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Comments

The EPA's Environmental Audit Policy: Are Small Businesses Disadvantaged?

I. Introduction

In 1995, the Environmental Protection Agency ("EPA") issued its Audit Policy Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations ("Environmental Audit Policy"),¹ which encourages corporations and businesses to perform voluntary environmental audits.² This policy allows corporations to avoid criminal sanctions and gravity-based penalties³ by discovering and self-reporting violations to the EPA.⁴ The Environmental Audit Policy provides incentives for corporations to discover and promptly disclose violations or face stiff penalties.⁵ The policy also

1. *See* Audit Policy Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (1995).

2. *See id.*

3. Gravity-based penalties include all penalties that the EPA can assess to the business with the exception of the amount of gain the business received by violating the regulation. *See* Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. 27,984, 27,986 (1996).

4. *See* Audit Policy Incentives for Self-Policing, 60 Fed. Reg. at 66,706.

5. *See id.* at 66,706-66,707. The EPA could criminally prosecute the officers of a corporation, assess full gravity-based penalties, and relieve the corporation of the amount of gain received by violating the environmental regulation. Gravity-based penalties could include costs to correct the problem caused by the violation and damages. *See id.* at 66,707; Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,986.

decreases the workload of the EPA by turning the role of auditor over to the corporations.⁶

While the Environmental Audit Policy purports to allow corporations to monitor themselves, the policy is not advantageous to all businesses. Small businesses are often caught in a difficult situation; many do not have the financial resources to perform periodic environmental audits or to pay fines levied by the EPA.⁷ Even if a small business can afford an environmental audit, it may not have the technical or legal expertise necessary to understand or act on audit results.⁸ Large corporations who can afford to have attorneys oversee their environmental audits may be able to use the attorney-client privilege and the work product doctrine to conceal their violations from the EPA.⁹ Small businesses, however, which agree to participate in compliance assistance programs¹⁰ are not guaranteed confidential communications with agents helping them comply.¹¹

Recognizing some of the disadvantages faced by small businesses, the EPA has developed and updated an Interim Policy on Compliance Incentives for Small Businesses ("Small Business Policy").¹² Utilizing the Small Business Policy, the EPA provides small businesses with additional incentives and assistance in an effort to encourage them to comply with environmental regulations.¹³ Regardless of the pronouncements of the Small Business Policy, the question still remains; are small businesses disadvantaged by the Environmental Audit Policy?

6. See Audit Policy Incentives for Self-Policing, 60 Fed. Reg. at 66,707.

7. See Elizabeth Glass Geltman & Carey Ann Mathews, *Environmental Democracy*, 22 J. CORP. L. 395, 406-407 (1997).

8. See also *id.* at 400.

9. See *id.* at 400-401.

10. Compliance assistance programs are government-funded programs in which a business can receive information or assistance in complying with environmental regulations from the EPA or another government agency. The Interim Policy on Compliance Incentives for Small Businesses ("Small Business Policy") requires on-site compliance assistance. The revised 1996 Small Business Policy allows businesses to identify violations through the use of environmental audits or compliance assistance. See Interim Policy on Compliance Incentives for Small Businesses, 60 Fed. Reg. 32,675, 32,677 (1995); see also Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,985.

11. See Geltman & Mathews, *supra* note 7, at 400.

12. See Interim Policy on Compliance Incentives for Small Businesses, 60 Fed. Reg. at 32,675; see also Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,984.

13. See Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,985.

First, this Comment will briefly describe the Environmental Audit Policy. Second, the Small Business Policy will be thoroughly examined. Third, the Small Business and Environmental Audit Policies will be compared in an analysis that discusses the disadvantages of the policies to small businesses and explains the inadequacies of the Small Business Policy. Finally, the implementation of the Small Business Policy in conjunction with particular state policies and programs in Pennsylvania will be examined.

II. Environmental Audit Policy

By discovering violations through environmental audits and disclosing them to the EPA, corporations can avoid harsh penalties for violating environmental regulations.¹⁴ An environmental audit is a periodic, systematic, documented, and objective review of facility operations and practices related to compliance with environmental requirements.¹⁵ Audit findings are documented to gauge performance over time. The Environmental Audit Policy requires that any violation be discovered voluntarily, not through a monitoring, sampling, or auditing procedure required by statute, regulation, permit, judicial or administrative order, or consent agreement.¹⁶ Essentially, corporations only enjoy the benefits of the Environmental Audit Policy if the EPA has not had to force them to look for violations. Corporations must promptly disclose any violations discovered to the EPA, or a comparable state agency, in writing to avoid criminal sanctions or gravity-based penalties.¹⁷

A. *Purposes of the Environmental Audit Policy*

The Environmental Audit Policy encourages more corporations to comply with environmental regulations and remain in compliance by performing periodic audits.¹⁸ Offering incentives for complying with the Environmental Audit Policy and assessing stiff penalties to violators of environmental regulations, allows the EPA to give corporations an incentive to police themselves.¹⁹ The EPA has limited resources, therefore, it cannot possibly discover all viola-

