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## Michigan's Part 148 Law— Incentives for Self-policing & for Small Business

***This month's column continues Mr. Smary's discussion on the landmark legislation recently passed in the State of Michigan concerning the discovery of unintentional environmental violations. As noted last month, an important feature of this law is the creation of immunity from certain fines and penalties and how this legislation (the Environmental Audit Privilege and Immunity Law, or Part 148) affects finishers.***

### Federal Incentives For Self-policing

The U.S. Environmental Protection Agency (EPA) made a public policy statement in December of 1995 that expresses the EPA's policy regarding incentives for self-policing and evaluation. EPA's policy is much more limited than Part 148 in most respects. The policy does not, for example, provide for an evidentiary privilege. Further, immunity from fines and penalties generally amounts to a reduction of those fines and penalties instead of complete protection.

### Privilege

While EPA's policy does not create an evidentiary privilege, EPA does restate in its policy EPA's long-standing practice of not requesting voluntary audit reports to trigger enforcement investigations.

### Penalty reduction

EPA's policy eliminates or reduces the gravity-based portion of penalties for violations found through environmental auditing that are promptly disclosed and corrected. Further, to provide additional encouragement for self-policing, EPA will reduce gravity-based penalties by 75 percent for a violation that is voluntarily discovered, promptly disclosed and corrected, even if it was

found through an environmental audit. In all cases, the EPA reserves the right to collect any economic benefit that may have been realized as a result of noncompliance to ensure a level playing field for businesses.

### Environmental audits

To receive full benefit of EPA's policy, several requirements must be met:

1. The violation must have been discovered through an environmental audit or due diligence;
2. The violation must have been voluntarily discovered (*i.e.*, before the commencement of a federal, state or local agency inspection) and promptly disclosed to the EPA (within 10 days, except when complex issues are involved and there is no serious threat to the environment);
3. The violation must be expeditiously corrected (within 60 days unless written notice is given to the EPA that more time is necessary), and any harm caused by the violation must be remedied and a certification sent to the appropriate state, local or EPA authority that the violation has been corrected;
4. Recurrences of the violation must be prevented (*e.g.*, by improvements to environmental auditing or due diligence efforts);
5. There must be no repeat violations within the past three years at the same facility or be part of a pattern of violations on the regulated entity's part over the past five years; and
6. Violations that result in serious actual harm or that present an imminent and substantial endangerment to public health or the environment are excluded from protection. EPA, *Incentives for Self-Policing, Discovery, Correction and Prevention of Violations*, 60 Fed.

*Reg.*, p. 66706 (December 22, 1995).

### Compliance Incentives For Small Business

The U.S. EPA published its "Interim Policy on Compliance Incentives for Small Business" on June 3, 1996, in the *Federal Register* (61 Fed. Reg. 27984). In it, Assistant Administrator Steven Herman said that the policy was "intended to promote environmental compliance among small businesses by providing incentives for them to participate in on-site compliance assistance programs and to conduct environmental audits."

### Policy scope

The policy eliminates or mitigates EPA's settlement demands against small businesses based on the following criteria:

1. The small business (defined as employing fewer than 100 individuals across all facilities and operations owned by the entity) has made a "good faith" effort to comply with the applicable environmental requirements, as demonstrated by satisfying:
  - a. receiving on-site compliance assistance from a government or government-supported program; or
  - b. conducting an environmental audit and promptly disclosing in writing to EPA or the appropriate state regulatory agency all violations discovered.
2. This is the business' first violation of the requirement within the past three years. If it has been subject to two or more enforcement actions for violations of any environmental requirement in the past five years, this policy does not apply.
3. The business corrects the violation within the shortest practical period of

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time, not to exceed 180 days following detection of the violation. Up to a year may be taken if necessary to allow a small business to correct the violation by implementing pollution prevention measures. If correction cannot be accomplished within 90 days, the business should submit a written schedule or the Agency should issue a compliance order with a schedule. Correcting the violation includes: "Remediating any environmental harm associated with the violation, as well as implementing steps to prevent a recurrence of the violation."

#### Policy limitations

The policy applies only if:

1. There has been no actual serious harm to public health, safety or the environment caused by the violation; and
2. There is not an imminent and substantial endangerment to public health or the environment caused by the violation; and
3. The violation does not present a significant health, safety or environmental threat (violations involving hazardous or toxic substances may present such threats); and
4. The violation does not involve criminal conduct.

#### Penalty mitigation guidelines

1. The civil settlement penalty mini-enforcement action will be completely eliminated if the small business satisfies all of the criteria discussed above.
2. If a business meets all of the criteria but needs a longer period of time to correct the violation, EPA, at its option, may waive up to 100 percent of the gravity component of the penalty, but reserves its right to seek economic benefit.
3. If a business meets all of the criteria, except it has obtained a "significant economic benefit from the violation(s) such that it may have obtained an economic advantage over its competitors." EPA reserves the right to waive up to 100 percent of the gravity component of the penalty, but may seek the full amount of significant economic benefit.
4. The policy allows for mitigation of the penalty where there is a "documented inability to pay all or a portion of the penalty."

#### Applicability to states

The new policy says that EPA will defer to state action, but only to states in "delegated or approved programs that are generally consistent with the criteria set forth in the Policy." **P&SF**

#### About the Columnist

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*liability, and client counseling on compliance with environmental laws. He recently served as spokesperson for the Michigan Chamber of Commerce during the legislative process for the Michigan Environmental Audit Privilege and Immunity legislation. A graduate of the University of Notre Dame Law School, he serves on numerous state environmental committees and task forces, and is co-editor of Michigan Environmental Law Deskbook, published by Michigan's Institute of Continuing Legal Education. He has lectured extensively on various environmental topics to a variety of professional and civic organizations in the U.S. and Canada.*