

## MEMORANDUM

**SUBJECT:** Transmittal of the 2021 RCRA Expedited Settlement Agreement Pilot

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

ROSEMARIE  
KELLEY

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Date: 2021.09.10 13:31:38 -04'00'

Cyndy Mackey, Director  
Office of Site Remediation Enforcement

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Date: 2021.09.14 14:36:38 -04'00'

Karin Leff, Director  
Federal Facilities Enforcement Office

Leff, Karin

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Date: 2021.09.13 12:30:38  
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**TO:** Regional Counsels  
Enforcement and Compliance Assurance Division Directors  
RCRA Enforcement Managers  
Federal Facility Program Managers  
Office of Site Remediation Enforcement Division Directors

Attached is the 2021 RCRA Expedited Settlement Agreement Pilot (“2021 RCRA ESA Pilot” or “Pilot”) pursuant to the November 24, 2014 memorandum titled “Revised Guidance on the Use of Expedited Settlement Agreements” (2014 ESA Guidance) and corresponding model documents. The 2021 RCRA ESA Pilot replaces the RCRA ESA Policy dated September 30, 2013, which established an expedited settlement process for resolving specific RCRA Subtitle C violations during the life of the Pilot. As described in further detail below, this Pilot specifies eligibility criteria for the Regions to use to determine whether a case is eligible for resolution through a RCRA ESA. Violations eligible for coverage under the Pilot must be easily detected and easily corrected, cannot pose a current or likely imminent and substantial endangerment to human health or the environment, and must not require extensive investigation to prove and resolve. Violations that result in a facility being designated a Significant Noncomplier (SNC) are not eligible for an ESA.

This Pilot is consistent with the 2014 ESA Guidance in that traditional enforcement mechanisms must be utilized if an ESA offer is rejected or ignored. The EPA always reserves the right not to extend an ESA offer to any particular party and the penalty amount in an ESA settlement offer is non-negotiable.

This Pilot will last for a 36-month period. After 12 and 24 months, the Waste and Chemical Enforcement Division (WCED), together with the Office of Site Remediation Enforcement (OSRE) and the Federal Facilities Enforcement Office (FFEO), will evaluate the Pilot based on data and feedback from the Regions and Headquarters’ offices.

For questions or assistance during the implementation of this Pilot, please contact Ann Stephanos (OCE) at 202-564-4006. For specific questions regarding corrective action, please contact Elisabeth Freed (OSRE) at 202-564-5117, and for federal facility enforcement, please contact Melanie Garvey (FFEO) at 202-564-2579.

cc: ESA Workgroup Members  
Amy Porter  
Carol Holmes  
Laurie Ireland

#### Attachments

2021 RCRA ESA Pilot (Attachment A)  
Model Notice Letter for Expedited Settlement of RCRA Violations (Attachment B)  
Model Expedited Settlement Agreement for RCRA ESA Program (Attachment C)  
Model Injunctive Relief Worksheet (Attachment D)

## Attachment A

### 2021 RCRA Expedited Settlement Agreement (RCRA ESA) Pilot

#### 1. Introduction

The Environmental Protection Agency (EPA) has many civil enforcement tools at its disposal to respond to violations of RCRA. These include: notices of violation, administrative complaints, referrals to the Department of Justice, and expedited settlement agreements consistent with this 2021 RCRA ESA Pilot.

This 2021 RCRA ESA Pilot makes ESAs eligible to all RCRA-regulated facilities regardless of type or size (i.e., eligibility is based on the type and number of violations, not on the violator's size or presumed sophistication).

ESAs are a form of a Consent Agreement and Final Order (CAFO), 40 C.F.R. §22.13(b) and 40 C.F.R. §22.18(b). An ESA is a nonnegotiable expedited settlement used in the defined circumstances set forth herein. Attached to this 2021 RCRA ESA Pilot are the corresponding model documents.

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.

#### 2. Eligibility Criteria

The most significant change from the 2013 RCRA ESA Policy is the removal of the list of ineligible violations. The universe of violations eligible for resolution using an ESA is therefore not delineated. Instead, each case must be evaluated in accordance with the case development process to determine whether a case is eligible for resolution through a RCRA ESA. This process includes: (1) evaluating the violator's Significant Non-Complier (SNC) status; (2) determining whether the specific violations at issue are easily detected and easily corrected, and do not pose a current or likely imminent and substantial endangerment to human health or the environment; and (3) calculating the penalty using the ESA penalty values, which must total less than the \$20,000 penalty cap.

