40 C.F.R. Part 22. (*See*, *e.g.*, 40 C.F.R §§ 22.13(b); 22.14(a)(1)-(3), 8; 22.18(b)).

The inclusion of model ESA documents with a pilot proposal helps with easy and consistent implementation of the pilot. The ESA must clearly identify the alleged violations, the basis for alleging such violations (*e.g.*, inspectors' observations or simple information request), and EPA's authority to enter into the expedited settlement. An instruction sheet should accompany the ESA offer, explaining the mechanics of accepting and complying with the offer. The ESA offer, in conjunction with an accompanying instruction sheet, must convey to the recipient that the terms of the proposed settlement are non-negotiable, and that the recipient must admit to jurisdiction and waive its right to a hearing, or contest the allegation and appeal the proposed order accompanying the consent agreement. If the ESA offer is made to a federal agency, then the federal agency must also waive its opportunity to confer with the Administrator. The recipient must also be required to certify, under penalty of perjury, that the violations have been corrected, or will be corrected within the allowable time, and the penalty has been or will be submitted in accordance with Section II.E.3 above. If the EPA has a statutory obligation to provide public notice before issuing an order assessing a civil penalty, the recipient can either submit its payment upon acceptance of the offer or certify that the payment will be made within a certain timeframe. *See* Storm Water ESA Program.

The ESA offer must set a deadline for the recipient to accept the offer, and should be automatically withdrawn – without prejudice to the EPA's ability to institute an enforcement action for covered violations – if the recipient fails to accept the offer within the designated timeframe (including any extension). The release language in the ESA should be consistent with longstanding form and procedural requirements in our administrative settlements to resolve only the civil and administrative claims narrowly and specifically identified in the administrative settlement agreement. As such, the ESA should indicate that once final, the EPA will take no further civil action against the recipient for the violations alleged in the ESA documents.

The settlement does not become final until the recipient, the settling complainant, and the approving EPA official have signed the document. Additionally, as noted above, the ESA offer is automatically withdrawn if not accepted within the delineated response time, including any authorized extension.

G. ICIS Fields

The 2003 guidance contained a section on tracking ESAs in the Integrated Compliance Information System (ICIS). More specifically, the guidance noted that new expedited settlement values were added to ICIS, allowing OECA to track ESAs separately from other administrative penalty orders (APOs).

Even though one of the reasons for adding these values to ICIS no longer exists,[14] it continues to make sense to separately track issuance of ESAs from other APOs. Such information is

[14] The Small Business Paperwork Reduction Relief Act of 2002 no longer requires that EPA prepare a regulatory enforcement report that specifies civil penalties assessed against regulated entities, in particular small business.

important for the periodic evaluation of each ESA program. (See below regarding periodic evaluation of ESA programs.) Nonetheless, it may not make sense to require revisions to ICIS for ESA pilots, since they tend to be limited in scope and duration the Region(s) and Headquarters may be able to track ESAs using a more informal process. However, Regions and/or Headquarters will need to track these pilot programs in order to determine their success in meeting the pilot's purpose and objectives. When an ESA pilot is approved for long-term national use, part of that approval can address any new fields required in ICIS to allow easy tracking of ESAs under the program.

III. Approval of ESA Programs

A. Headquarters Approval of a Pilot

Consistent with the 2003 guidance, each Region seeking to pilot a new ESA program should communicate with the relevant media-specific OCE Division prior to implementation. While the media-specific OCE Division will serve as the first point of contact, any pilot must be approved by the OCE Office Director. Because this revised guidance allows more flexibility in the development of ESA programs, approval at the Office Director level will help ensure reasonable consistency among the various ESA programs, as well as across the country. OCE is committed to reaching an approval decision on each ESA pilot request in a timely manner.

If an ESA pilot or program, however, involves a Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA) or Resource Conversation and Recovery Act (RCRA) corrective action violation generally handled by OSRE, then consultation and approval should be through OSRE.

As in 2003, this guidance applies only in the context of ESAs that deviate from the applicable penalty policy. Regional enforcement tools that do not deviate from the penalty policy do not require advance Headquarters approval. Nonetheless, because OECA is the national compliance and enforcement program manager, we request that the Regions advise the media-specific OCE Division or OSRE that they are applying a unique enforcement response for a class of violators or violations, even if that response is within the applicable penalty policy.

