

Questions & Responses on State Small Business Enforcement Policies December 2011

CT DEEP is in the process of developing a small business enforcement policy and asked other NEWMOA member states the following questions about their policies:

- 1.) Do other NEWMOA states have special provisions for small businesses who incur violations that require formal enforcement with a penalty?
- 2.) Do other NEWMOA states specifically define “small business”?
- 3.) If other NEWMOA states exercise some sort of small business policy or small business enforcement discretion, how successful has that policy/discretion been from a negotiating standpoint as well as from a compliance standpoint?

The following summarizes the responses received as of December 2011.

Maine

The following is a link to the ME DEP compliance assistance policy for small businesses, entitled the Small Business Compliance Incentive Policy. The policy is a Department-wide policy. A “small business” is defined in this policy as 100 employees.

www.maine.gov/dep/innovation/sbta/sbc_i_policy.htm

The following is a link to an environmental audit law established in 2011 that provides penalty relief to businesses, including small businesses, if they discover violations through environmental audits [See Subchapter 1A: Environmental Audit Program in the following link]. This is similar to EPA’s environmental audit policy, but it is enacted into Maine law. It is applicable to all businesses, including small businesses.

www.mainelegislature.org/legis/statutes/38/title38ch2sec0.html

Massachusetts

Mass DEP does have a policy available at <http://www.mass.gov/dep/service/enfpol.htm>. The policy can help to settle cases faster. The following are some of the key features of the policy:

- MassDEP’s Small Business Policy is implemented in concert with the Agency’s other enforcement policies (e.g., ERP, civil penalty policy, self-audit policy, etc.) as part of an Enforcement Notebook
- Mass statute requires MassDEP to consider 12 factors when pursuing a penalty (e.g., good faith, negligence, criminal conduct, etc.). Mass uses PenCalc software, which is programmed with these factors and its enforcement policies to calculate civil penalties.
- Use of the Small Business Policy is NOT limited solely to those facilities that voluntarily self-disclose violations or find and disclose violations through a voluntary audit by a 3rd party
- In the instance where a violation is determined by MassDEP through a routine inspection of a “small business”, MassDEP will use the Small Business Policy with enforcement

discretion, just as in any other case, taking into account the 12 factors, regardless of how the violation was discovered. A business that has a pattern of non-compliance or blatantly non-complied or has an overall attitude of non-compliance would not be considered under the Small Business Policy.

- Some small businesses in Mass use a technical assistance group similar to CT's CONNSTEP to provide on-site compliance audits.
- MassDEP developed its Small Business Policy in 1997 along with its other enforcement policies amongst a group of about 15 engineers, analysts, attorneys, managers. Development of all the policies took about 1.5 – 2 yrs. After being drafted, the policies were reviewed by a stakeholder group appointed by the Commissioner and that group's comments were addressed in the final policy drafts. The business workgroup was not otherwise part of the policy development workgroup.
- EPA reviewed MassDEP's final draft policies before the policies became effective.
- Mass DEP reviewed small business SIC codes and determined an initial number of "20" employees, which would define a small business. However, the business workgroup pushed back on this number, feeling that it was not restrictive enough. Mass DEP eventually decided on < 10 employees as appropriate for defining small business. About 70 percent of Mass. businesses have less than (20) employees. MA is not a "big industry" state; so that setting the cutoff of a small business at the Federal cutoff of 100 employees would bring the vast majority of MA businesses within the definition of a small business thereby allowing such a large number of businesses to be able to obtain the penalty mitigation available in MassDEP's small business policy so as to defeat the purpose of the policy, which is to grant relief only to truly small "Mom & Pop" type businesses that may not have the ability and expertise to fully inform themselves of environmental regulatory requirements and whose greatest need may be for compliance assistance to help them comply. For example, a significant number of small businesses are operated by immigrants, who may have limited English-speaking ability and/or have limited education. MassDEP settled on the cutoff number of (10) employees in order to reduce the number of potential beneficiaries of the policy to a reasonable percentage of the universe of Mass. businesses and because (10) is a cutoff number for regulation or minimal regulation in other programs, such as MassDEP's toxics use reduction program and in OSHA.
- Geri Lambert, MassDEP offered herself as a resource for any future questions