SNC Status: SNCs are not eligible for an ESA. Thus, the first step in determining whether a case is eligible for an ESA under this 2021 RCRA ESA Pilot is to evaluate the alleged violations and

determine whether the violator is a SNC using the 2003 Hazardous Waste Enforcement Response Policy (RCRA ERP). According to the RCRA ERP, “SNCs are those violators who have caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous waste constituents; are chronic or recalcitrant violators; or deviate substantially from the terms of a permit, order, agreement or from RCRA statutory or regulatory requirements.” The case team should document whether the specific facts of a case warrant a SNC determination and consider appropriate enforcement options.

Easily Detected/Easily Correctable Violations That Do Not Pose an Imminent and Substantial Endangerment: If the specific facts of a case do not result in a SNC determination, then the second step is to determine whether all of the violations are easily detected, easily correctable, and do not pose a current or likely imminent and substantial endangerment to human health or the environment. If, based on case-specific facts, the case team decides that all of the violations, including violations of cleanup requirements or corrective action orders or permits, meet this description, then the case may be eligible for an ESA.

Additional Violation-Specific Considerations:

- If the violations include failure to respond to a Request for Information or provide records pursuant to Section 3007, then the facility is not eligible for an ESA.
- If the case is subject to other guidance that requires notification,<sup>1</sup> consultation or concurrence with Headquarters, then the facility may be eligible for an ESA.

Calculating the ESA Penalty

The final step in determining whether an ESA is appropriate in a specific case is to calculate the penalty. The penalty amount per violation is \$1,250 and multiple, related violations can be compressed as described in the 2003 RCRA Civil Penalty Policy. The new penalty cap in this 2021 RCRA ESA Pilot is \$20,000.

If the Region includes a failure to file a report in the biennial reporting system (BRS) as a violation, then the penalty for that violation is \$2,500 in accordance with the BRS ESA program. If the Region wants to include BRS violations as part of this 2021 RCRA ESA Pilot, then the penalty for the total number of violations, including the BRS violation, must still be \$20,000 or lower.

To document the above analysis, the enforcement team should record how EPA determines whether each facility is eligible for an ESA, as well as EPA’s calculation of the penalty.

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<sup>1</sup> A notification by a Region to FFEO to determine FFEO’s involvement in a regulatory enforcement action involving a federal agency or facility per the June 10, 2015, Dave Kling Memorandum, “Revised Procedures for Determining Level of Federal Facility Enforcement Office (FFEO) Involvement in Formal Regulatory Enforcement Cases” will not preclude the issuance of an ESA to a federal agency or federal facility if all other criteria of this RCRA ESA Pilot are met.

### **3. Timeliness of Response**

To encourage timely resolution, ESA offers must require Respondents to sign and return the ESA within 30 calendar days of the date of its receipt before the ESA is automatically withdrawn. Regions are expected to pursue formal enforcement if, within 90 days of Respondent's receipt of the ESA offer, the Respondent declines or does not adequately respond to the offer of settlement. An adequate response includes returning the signed agreement, paying the penalty, and certifying that the violation(s) has been corrected. This deadline is important so that if the respondent fails to meet the ESA deadlines, cases do not languish, and the Region may proceed promptly to formal enforcement.

EPA may grant an extension of no more than 60 days if the facility makes the request in writing no later than 10 days before the end of the initial 30-day compliance period and demonstrates that it is technically infeasible or impracticable to correct the violations within 30 days. As EPA cannot anticipate every situation in which a facility may need more than 30 days, such requests will be decided on a case by case basis, depending on the reason for the request and if the facility demonstrates that it is technically infeasible or impractical to correct the violations within 30 days.

### **4. Repeat Violators**

This 2021 RCRA ESA Pilot provides the discretion to issue an ESA to a repeat violator. A repeat violator, for purposes of this Pilot, is a facility that has received an NOV or an ESA within the past five years, entered into a CAFO within the past five years, or was identified as a SNC but has returned to compliance within the last five years. Regions may only issue a second ESA after the facility has attained compliance with the first enforcement action and an ESA can only be used once for a repeat violator in a five-year period. Under this Pilot, a minimum 10% increase in penalty for history of non-compliance should be applied for repeat violators while still maintaining the penalty cap of \$20,000 (the penalty for each ESA is still less than would be calculated under the ERP). The option to issue an ESA to a repeat violator applies to any violations otherwise eligible for an ESA under the Pilot, including violations of cleanup requirements or corrective action orders or permits.