In addition, some Regions may have approached individual media-specific OCE Divisions to request deviation from the penalty policy for a very limited set of circumstances (*e.g.*, for a limited number of facilities in one sector in the Region), and referred to such deviations as ESAs. While it may be true that the suggested enforcement response is expedited, and that it deviates from a penalty policy, it is not an ESA for the purposes of this guidance.[15] This guidance applies to OCE- or OSRE-approved ESA pilots that are meant to test an ESA approach, with the goal of expanding pilots nationally and maintaining them into the foreseeable future, if appropriate. This is not to say that an ESA program cannot be developed with a sunset date in mind (*e.g.*, three years after a new requirement is in place), but these very limited, fact-specific deviations from

[15] Note that the OCE Director is authorized to approve deviations from an applicable penalty policy for good cause. *See* "Approval of Deviations from OECA Penalty Policies for Good Cause in Regulatory Enforcement Cases," Cynthia Giles (Apr. 23, 2014). The OSRE Office Director would need to approve deviations from an applicable penalty policy related to cleanup programs.

penalty policies are not ESAs as that term is used in this guidance. Any request to deviate from the penalty policy in those circumstances must be approved consistent with the applicable guidance and delegations.

B. Detail Required in Memoranda Requesting Approval of a Pilot

Because this guidance provides broad flexibility to the Regions, OCE Divisions and OSRE as they develop ESA pilots, providing details regarding why the exercise of that flexibility in the pilot is reasonable for the applicable program will expedite review and approval of the pilot.[16] An ESA pilot proposal that discusses each of the items in Section II above in detail will foster productive dialogue between the Region(s) and Headquarters regarding the pilot, help the agency ensure the appropriate level of national consistency, and assist with implementation of the pilot. More specifically, a complete pilot proposal should:

- Set forth the **purpose and goals** of the proposed pilot, including identified metrics that would allow an evaluation of the pilot's effectiveness. The ESA pilot memorandum should contain a discussion of why an ESA program is appropriate given the covered environmental program, the violations to be addressed by the ESA, and the likely recipients of the ESA. The pilot memorandum should also set forth the duration of the pilot (*e.g.*, one year).
- Identify the **specific violations** covered by the pilot, and how they are consistent with the requirement that violations covered by ESAs be easily detected, easily corrected, and not result in significant adverse impact. Also, the memoranda should set forth the maximum response period for a recipient of an ESA offer, as well as any extension, and explain why that response period is reasonable for that program and the type of entities likely to receive the ESA offer.
- Indicate whether the pilot will allow ESAs for **repeat violators**, and if so, identify specifically when a repeat violator will and will not be eligible for an ESA, and why such treatment is appropriate for that program. The pilot memoranda should also establish separate, higher penalties for repeat violators (*e.g.*, by providing a separate penalty matrix or escalation factor for repeat violators).
- Specify under what circumstances an ESA may be offered when the recipient had already returned to compliance prior to the EPA's discovery of the violation (*e.g.*, when notice of inspection led to affirmative action). If a program anticipates regularly offering ESAs which obtain only a penalty, the pilot or program memoranda should explain how **penalty-only ESAs** in these circumstances support an effective enforcement program (*e.g.*, creating a deterrent effect, addressing potential or actual environmental harm caused by past violations, maintaining the integrity of the regulatory program, etc.), and why no injunctive relief or corrective action would be needed.
- Establish the **reduced penalties** that apply to the violations covered by the ESA, including an explanation of why the deviation from the penalty policy is appropriate. As noted above, if an ESA can be offered to a repeat violator, then the penalty scheme must increase the penalties for repeat violators.

[16] This section applies also to a proposal to revise an existing ESA program.

- Provide **model ESA documents** to be used in the pilot (*e.g.*, ESA offer, cover letter, violation checklist with penalty calculation sheet, etc.). Discuss whether draft forms or other documents could be left with the violator by the inspector. The pilot should also discuss the role of the Office of Regional Counsel in deciding whether to offer an ESA, and in the production of an ESA offer. It may be that given the somewhat objective nature of the ESA model documents, and the expedited nature of ESAs generally, the Region does not plan to involve counsel in every step in the ESA process. However, since behind every ESA offer must be the commitment to take more formal administrative enforcement if the ESA is rejected, the Region's enforcement program could benefit from support from counsel early in the process.
- Discuss any relevant **outreach efforts** (*e.g.*, to states or compliance assistance) related to the ESA program or the underlying regulatory/statutory requirements.[17]
- Address any **unique statutory requirements** applicable to the ESA program (*e.g.*, under CWA §309, the EPA provides a 30-day public notice of proposed settlements; under Clean Air Act (CAA) §113(d), the EPA must seek a waiver from the Department of Justice when instituting an administrative penalty action for violations where the first alleged date of violation occurred more than twelve months prior to initiation of the administrative action).

