

**INTERIM POLICY ON COMPLIANCE INCENTIVES  
FOR SMALL BUSINESS**

**(SMALL BUSINESS POLICY)**

POLICY ENF-97.002

**I. INTRODUCTION**

**A. PURPOSE AND INTENT**

This interim policy sets forth how the Department of Environmental Protection expects to exercise its enforcement discretion in deciding on an appropriate enforcement response and determining an appropriate administrative penalty for violations by small businesses.

Many small businesses experience difficulty in complying with environmental requirements as a result of limited access to information concerning requirements and limited financial resources. This policy is intended to provide compliance incentives to those small businesses that are experiencing such difficulties. **Whether DEP decides to extend the incentives and benefits outlined in this policy to a particular small business is solely within DEP's discretion.** In some cases, even though a regulated entity may satisfy the definition of "small business" contained in this policy, application of this policy may not be appropriate, in whole or in part. In particular, the option to suspend or waive a penalty outlined in Section III.B.4 may not be appropriate where evidence exists that the small business clearly has ample access to information concerning compliance and/or financial resources necessary to comply.

Despite the difficulties typically experienced by small businesses, every small business is required to comply fully with the statutes and regulations administered by DEP, and will be

regulated in a manner consistent with other regulated entities to the fullest extent possible.

In recognition of the particular difficulties typically experienced by small businesses, this interim policy is intended to:

- 1) promote environmental compliance among small businesses by providing them with incentives to seek on-site compliance assistance, or to conduct environmental audits; and
- 2) achieve statewide consistency in responding to noncompliance by small business by providing guidance to DEP staff on the exercise of enforcement discretion in such cases.

## **B. APPLICABILITY AND LEGAL EFFECT**

This policy applies to all administrative enforcement actions against facilities owned and/or operated by small businesses as defined in this policy and Section II of the DEP 1997 Enforcement Response Guidance (ERG).

This policy applies to all such actions commenced after the effective date of this policy, April 26, 1997, and to all pending cases in which DEP has not reached agreement in principle with the regulated entity on the amount of an administrative penalty.

This policy supplements the ERG, and should be read in conjunction with it. The principles, policies and procedures contained in the ERG apply to small businesses unless otherwise provided below.

This policy supplements the DEP Interim Policy on Incentives for Self-Policing: Environmental Audit Policy (POLICY ENF-97.004), and should be read in conjunction with it.

This policy does not apply to settlements of claims for stipulated or suspended penalties for violations of consent orders or other settlement agreement requirements.

This policy may be replaced by industry sector-specific policy(ies) developed in recognition of established or anticipated targeted educational initiatives.

## II. DEFINITIONS

For the purposes of this policy, the following definitions apply. Some terms used in this policy may also be more fully discussed in the ERG.

"Calculation Guidance" refers to the DEP Guidelines for Calculating Administrative Penalties (POLICY ENF-90.001).

"Compliance assistance" (also known as **technical assistance**) is information or assistance provided by DEP, another government agency or government supported entity, public or private, to help the regulated community comply with legally mandated environmental requirements. Compliance assistance does not include suggestions or information about how to correct and prevent violations that may be received from inspectors during enforcement inspections or as a result of enforcement actions. **[NOTE:** Compliance assistance as defined here does not apply to "compliance assistance" as that term is defined in the Audit Program conducted pursuant to M.G.L. Chapter 21E and 310 CMR 40.0006.]

"Economic benefit" refers to an adjustment factor that M.G.L. Chapter 21A, Section 16 and 310 CMR 5.00 require DEP to consider in calculating the amount of an administrative penalty. DEP Guidelines for Calculating Administrative Penalties, (POLICY ENF-90.001) provide that economic benefit should be calculated and added to the gravity based penalty whenever there is an indication that noncompliance resulted in delayed compliance costs, avoided compliance costs, and/or profits from unlawful activity.

"Punitive penalty" is that portion of an administrative penalty which reflects the gravity of the violations, duration of noncompliance, behavior and financial condition of the regulated entity and other relevant public interest considerations. A punitive penalty includes adjustments from the base number, as described in the DEP Guidelines for Calculating Administrative Penalties (POLICY ENF-90.001), on the basis of: the actual and potential impact of the violations; the actual or potential costs incurred, and actual and potential damages suffered by the Commonwealth; multiple days of occurrence; existence or lack of good faith; financial condition; and relevant public interest considerations. Punitive penalty does not include that portion of the penalty representing the regulated entity's economic benefit or gain from noncompliance. **[NOTE:** Punitive penalties do not include Natural Resource Damages recoverable pursuant to M.G.L. Chapter 21E or CERCLA.]

"Small business" includes a person, corporation, partnership, or other entity employing fewer than ten (10) persons (measured as FTE equivalents on an annual basis [2000 hours per year of employment], including contract employees) to manufacture a product or to provide a service, and which does not fall into one or more of the following categories:

- 1) large quantity generator of hazardous waste, a hazardous facility or Level III recycler of hazardous waste pursuant to M.G.L. Chapter 21C and 310 CMR 30.000;
- 2) NPDES major source pursuant to M.G.L. Chapter 21, Sections 26-53 and 314 CMR 3.00;
- 3) air quality major source pursuant to 310 CMR 7.00;
- 4) TUR filer pursuant to M.G.L. Chapter 21I, the Toxics Use Reduction Act;
- 5) a solid waste disposal or recycling facility pursuant to Chapter 584 of the Acts of 1987, M.G.L. Chapter 21A, Sections 2 and 8, and Chapter 111, Section 150A and 310 CMR 19.00;
- 6) any facility or location owned and/or operated by local, county, state or Federal government;
- 7) branch offices, divisions, or subsidiaries of a business that in the aggregate employs ten or more persons; or
- 8) a location franchised by a parent corporation.