### **5. Model Documents**

Attached are the following model ESA documents: (1) Model Notice Letter for Expedited Settlement of RCRA Violations (Attachment B), (2) Model Expedited Settlement Agreement for RCRA ESA Program (Attachment C) and (3) Model Injunctive Relief Worksheet (Attachment D). Regions should use these models, with appropriate regional modifications, when implementing this 2021 RCRA ESA Pilot. A region may not modify the Injunctive Relief Worksheet or any substantive aspects of the Pilot (e.g., deadline for responding to ESA offer) when revising these models for the region.



## Attachment B

### Model Notice Letter for Expedited Settlements of RCRA Violations

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

**[Facility Contact]**  
**[Facility Contact Title]**  
**[Facility Name and Address]**

Re: EXPEDITED SETTLEMENT OPPORTUNITY  
Notice of Investigation Results under the Resource Conservation and Recovery Act  
[Facility Name]  
EPA ID Number: [ID #]  
Docket Number: [Docket #]

Dear **[Facility Contact]**:

Based on our review of information gathered during this **[inspection, file review, or virtual inspection]**, the U.S. Environmental Protection Agency (“EPA”), Region **[Number]**, has identified violations of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6922(a)(6) and the authorized **[State]** hazardous waste management program at **[Facility name]**, located at **[Facility address]**.<sup>1</sup>

By this letter, we wish to provide you with an opportunity to quickly resolve these violations by entering into an Expedited Settlement Agreement. The EPA has authority under RCRA to pursue civil penalties for violations of RCRA requirements that are easily identifiable and easily correctable, such as the violations cited below. You may resolve the alleged violations by correcting the violations cited below, paying the specified penalty, and signing and returning the enclosed Expedited Settlement Agreement within 30 days of your receipt of this letter.

If you dispute these violations, please provide a written explanation, along with any documentation to **[EPA contact]** at the address below within 30 days of your receipt of this letter.

As a result of the EPA **[inspection, file review or virtual inspection]** of your facility on **[Date]**, **[Respondent]** failed to comply with the following RCRA regulation[s]:

**[1] – [Violation Title]**  
**[Explanation of violation including description of evidence]**

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<sup>1</sup> See **[State Regulation]**. EPA is enforcing **[State]** hazardous waste management program requirements as approved and authorized by the United States on **[Date]** (see **[Federal Register Notice]**) and the revisions to the hazardous waste management program as approved and authorized by the United States on **[Date]** (see **[Federal Register Notice]**).

## **Expedited Settlement Agreement Process**

Under the authority of Section 3008 of RCRA, 42 U.S.C. §6928, the EPA may pursue civil penalties of up to seventy-six thousand seven hundred sixty-four (\$76,764) per day for each violation of Subtitle C of RCRA, including violations of approved and authorized State program requirements.

However, the EPA is offering to resolve the violations described above with an Expedited Settlement Agreement (Agreement), which provides you the opportunity to quickly resolve the violations with payment of a substantially reduced penalty. If you choose to sign the Agreement, then the EPA will settle the violations listed above for \$[Amount]. In order to take advantage of the Expedited Settlement offer, within thirty days of your receipt of this letter, you must:

- (1) Correct the existing violation[s]. This shall be documented [on the enclosed document titled “Injunctive Relief Worksheet.”]
- (2) Complete and return to EPA the enclosed Expedited Settlement Agreement (“ESA” or “Agreement”). In signing the enclosed Agreement, you are certifying that you have corrected the RCRA violation[s] cited above, paid the assessed penalty, and you are waiving your opportunity for a hearing or an appeal concerning your violation[s].
- (3) Pay the assessed penalty of \$[Amount]. The information below explains how and where to pay the penalty.