In the past, Headquarters has issued a separate memoranda approving the pilot, which sets forth OECA's understanding regarding the particulars of the ESA pilot program (*e.g.*, penalty range, the types of violations covered, the model ESA documents to be used, etc.). When all of those particulars are set forth clearly and comprehensively in the Regional memorandum requesting approval of the pilot, and Headquarters agrees with the pilot as set forth by the Region, the OCE or OSRE Office Director will approve the pilot by signing the approval line in the pilot memorandum. If, however, in discussing the pilot with the Region(s), Headquarters determines that some clarifications or changes are appropriate, OCE or OSRE will issue a separate memorandum approving the pilot as described in the approval memorandum. Importantly, without either the Office Director's signature on the pilot memorandum approval line or a separate approval memoranda from the Office Director, the ESA pilot is not approved.

C. Evaluation of Pilots and Expansion to National Program

The decision to nationally authorize all Regions to implement a particular pilot as a national ESA program will be based on a review of the pilot, after it has been field tested, to determine if it is a viable compliance and enforcement tool. After the pilot has been field tested for at least one-year, Headquarters, in consultation with the Regions, will either expand the pilot into a national program, with or without modifications, or decide to discontinue the pilot. In the event that substantial modifications are made to the pilot, further field testing of the pilot, as modified, may be warranted.

[17] The 2003 guidance contained sections on coordination with states, tribes and local governments, and on up-front outreach and compliance assistance. This guidance does not contain any coordination or compliance assistance requirements, but notes that if the Region suggests such activities, it should describe them in the pilot proposal.

Factors that have previously been considered in assessing whether a pilot is a viable national ESA program include:

- The ease with which the inspectors could identify violations appropriate for ESA treatment and use accompanying checklists either during or after the inspection for such violations;
- Whether the inspectors encountered any difficulties in using the inspection forms during the inspection;
- The percentage and number of entities that accepted an ESA offer;
- Whether the regulated community found the process confusing;
- Whether the ESA pilot saved the Region resources; and
- Whether there was an increase in compliance.

IV. Periodic Review of ESA Programs at the National Level

An issue not discussed in the 2003 guidance is whether ESA programs would benefit from periodic review once they have been expanded nationally. While the 2003 guidance discussed evaluation of a pilot for purposes of determining whether it would be a viable national compliance and enforcement tool, it did not consider whether subsequent periodic evaluation was appropriate.

This guidance establishes such a periodic review requirement. Many of the existing ESA programs have been implemented for over ten years, and circumstances may have changed; periodic review of ESA programs will ensure that they remain prudent compliance and enforcement tools, and are updated or modified as appropriate. Moreover, as discussed below, the periodic reviews will also provide the enforcement managers the forum to discuss how to review the ESA penalty numbers to reflect inflation.

A. Evaluation Process

The evaluation process for a national ESA program should be led by the media-specific OCE Division or OSRE, and coordinated with the Regional enforcement managers implementing the ESA program. While Headquarters/Regional enforcement managers for each national ESA program can determine the particular frequency for its periodic reviews, such reviews should occur not less frequently than every five years. A five year period provides sufficient time to have experience with a new or revised ESA program, without waiting too long to see if revisions may be appropriate based on experience gained in implementing the ESA program. Headquarters management will periodically inquire into the status of the ESA program reviews. Note, for any ESA program that was approved as a national program more than five years ago,[18] the

[18]Although some adjustments have been made to the following ESA programs somewhat recently, the following ESA programs have been authorized for more than five years and thus would need to be evaluated fully within two years of this guidance:

1. UST Field Citation (1992)
2. Clean Water Act SPCC (2003; 2010 penalty update)
3. Clean Air Act 112(r) (2004; 2011 penalty update; 2013 limited update)

Headquarters/Regional enforcement managers must complete the periodic review, including any adjustments for inflation, within two years of this guidance.