### **III. STATEMENT OF POLICY**

The selection of an appropriate enforcement response is integral to the DEP enforcement program. In determining an appropriate response upon discovering noncompliance by a small business, DEP managers and staff will be guided by the principles and presumptions that are described in ERG Sections III and IV, except as otherwise provided below.

M.G.L. Chapter 21A, Section 16 and 310 CMR 5.00 provide that when DEP addresses noncompliance through the administrative process, it must address the noncompliance either by issuing a written notice alleging noncompliance or by assessing an administrative penalty.

## A. NOTICE OF NONCOMPLIANCE

As with any regulated entity, DEP's initial enforcement response to violations by a small business will be a Notice of Noncompliance (NON), or a Field NON (FNON) where applicable, **provided** that:

- \* none of the preconditions for assessment of an administrative penalty exists, as described in ERG Section III.C.1.; and
- \* the violations are not within the categories listed in ERG Section IV -Presumptions for Higher Level Enforcement.

When DEP issues an NON, DEP will encourage small business to seek compliance assistance, as defined in ERG Section II, and defined and described in this policy, preferably from a third party or government supported program that offers services to small businesses, in order to return to compliance, assure future compliance and/or investigate pollution prevention measures.

## B. ADMINISTRATIVE PENALTY CALCULATION AND MITIGATION

If any violations are within the categories in ERG Section IV -- Presumptions for Higher Level Enforcement, or otherwise warrant the assessment of an administrative penalty, DEP will consider the assessment of a penalty that is consistent with those assessed against other regulated entities for violations of the same or similar requirements. DEP will not mitigate or waive an administrative penalty simply because the regulated entity is a small business.

DEP, in its sole discretion, will exercise its enforcement authority under M.G.L. Chapter 21A, Section 16 to mitigate administrative settlement penalties in cases involving small businesses as follows.

- 1) As provided in the Calculation Guidance, DEP staff will **first** calculate all **upward adjustments** to the penalty base numbers on the basis of all facts known about the violations. DEP will then calculate any downward adjustments based on relevant facts to mitigate the penalty and arrive at an appropriate final penalty amount.

2) If a small business **claims an inability to pay** a penalty, or otherwise raises financial constraints, the **burden is on the small business** to demonstrate why such constraints result in an inability to pay a full penalty or significantly impede its ability to comply or perform a remedial measure. DEP will not accept claims of, or assume financial constraints on a small business without detailed substantiation from a company official with direct responsibility for the small business's financial status.

3) If a small business satisfactorily demonstrates an inability to pay a penalty, in whole or in part, DEP staff should **first consider the use of an alternative payment plan**, as that term is defined in ERG Section II, to obtain an appropriate penalty **prior to considering suspension or complete waiver** of a penalty. DEP staff should consider suspending or waiving a penalty based solely on inability to pay only when a small business demonstrates that payment of any penalty will impede its ability to comply or perform a remedial measure.

4) DEP may **suspend or waive the entire** administrative penalty in any enforcement action, even when a small business has not claimed financial constraints, and regardless of whether noncompliance was detected through a DEP inspection, report from the public, or self-report resulting from regulatory or permit requirements, compliance assistance or an environmental audit, **provided that all of the following conditions are satisfied** within the terms of an administrative consent order:

a) Small business agrees to return to compliance promptly, and remedy any adverse impacts of noncompliance within a reasonable period of time; and

b) Noncompliance has **not** caused **actual harm** to public health, safety, or the environment, or otherwise presented a significant threat; and

c) Noncompliance does not involve criminal conduct; and

d) Small business demonstrates a good faith intention to maintain future compliance with all applicable environmental requirements by either:

i) obtaining **on-site** compliance assistance from a Licensed Site Professional, or other third party or government supported program that offers services

to small businesses, provided that such services are not already required by law or regulation; or

ii) conducting an environmental audit that conforms with the definitions and relevant conditions of Section III.B. of the DEP Interim Policy on Incentives for Self-Policing: Environmental Audit Policy (POLICY ENF-97.004; and

iii) where response actions are required pursuant to the M.G.L. Chapter 21E and 310 CMR 40.000, conducting risk reduction measures on an expedited basis and paying a penalty equal to any Tier IB compliance fees that may have been avoided.

**[Note:** In the event that a small business seeks penalty mitigation under this policy for noncompliance initially discovered through on-site compliance assistance or an environmental audit, satisfying this condition is not required since it has effectively been satisfied.]

e) Small business agrees to investigate pollution prevention, source reduction and resource conservation opportunities, and implement them as established to be feasible by the small business and agreed to by DEP; and

f) Small business has not been involved in a higher level enforcement action, as that term is defined in ERG Section II, for violations of environmental requirements within five (5) years of the current noncompliance.

If a small business does **not** satisfy **all** of the conditions for mitigation described above, DEP may not suspend or waive the entire penalty, but **may mitigate the penalty** consistent with the degree to which the conditions are satisfied, and with the factors set forth in M.G.L. Chapter 21A, Section 16, as they relate to the facts of the specific case.

### **C. COMPLIANCE ASSISTANCE**

The content of compliance assistance varies greatly, and may be delivered in a variety of ways. The penalty mitigation considerations provided by this policy are restricted to **on-site** compliance assistance in order to increase the potential for violations to be detected and thus corrected.

Compliance assistance does not include enforcement inspections or enforcement actions. DEP does not have the resources to provide on-site compliance assistance to all small businesses that may seek it. DEP may, however, refer a small business to other public or private sources of assistance that may be available. This policy does not create any right or entitlement to compliance assistance.

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