Payment under this Agreement must be made by cashier’s check or certified check payable to the order of “Treasurer, United States of America.” Note the title and docket number of this action on the check. Deliver the check via United States mail to the following address:

U.S. Environmental Protection Agency  
Fine and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, Missouri 63197-9000

Please send, by email, a PDF copy of the signed Agreement and proof of penalty payment (i.e., a copy of the check or a statement of affirmation regarding electronic funds transfer) to the address below and also send the original documents via United States first class mail, to:

**[EPA contact and title]**  
U.S. Environmental Protection Agency  
**[Regional Office]**  
**[Regional Address]**  
**[Regional Email Address]**



A copy of your proof of penalty payment, as described above, should also be e-mailed to:

Regional Hearing Clerk  
U.S. Environmental Protection Agency  
**[Regional Hearing Clerk Email Address]**

If you can demonstrate, in writing, that it is technically infeasible or impracticable to correct your RCRA violation[s] within thirty days, upon request, the EPA, at its discretion, may grant an extension. Extension requests and the above demonstration must be made in writing no later than ten days before the end of the initial 30-day compliance period. The request must clearly indicate whether you intend to take advantage of the settlement agreement. Any extensions must be granted in writing by the EPA.

If you do not follow the procedures outlined in this letter for Expedited Settlement (i.e., correct your violation, pay the assessed penalty, and sign the ESA) within 30 days of receipt of this letter, then this settlement offer will be automatically withdrawn, without prejudice to the EPA's ability to file an enforcement action for the cited violation[s]. The EPA may seek penalties of up to \$76,764 per day for each violation cited above.

We are committed to the fair and rapid settlement of this matter. If you have any questions or wish to discuss the general circumstances of your case, please contact **[EPA contact]** of my staff at **[Phone Number and/or Email Address]**.

Sincerely,

**[EPA Manager's Name and Signature Block]**

cc: State Contact  
**[Persons to cc]**

Enclosures

1. Expedited Settlement Agreement
2. Injunctive Relief Worksheet
3. Instructions for Making a Payment **[if enclosed]**

Attachment C

Model Expedited Settlement Agreement for Pilot Program

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION [Number]

IN THE MATTER OF:	)	Docket No.
	)	[Number]
	)	
[Facility Name]	)	
[Facility Address]	)	<b>EXPEDITED SETTLEMENT</b>
EPA ID. No. [#]	)	<b>AGREEMENT AND</b>
	)	
Respondent	)	<b>FINAL ORDER</b>
	)	
	)	

**EXPEDITED SETTLEMENT AGREEMENT**

1. The U.S. Environmental Protection Agency (“EPA”) is authorized to enter into this Expedited Settlement Agreement (“Agreement”) pursuant to Section 3008 of the Resource Conservation and Recovery Act (“RCRA”) and 40 C.F.R. § 22.13(b).
2. By copy of this letter, the EPA is providing the [State] with notice of the referenced violations of Subtitle C of RCRA as required by Section 3008(a)(2).
3. [Facility name] (“Respondent”) is the owner or operator of the facility at [Address] (“Facility”). The EPA [inspected the facility, reviewed files or conducted a virtual inspection] on [Date]. The EPA alleges that Respondent violated the following requirements of the RCRA and the EPA approved and authorized [State] hazardous waste management program. [State Regulation].
  - a. [C.F.R. or State regulation reference] requires that [regulatory description]. On [Date], [short description/evidence of violation], in violation of [C.F.R. or state regulation reference].
4. The EPA and Respondent agree that settlement of this matter for a civil penalty of [write out amount] dollars (\$[Amount]) is in the public interest.
  1. In signing this Agreement, Respondent: (1) admits that Respondent is subject to RCRA and its implementing regulations; (2) admits that EPA has jurisdiction over Respondent and Respondent’s conduct as alleged herein, (3) neither admits nor denies the factual allegations contained herein; (4) consents to the assessment of this penalty; (5) waives the opportunity for a hearing to contest any issue of fact or law set forth herein; (6) waives its right to appeal the Final Order accompanying this Agreement pursuant to Section 3008(b)

of RCRA; and (7) consents to electronic service of the filed ESA.

2. In addition, if the Respondent is a Federal agency, the Respondent waives its rights to confer with the Administrator pursuant to section 6001(b)(2) of RCRA.
7. By its signature below Respondent certifies, subject to civil and criminal penalties for making a false submission to the United States Government, that: (1) the alleged violation[s] **has/have** been corrected, and (2) Respondent is submitting proof of payment of the civil penalty with this Agreement.
8. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this Consent Agreement and Final Order and to execute and legally bind Respondent to it. Upon the effective date of this Agreement, payment of the civil penalty shall constitute full settlement of the civil claims alleged herein.
9. EPA reserves all of its rights to take an enforcement action for any other past, present, or future violations by Respondent of RCRA, any other federal statute or regulation, or this Agreement.
10. Each party shall bear its own costs and fees, if any.
11. This Agreement is binding on the parties signing below, and in accordance with 40 C.F.R. § 22.31(b), is effective upon filing.

