

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

[FRL-6576-4]

Small Business Compliance Policy

AGENCY: Environmental Protection Agency (EPA)

ACTION: Final Policy Statement

SUMMARY: The Environmental Protection Agency (EPA) today issues its revised final Small Business Compliance Policy to expand the options allowed under the Policy for discovering violations and to establish a time period for disclosure. This Policy was originally titled the Policy on Compliance Incentives for Small Businesses. This Policy is intended to promote environmental compliance among small businesses by providing incentives for voluntary discovery, prompt disclosure, and prompt correction of violations. The Policy accomplishes this in two ways: by setting forth guidelines for the Agency to apply in reducing or waiving penalties for small businesses that come forward to disclose and make good faith efforts to correct violations, and by deferring to State, local and Tribal governments that offer these incentives. Major revisions released today include lengthening the prompt disclosure period from 10 to 21 calendar days and broadening the applicability of the Policy to violations uncovered by small businesses through any means of voluntary discovery.

DATES: This policy is effective May 11, 2000.

ADDRESS: Additional documentation relating to the development of this policy is contained in the Office of Enforcement and Compliance Assurance (OECA) public docket (EC-P-1999-009). An index to the docket may be obtained by contacting the Enforcement and Compliance Docket and Information Center by telephone at (202) 564-2614 or (202) 564-2119, by fax at

(202) 564-1011, or by email at docket.oeca@epa.gov. Office hours are 8:00 a.m. to 4:00 p.m., Monday through Friday, except legal holidays. An additional contact is Ginger Gotliffe (202) 564-7072; fax (202) 564-009; e-mail: gotliffe.ginger@epa.gov.

SUPPLEMENTARY INFORMATION:

Introduction. Five years ago, EPA reorganized its compliance programs. This reorganization was undertaken by Administrator Browner with a goal of making EPA's enforcement and compliance programs more effective in protecting public health, safety and the environment. The reorganization also improved and enhanced EPA's ability to reach out to small businesses with information to help them comply with environmental requirements. Five years after the reorganization, EPA conducted outreach efforts to obtain feedback on compliance and enforcement activities, on ways to further improve public health, safety and the environment through compliance efforts, and on actions the Agency has taken over the past five years. From these and other outreach efforts and from meetings and conference calls with interested stakeholder groups, OECA received feedback that improvements were needed to both its Audit Policy and to its Small Business Policy. In response to that feedback, OECA reviewed ways to improve these Policies.

Background and History. EPA issued two incentives policies in 1995 and 1996. The "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," informally known as the "Audit Policy," was issued in December 1995. See 60 FR 66706 (Dec. 22, 1995). The purpose of the Audit Policy, which is available to entities of any size, is to enhance protection of human health, safety and the environment by encouraging regulated

businesses to voluntarily discover, promptly disclose, expeditiously correct and prevent violations of federal environmental law. Benefits available to businesses that qualify for the Audit Policy include reductions in the amount of civil penalties and no recommendation for prosecution of potential criminal violations. The Audit Policy has been recently modified, and the Final revised Audit Policy is being published today in the Federal Register.

To address the special needs of small businesses EPA issued the “Policy on Compliance Incentives for Small Businesses,” which is commonly called the “Small Business Policy,” in June 1996. See 61 FR 27984 June 3, 1996. The Small Business Policy implements section 223 of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996. The term “small business” will be used throughout this Policy, however this term will also cover entities such as small governments and small organizations as defined in SBREFA. Under the existing Small Business Policy, EPA will waive or reduce civil penalties whenever a small business makes a good faith effort to comply with environmental requirements by discovering violations as part of a government sponsored compliance assistance program or a voluntary environmental audit, promptly disclosing those violations, and correcting them in a timely manner. If the small business meets all the criteria in the policy, including violation history, correction timeframe, and lack of harm, EPA will waive 100% of the gravity component of the civil penalty. Moreover, EPA will defer to State, local and Tribal actions that are consistent with the criteria set forth in this Policy. The Small Business Policy provides penalty reduction as an incentive for small businesses, who are less likely than large businesses to have sophisticated environmental expertise, to ask for compliance assistance. This policy was also simpler for

small businesses to use.