There is not one format that a review must follow; many forms of review may be appropriate. For example, the Headquarters/Regional enforcement managers may include a discussion and review of the ESA program as part of a routine call (*e.g.*, it can be a topic on a monthly enforcement managers calls), or as part of an annual or biannual enforcement managers meeting. However, a record of the outcome of the review (*e.g.*, maintain the ESA as written, revise the ESA, terminate the ESA, and the reasons for the decision) should be memorialized in writing for future reference.

As part of the periodic review, the Headquarters/Regional enforcement managers should evaluate several issues, including:

(1) Have the purposes and goals of the particular ESA program been met?
(2) Using ICIS and other information, is there an appropriate mix of ESAs and traditional enforcement tools for the program?
(3) Are all the Regions using the ESA program as intended, and if not, are the differences appropriate?
(4) If the vast majority of violations of the larger program are being resolved as ESAs, should the penalty policy for the overall program be revised?
(5) Was the ESA initially crafted to address a new regulatory or statutory requirement, and if so is it still appropriate several years into the requirement?
(6) Are revisions to particular elements of the ESA appropriate based on issues identified during implementation (*e.g.*, repeat violators, size of penalties)?
(7) Has there been a penalty adjustment rule since the last review, and if so, how should penalties in the ESA be adjusted to reflect inflation? See below.
(8) Are there other ways to address the goals of the ESA (*e.g.*, if concerns regarding small businesses gave rise to the ESA, can they be addressed through a micro business policy instead)?
(9) How often are sources requesting extensions and should the time frame provided in the ESA for accepting settlement be adjusted based on this experience?

B. Adjusting ESA Penalties to Reflect Inflation

Although to date the EPA has adjusted its penalty policies four times pursuant to the Debt Collection Improvement Act,[19] we have not routinely adjusted penalties in ESAs at the same time. Because ESAs are essentially alternative penalty policies, they also should be adjusted to reflect inflation; indeed some ESA programs have already adjusted their penalties at least once (*e.g.*, SPCC in 2010; CAA Chemical Accident Prevention in 2011). Thus, in the future, as part of the periodic reviews of ESA programs, Headquarters/ Regional enforcement managers should consider how to make any appropriate adjustments to the penalties in the ESA to reflect inflation.

4. Revised Clean Water Act Storm Water Construction (reauthorized 2006)
5. Emergency Planning and Community Right to Know Section 312 ESA (2008)
6. Clean Air Act Vehicles and Engines (2008)

[19] *See* the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note.

More specifically, if an inflation adjustment rule (or several adjustment rules) has been issued since the ESA penalties were last updated, then the enforcement managers should calculate how the penalty adjustment factors would impact the ESA penalties. Note, that if the applicable inflation adjustment factor is not large, the impact on the already relatively low penalties in an ESA may be so negligible that they do not necessitate adjustment (*e.g.*, it would not be worth reissuing the ESA documents to increase a penalty for a violation from $100 to $101). However, we do not expect this to be the case for any longstanding ESA programs that have remained the same through several penalty adjustment exercises.

While the inflation adjustment rule typically provides a multiplication factor for adjusting penalties, because ESAs are meant to be simple and easy for the recipient to follow, adjustments to ESA penalties are best achieved by reissuance (by OCE Office Director or OSRE Office Director) of new ESA model documents containing the revised penalties. The January 10, 2010 adjustment to the SPCC ESA penalties provides an example of how such an adjustment can be made to an existing ESA program.

Finally, please note that if an ESA program has a cap on total penalties that may be assessed in an ESA, that cap should be adjusted as well. *See, e.g.,* Changes to Restrictions on Use of Expedited Settlements in Addressing Violations of the Clean Air Act Chemical Accident Prevention Regulations (Dec. 20, 2013) (raising the cap on total penalties to $15,000 to accommodate the increase in the per violation penalties).

IV. Conclusion

In conclusion, ESAs serve a specific function within the broader, robust enforcement program. The EPA should continue to develop new ESA programs as appropriate, and assess the success of existing ESA programs and revise these programs as necessary to ensure their utility in the overall enforcement strategy in order to achieve the greatest amount of environmental benefits through compliance with current laws.