### **FINAL ORDER**

Pursuant to the authority of Section 3008(a) of RCRA, 42 U.S.C. §6938(a), and according to the terms of this Expedited Settlement Agreement and Final Order, IT IS HEREBY ORDERED THAT:

12. Respondent shall pay a civil penalty of **[write out amount]** dollars (**[\$Amount]**) within 30 days of its receipt of the letter setting forth the opportunity for expedited settlement. Such payment shall identify Respondent by name and docket number and be paid in accordance with the Penalty Collection Procedures provided to Respondent.
13. A copy of the certified or cashier's check or other information confirming payment shall be simultaneously be sent via e-mail to the following:

**[Regional Hearing Clerk]**

U.S. Environmental Protection Agency, Region [#]

**[Regional Hearing Clerk Address]**

**[Regional Hearing Clerk Email Address]**

**[EPA Contact and Title]**

U.S. Environmental Protection Agency, Region [#]

**[Regional Address]**  
**[Regional Email Address]**

14. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CAFO shall be claimed by Respondent as a deduction for federal, state or local income tax purposes.
15. Upon signing and returning this Agreement to the EPA, the Respondent waives the opportunity for a hearing or appeal pursuant to section 9006(b) of RCRA or 40 C.F.R. part 22. In addition, if the Respondent is a Federal agency, the Respondent waives its right to confer with the Administrator pursuant to section 6001(b)(2) of RCRA.
16. This Expedited Settlement Agreement and Final Order shall be effective upon the filing of the Final Order by the Regional Hearing Clerk for EPA, Region [#]. Unless otherwise stated, all time periods state herein shall be calculated in calendar days from such date.

IT IS SO AGREED,

\_\_\_\_\_  
Name (print)

\_\_\_\_\_  
Title (print)

\_\_\_\_\_  
Signature

Date: \_\_\_\_\_

APPROVED BY EPA:

\_\_\_\_\_  
**[EPA Manager's Name]**  
**[Title]**

Date: \_\_\_\_\_

IT IS SO ORDERED:

\_\_\_\_\_  
**[Name]**  
**Regional Judicial Officer [Region]**

Date: \_\_\_\_\_

**Attachment D**

**Injunctive Relief Worksheet**  
**[Respondent's Name]**  
**[City, State]**

Instructions: For each violation listed below, you must describe what actions you took to correct the violation and provide documentation (such as a photograph or copies of appropriate documentation) to show that each violation has been corrected. **You must sign and return this sheet with your signed ESA.**

1. [Violation Citation]

*How was this violation addressed:* \_\_\_\_\_  
\_\_\_\_\_

2. [Violation Citation]

*How was this violation addressed:* \_\_\_\_\_  
\_\_\_\_\_

Signature: \_\_\_\_\_

Date \_\_\_\_\_

Printed  
Name: \_\_\_\_\_  
\_\_\_\_\_

Printed Title: \_\_\_\_\_

**Expedited Settlement Penalty Worksheet**  
**[Respondent's Name]**  
**[City, State]**

<b>Violation</b>	<b>Penalty per occurrence</b>	<b>Number of occurrences</b>	<b>Total penalty for violation</b>
<b>TOTAL PENALTY</b>			

**United States  
Environmental Protection Agency, Region  
Penalty Collection Procedures**

1. Certified or cashier's check (no personal checks) made payable to "United States Treasury" and remitted to the address below. Please reference the docket number on the check.

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
PO Box 979077  
St. Louis, Missouri 63197-9000

2. On-line payments made through a website provided by the Department of Treasury ([www.pay.gov](http://www.pay.gov)). Enter "sfo 1.1" in the "search public forms" field. Open the form and complete the required fields.

3. Wire transfers should be directed to the Federal Reserve Bank of New York:

Federal Reserve Bank of New York  
ABA = 021030004  
Account = 68010727  
SWIFT address = FRNYUS33  
33 Liberty Street  
New York NY 10045  
Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

Proof of penalty payment (e.g., a copy of the certified or cashier check, a statement of affirmation regarding electronic funds transfer) should be e-mailed, to:

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region

and

Office of Regional Counsel  
U.S. Environmental Protection Agency, Region