There are several notable differences between the existing Audit Policy and Small Business Policy. First, the policies allow penalty reduction for violations discovered in different ways. The Audit Policy addresses violations discovered through systematic methods such as audits as well as through non-systematic methods. The Small Business Policy applies only to violations discovered through audits and during government sponsored on-site compliance assistance activities. Second, the penalty reduction granted by the policies varies. The Audit Policy provides 100% reduction of the gravity component of the penalty (explained below) for systematic discoveries (i.e., part of a regular audit program) and 75% for non-systematic discoveries. The Small Business Policy grants provides up to 100% reduction of the gravity component of the penalty for violations discovered either through regular audits or during government sponsored on-site compliance assistance activities. Finally, the period within which violations must be corrected is different. Under the Audit Policy, businesses must correct a violation within up to 60 days of its discovery of the violation to qualify for penalty reduction. Under the Small Business Policy, a business must generally correct a violation within 180 days of its discovery to qualify for penalty reduction, and within 360 days if the correction involves pollution prevention modifications.

In addition to these notable differences, the Audit Policy addresses several issues not covered by the Small Business Policy; criminal conduct and multi-facility disclosures. The Small Business Policy is inapplicable for criminal violations. Violations that may involve criminal conduct can be addressed under the Audit Policy. In the unlikely situation where a disclosure

involves a multi-facility business, the Agency will identify the relevant provisions of the Audit and Small Business Policies.

Changes to Policy. EPA is today making several major changes to the Small Business Compliance Policy. All of these changes will make it easier for small businesses to take advantage of the Small Business Compliance Policy. These changes result from EPA's evaluation of comments received on our proposed modification of the Small Business Compliance Policy, which was published on July 29, 1999. See 64 FR 41116.

The following sections discuss the two major changes that we have made to the Small Business Compliance Policy: expansion of options for discovery of violations and lengthening the disclosure period.

1. Expanded Options for Discovery of Violations. Comments submitted to EPA suggested that this Policy should be expanded to include violations that are discovered by a variety of compliance assistance activities, including participation in compliance programs or the use of tools that have been developed or sponsored by EPA, the States, and local, private and non-profit assistance providers. Based on its evaluation of those comments, EPA has decided in the revised Small Business Compliance Policy to allow small businesses to obtain penalty relief if violations are discovered by any voluntary means in addition to discovery as the result of government sponsored on-site compliance assistance activities or environmental audits. For example, voluntary discovery could result from compliance management systems (CMSs), pollution prevention assessments, participation in mentoring programs, training classes, use of on-line compliance assistance centers, and use of checklists. These programs and activities need

not be associated with environmental regulatory agencies, but may be associated with any public, private, or non-profit organization. The Agency wants to encourage participation in those programs or activities that could increase compliance, improve efficiency, and reduce pollution.

There are a variety of activities and sources of information that a small business can use to learn more about environmental regulatory requirements. EPA and the States provide various forms of compliance assistance. Some State assistance programs are run as confidential services to the small business community. If a small business wishes to obtain a corrections period under this policy after receiving compliance assistance from a confidential program, the business must promptly disclose the violations to the EPA or the State or Tribal government agency which is applying a similar policy and comply with the other provisions of this Policy.

2. Clarify and Lengthen the Disclosure Period. This revised Small Business Compliance Policy extends the time period within which the small business must fully disclose a violation from 10 to 21 calendar days. The original Policy required “prompt disclosure” for compliance assistance discovery and 10 day disclosure for discoveries made through an environmental audit.

Lengthening the disclosure period to 21 calendar days regardless of how the violation was discovered will give small businesses more opportunity to make use of the Small Business Compliance Policy while allowing EPA to get timely reporting of violations. Such timely reporting provides the Agency with clear notice of violations that have or may have occurred and the opportunity to respond if necessary, as well as an accurate picture of a given businesses’ compliance record. Lengthening the disclosure period to 21 calendar days is also consistent with a similar change that EPA made to the Audit Policy.

EPA received comment that there might be situations where small businesses would not be able to disclose within the 21 calendar day period. Therefore the revised Small Business Compliance Policy addresses this issue. Where the 21 calendar day disclosure period has not expired and a small business knows that it will be unable to disclose within that time period, the small business is advised to contact the appropriate EPA Office before the period expires to request additional time. For situations in which the 21 calendar day disclosure period has already expired, the Agency may accept a late disclosure in the exceptional case, such as where there are complex circumstances. In such instances, the small business will need to demonstrate that an exceptional case exists.

With the broadening of the options for the discovery of violations, there was some concern by one commenter in a follow-up conversation about the event that triggers the beginning of the 21 calendar day disclosure period. The 21 calendar day disclosure period begins when the small business discovers that a violation has, or may have, occurred. Discovery occurs when any officer, director, employee or agent of the facility becomes aware of any facts that reasonably lead him or her to believe that a violation has or may have occurred at the facility.