New Hampshire

NH DES has provisions within its Compliance Assurance Response Policy (CARP <http://des.nh.gov/organization/commissioner/legal/carp/index.htm>) for small businesses. When seeking an administrative penalty DES may apply the following penalty reduction described in the CARP:

“f. Small Business

If the Respondent is a small business and the size of the business has not already been accounted for in the penalty calculation, the gravity portion of the penalty can be reduced by up to 20% (generally, the smaller the business, the greater the percent reduction). For purposes of this penalty reduction only, "small business" means an independently owned and operated business that employs fewer than 10 individuals in total, regardless of the number of locations at which the business operates, and has gross annual revenues not exceeding \$2 million. This reduction usually will not be applied by a program if the majority of parties regulated by that program qualify as a "small business" under this definition.”

As an EPA authorized program the NH DES RCRA program typically applies the RCRA Civil Penalty Policy as a guideline when recommending cases to the Attorney General’s office for civil enforcement. The RCRA Civil Penalty Policy references EPA’s Small Business Policy. EPA’s Small Business Compliance Policy info:

<http://www.epa.gov/compliance/incentives/smallbusiness/index.html>

As stated above, if NH DES is using the CARP guidelines to negotiate a settlement, "small business" will mean an independently owned and operated business that employs fewer than 10 individuals in total, regardless of the number of locations at which the business operates, and has gross annual revenues not exceeding \$2 million.

NH DES has utilized the “up to 20 percent” reduction to the gravity portion of a proposed penalty on several occasions to assist in executing an Administrative Fine by Consent.

New Hampshire has a Small Business Technical Assistance Program (SBTAP <http://des.nh.gov/organization/commissioner/p2au/sbtas/sbtap/ombudsman.htm>) that was created as required by Section 507 of the Clean Air Act. SBTAP and the position of a Small Business Ombudsman are specifically outlined in the State Implementation Plan. While the primary focus of the SBTAP program is small business stationary source technical assistance, the program provides general environmental compliance assistance, including RCRA. Additionally, the Small Business Ombudsman will act as an advocate for a small business, if requested, in the negotiation of a RCRA penalty settlement.

New Jersey

New Jersey DEP has a small business assistance program -

<http://www.state.nj.us/dep/egge/sbap/index.html>.

New York

NY has a small business self disclosure policy, <http://www.dec.ny.gov/regulations/25246.html>.

This policy is rarely used because it makes the small business do too much to meet the conditions of the policy. NYS DEC began an Environmental Results Program (ERP), but canceled it due to staff loss, and this policy was used in conjunction with the ERP. A little over a year ago, the Pollution Prevention Unit was trying to update the policy, but it has not progressed beyond the first draft.

Rhode Island

Rhode Island does not have a specific policy regarding enforcement actions involving small businesses to the best of my knowledge. In July 2002, the Rhode Island General Assembly enacted the Rhode Island Environmental Compliance Incentive Act, which provides a mechanism for the regulated community to conduct self audits and to report non-compliance to RI DEM without being subject to gravity-based penalties provided the entity quickly returns to compliance with the applicable regulation(s). The Act allows the State to assess penalties for economic benefit achieved via the non-compliance as well as recover any costs expended by the State investigating the noncompliance. The following link provides the Environmental Compliance Incentive Act: www.dem.ri.gov/programs/benviron/assist/pdf/audplcy.pdf.

Vermont

VT does not have an enforcement policy that applies only to small businesses. DEC has a small business assistance program; the following is a link to the web site with information on the program:

<http://www.anr.state.vt.us/dec/ead/sbcap/index.htm>.