Other Issues Addressed by Public Comment. There were also issues that the public commented on, either through outreach activities or in response to the Agency's proposed modifications. These covered reduction of penalties, implementation of the policy, and the combination of the Audit Policy and the Small Business Compliance Policy.

1. Penalty Reduction. EPA did not change the Small Business Compliance Policy provisions on

reducing or eliminating the gravity component of civil penalties that it would otherwise seek.

Civil penalties are made up of two components: a gravity component and an economic benefit component. The gravity component typically reflects the nature of the violations, the duration of the violations, the environmental, safety or public health impacts of the violations, good faith efforts by the business to promptly remedy the violation, and the business's overall record of compliance with environmental requirements. Under this Policy, the Agency will grant 100% reduction of the gravity component of the penalty for violations provided all the other criteria in the policy are met. The Agency believes the incentive of 100% reduction of the gravity component should encourage small businesses to disclose violations promptly and correct them within the specified time period.

The economic benefit component typically reflects any monetary advantage a small business has derived from the violations. For example, if a small business significantly reduced its expenses by not purchasing and installing an emission control device to meet regulatory requirements, then that small business has gained an economic benefit or advantage over its competitors who have complied with the environmental requirements. We received a comment that the possibility of being subject to the economic benefit component of a civil penalty would keep small businesses from using the policy. However, other commenters stated that the economic benefit component should be retained to protect law abiding small businesses from being placed at a competitive disadvantage to those which do not comply.

EPA retains discretion to consider and collect economic benefit where a significant benefit was gained, although based on its experience, the Agency does not anticipate the need to

exercise this discretion often. To date, the vast majority of the disclosures under the Audit Policy and all of the disclosures under the Small Business Compliance Policy have not necessitated recovery of economic benefit.

2. Implementation of the Policy. EPA has modified the Small Business Compliance Policy in format and language to provide the information in a more understandable manner. This in part helps to respond to comments about how we have implemented the Policy. In addition, when they become available, EPA will provide a fact sheet, contact list, and other information about the Policy at the EPA web site (<http://www.epa.gov/oeca/smbusi.html>) to increase the usefulness of the Policy. We will also ensure that other internet sites such as EPA's Small Business Ombudsman web site and the Compliance Assistance Center's web sites (all 9 Centers available at <http://www.epa.gov/oeca/main/compasst/compcenters.html>) link to this information about the Policy staff and other compliance assistance activities and initiatives will also provide information about the Small Business Compliance Policy.

Enhanced implementation of the Policy also involves improved procedures and coordination within EPA. EPA Headquarters and Regional staff working on the Audit Policy as well as this Small Business Compliance Policy are coordinating on issues and procedures to ensure national consistency in its application and to improve the timeliness of the Agency's review of each disclosure. In most circumstances, EPA will respond to a small business within 60 days of disclosure of a violation.

3. Combining Both Compliance Incentives Policies. As part of the Agency's evaluations of the Audit and Small Business Policies and given the similarities between the two Policies, EPA

asked for comments on the advisability of combining them. In particular, the Agency was interested in whether small businesses would be more likely to audit (or seek compliance assistance) and self-disclose violations if the two policies were merged. EPA received a range of comments supportive of combining the two policies if doing so would simplify the process for small businesses. After a careful review, EPA decided that it is preferable for small businesses to have a separate policy tailored specifically for them. The Small Business Compliance Policy: 1) is shorter and simpler, 2) contains additional benefits for small businesses such as a longer correction period and 100% penalty reduction of the gravity component for all covered violations, and 3) can be more easily distributed with compliance assistance materials developed just for small businesses.

We expect these changes to enable more small businesses to use the policy and thereby promote environmental compliance.

SMALL BUSINESS COMPLIANCE POLICY

A. INTRODUCTION AND PURPOSE

The Small Business Compliance Policy is intended to promote environmental compliance among small businesses by providing incentives for them to make use of compliance assistance programs, environmental audits, or compliance management systems (CMS), or to participate in any activities that may increase small businesses' understanding of the environmental requirements with which they must comply. The Policy accomplishes this in two ways: by

waiving or reducing civil penalties to which a small business might otherwise be subject, and by deferring to States and local governments or tribal authorities that offer these incentives consistent with the criteria established in this Policy.

EPA will waive or reduce the gravity component of civil penalties whenever a small business makes a good faith effort to comply with environmental requirements by:

- 1) voluntarily discovering a violation,
- 2) promptly disclosing the violation within the required time period, and
- 3) expeditiously correcting the violation within the proper timeframe.

To obtain the benefits of the Policy, the facility must also meet criteria on violation history, lack of harm, and criminal conduct.

B. BACKGROUND

This Policy implements section 223 of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996.

C. APPLICABILITY

This Policy applies to facilities owned by small businesses as defined here. A small business is a person, corporation, partnership, or other entity that employs 100 or fewer individuals (across all facilities and operations owned by the small business).¹ Entities, as defined under SBREFA, also include small governments and small organizations. Facilities that are

¹ The number of employees should be considered as full-time equivalents on an annual basis, including contract employees. Full-time equivalents means 2,000 hours per year of employment. For example, see 40 CFR §372.3.

operated by municipalities or other local governments may be covered under the Small Communities Policy (see <http://www.epa.gov/oeca/scpolicy.html>). Facilities that are disclosing violations involving multiple facilities should refer to the sections on multiple facilities in the Policy on Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations (the Audit Policy) of April 11, 2000.

This Policy supersedes the previous version of the policy which was called the Policy on Compliance Incentives for Small Businesses and became effective on June 10, 1996. To the extent that this Policy may differ from the terms of applicable enforcement response policies (including penalty policies) under media-specific programs, this document supersedes those policies.

D. HOW SMALL BUSINESSES CAN QUALIFY FOR PENALTY REDUCTION

EPA will eliminate or reduce the gravity component of civil penalties against small businesses based on the following criteria:

1. Discovery is Voluntary. The small business discovers a violation on its own before an EPA or State inspection. For example, a small business may discover violations after receiving compliance assistance, conducting an environmental audit or participating in mentoring programs. Other activities that may be useful in discovering violations include establishing CMS, using compliance checklists, reading materials on complying with environmental requirements, using compliance assistance center web sites, and attending training classes.

The violation must be identified voluntarily, and not through a monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent

agreement. For example, emissions violations discovered through a continuous emissions monitor (or alternative monitor established in a permit), violations of National Pollutant Discharge Elimination System (NPDES) discharge limits discovered through required sampling or monitoring, and violations discovered through a compliance audit required to be performed by terms of a consent order or settlement order are not eligible for penalty reduction under the policy.

2. Disclosure Period is Met.

i. The small business must voluntarily disclose a specific violation fully and in writing to EPA or the State within 21 calendar days after the small business has discovered that the violation has occurred, or may have occurred. Prompt disclosure is evidence of the small business's good faith in wanting to achieve or return to compliance as soon as possible. For purposes of this Policy, the time at which a small business discovers that a violation has or may have occurred begins when any officer, director, employee, or agent of the facility becomes aware of any facts that reasonably lead him or her to believe that a violation may exist. If a small business has some doubt as to the existence of a violation, EPA recommends that the business make a prompt disclosure and allow the regulatory authorities to make a definitive determination. This will ensure that the small business meets the disclosure period requirement.

ii. The disclosure of the violation must occur before the violation was otherwise discovered by, or reported to EPA, the appropriate state or local regulatory agency. See section F.1 of the Policy below. Good faith also requires that a small business cooperate with EPA and in a timely manner provide such information requested by EPA to determine applicability of this

Policy.

iii. If a small business wishes to obtain a corrections period after receiving compliance assistance from a confidential assistance program, the business may still take advantage of the policy by disclosing the violation to the appropriate regulatory agency.

3. Violation is Corrected. The business corrects the violation within the corrections period set forth below. Small businesses are expected to remedy the violations within the shortest practicable period of time. Correcting the violation includes remediating any environmental harm associated with the violation, as well as putting into place procedures to prevent the violation from happening again.

i. For any violation that cannot be corrected within 90 calendar days of its discovery, the small business must submit a written schedule, or the agency may, at its sole discretion, elect to issue a compliance order with a schedule, as appropriate. The small business must correct any violations within 180 calendar days after the date that they were discovered.

ii. If the small business intends to correct the violation by putting into place pollution prevention measures, the business may take an additional period of up to 180 calendar days, i.e., up to a period of 360 calendar days from the date the violation is discovered.

4. When the Policy Does Not Apply. The Policy does not apply if:

a. The facility has the following noncompliance history:

i. it has previously received a warning letter, notice of violation, or field citation, or been subject to a citizen suit or any other enforcement action by a government agency for a violation of the same requirement within the past three years.

ii. it has been granted penalty reduction under this Policy (or a similar State or Tribal policy) for a violation of the same or a similar requirement within the past three years.

iii. it has been subject to two or more enforcement actions for violations of environmental requirements in the past five years, even if this is the first violation of this particular requirement.

b. the violation was discovered through an information request, inspections, field citations, reported to a federal, state or local agency by a member of the public or a "whistleblower" employee, identified in notices of citizen suits, previously reported to an agency, or through an investigation unless the facility can demonstrate that it did not know that the agency had initiated the investigation and has disclosed in good faith.

c. The violation has caused actual serious harm to public health, safety, or the environment;

d. The violation is one that may present an imminent and substantial endangerment to public health, safety or the environment; or

e. The violation involves criminal conduct.

E. PENALTY REDUCTION GUIDELINES THAT EPA WILL FOLLOW

EPA will exercise its enforcement discretion to eliminate or reduce civil penalties as follows.

1. EPA will waive the gravity component of the civil penalty if a small business satisfies all of the criteria in section D. If, however a small business has obtained a significant economic

benefit from the violation(s), EPA will still waive 100% of the gravity component of the penalty, but may seek the full amount of the significant economic benefit associated with the violations.² EPA anticipates that such a significant economic benefit will occur infrequently. However, EPA retains its discretion to ensure that small businesses that comply with public health protections are not put at a serious competitive disadvantage by those who have not complied.

2. If a small business does not fit within the guideline E.1.immediately above, this Policy does not provide any special penalty reduction. However, if a small business has otherwise made a good faith effort to comply, EPA has discretion, pursuant to its applicable enforcement response or penalty policies, to waive or reduce civil penalties.³

3. Further, the Agency's enforcement response and penalty policies may allow for penalty reduction where the small business is able to document an inability to pay all or a portion of the penalty. Penalty reduction in this situation allows the small business to stay in business and to finance compliance. See *Guidance on Determining a Violator's Ability to Pay a Civil Penalty* of December 1986 (see <http://www.epa.gov/oeca/ore/aed/comp/acomp/a1.html>). Penalties also may be reduced pursuant to the *Final EPA Supplemental Environmental Projects Policy* of May 1998 (63 FR 24796, June 5, 1998, available at <http://www.epa.gov/oeca/sep/sepfinal.html>) and *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations Policy* of April 11, 2000.

² The "gravity component" of the penalty includes everything except the economic benefit amount.

³ For example, in some media specific penalty policies, the penalty calculation may be reduced to account for good faith efforts to comply.

4. This Policy sets forth how the Agency expects to exercise its enforcement discretion in deciding on an appropriate enforcement response and determining an appropriate civil penalty for violations by small businesses. It states the Agency's views as to the proper allocation of enforcement resources. This Policy is not final agency action and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.

F. ENFORCEMENT FOR VIOLATIONS NOT PROMPTLY CORRECTED

To ensure that this Policy enhances and does not compromise public health and the environment, a business remains subject to all applicable enforcement response policies (which may include discretion whether or not to take formal enforcement action) for all violations that were not remedied within the corrections period. The penalty in such action may include the time period before and during the correction period.

G. APPLICABILITY TO STATES AND TRIBES

Small businesses may take advantage of small business policies that many States have developed. EPA recognizes that states and tribes are partners in enforcement and compliance assurance and may have adopted their own penalty mitigation policies in Federally-authorized, approved or delegated programs. Therefore, EPA will generally defer to State and Tribal penalty mitigation for self disclosures as long as the State policy meets minimum requirements for Federal delegation and is generally consistent with the criteria set forth in this Policy. Whenever a State agency or Tribe provides a penalty waiver or mitigation or a correction period to a small business pursuant to this Policy or a similar policy, that State or Tribe should notify the

appropriate EPA Region to ensure coordination and to request that EPA defer to that action. Similarly, EPA will notify the appropriate State agency or Tribe whenever EPA applies this policy to ensure coordination and request the States defer to EPA's action. Regional contacts, along with other materials about the Policy, will be posted at the EPA web page (<http://www.epa.gov/oeca/smbusi.html>) as they become available.

H. EFFECTIVE DATE

This revised Policy is effective May 11, 2000.

Dated: April 5, 2000. **Sylvia K. Lowrance**, Acting Assistant Administrator for Enforcement and Compliance Assurance.