14. See Audit Policy Incentives for Self-Policing, 60 Fed. Reg. at 66,706.

15. See Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,987.

16. See Audit Policy Incentives for Self-Policing, 60 Fed. Reg. at 66,708.

17. See *id.* at 66,708-66,709.

18. See *id.* at 66,706.

19. See *id.* at 66706-66707.

tions, assess penalties, and enforce environmental regulations.²⁰ The Environmental Audit Policy enables the EPA to enforce environmental regulations without expanding its resources,²¹ thereby allowing the EPA to accomplish its goal of greater compliance with environmental regulations.²²

B. Conditions Required to Avoid Penalties under the Environmental Audit Policy

Corporations must satisfy several conditions under the Environmental Audit Policy to avoid criminal sanctions and gravity-based penalties.²³ A corporation must systematically discover the violation through an environmental audit or due diligence.²⁴ The efforts to discover the violation must be voluntary.²⁵ Then, the corporation must promptly disclose the violation to the EPA in writing.²⁶ In order to be voluntary discovery and disclosure must occur independent of the government or a third party plaintiff, meaning that the disclosure cannot be made in anticipation of impending enforcement, complaint, or inspection.²⁷

After discovery and disclosure of the environmental violation the corporation must correct the violation and remediate the harmful effects of the violation within sixty days or provide written notice where the violation may take longer to correct.²⁸ The corporation must take steps to prevent recurrences of the violation, and the same violation cannot be repeated or be part of a pattern of violations.²⁹ Throughout the compliance process, the corporation must cooperate with the EPA to be afforded the benefits of the

20. *See id.* at 66707.

21. *See* Audit Policy Incentives for Self-Policing, 60 Fed. Reg. at 66,707.

22. *See id.*

23. *See id.* at 66,708.

24. *See id.* The Environmental Audit Policy defines due diligence as the systematic efforts of a business to prevent, detect and correct violations through all of the following: (1) compliance policies, standards, and procedures identifying how employees are to meet environmental requirements; (2) assignment of specific and overall responsibility for overseeing compliance; (3) mechanisms for systematically assuring that compliance policies, standards, and procedures are being carried out; (4) efforts to inform employees of standards and procedures; (5) appropriate incentives to employees to perform in accordance with compliance policies, standards and procedures; and (6) procedures for prompt and appropriate correction of any violations. *See id.* at 66,710-66,711.

25. *See id.* at 66,708.

26. *See* Audit Policy Incentives for Self-Policing, 60 Fed. Reg. at 66,708-66,709.

27. *See id.* at 66,709.

28. *See id.*

29. *See id.*

Environmental Audit Policy.³⁰ However, even if the corporation satisfies all of these conditions, some violations are serious and harmful enough that penalty reductions are not available for them.³¹

C. Incentives for Compliance with the Environmental Audit Policy

The EPA provides corporations with several incentives to encourage them to comply with the Environmental Audit Policy.³² The EPA will not seek gravity-based penalties for violations found through auditing that are promptly disclosed and corrected.³³ The EPA has agreed to waive gravity-based penalties, which reflect the seriousness of the violation, for violations discovered through due diligence or environmental audits.³⁴

The EPA has also agreed to reduce gravity-based penalties by seventy-five percent for corporations that meet a higher standard of environmental auditing or systematic compliance management.³⁵ For corporations that comply with the conditions of the Environmental Audit Policy, the EPA will not recommend criminal prosecution for environmental violations.³⁶ However, corporations whose officers willfully conceal or condone noncompliance can still face criminal prosecution.³⁷ The EPA will refrain from routinely requesting audits from corporations that have complied with the Environmental Audit Policy.³⁸ By offering these incentives, the EPA is encouraging corporations to police themselves for violations of environmental statutes and regulations.³⁹

30. *See id.* at 66,709-66,710.

31. *See* Audit Policy Incentives for Self-Policing, 60 Fed. Reg. at 66,709.

32. The Environmental Audit Policy only applies when corporations have satisfied the conditions of the Policy. *See id.* at 66,708-66,709.

33. *See id.* at 66,706.

34. *See id.* at 66,707.

35. *See id.* The Environmental Audit Policy mentions compliance management systems, but the Policy itself does not thoroughly describe them. Compliance management systems are an organized effort on behalf of a business to train facility staff to detect and correct environmental violations on a daily basis and are a valuable component to periodic auditing. *See Final Environmental Compliance Audit Policy* (last modified Feb. 5, 1997) <http://www.dep.state.pa.us/dep/subject/final_policies/audit_policy.htm>.

36. *See* Audit Policy Incentives for Self-Policing, 60 Fed. Reg. at 66,707.

37. *See id.*

38. *See id.* at 66,708.

39. *See id.* at 66,706.

The Environmental Audit Policy offers adequate incentives to encourage large corporations to begin policing themselves for environmental violations. However, small businesses that have few financial resources to spend on environmental audits require more encouragement to begin self-policing their compliance with environmental regulations. Small businesses also need assurance that disclosed violations will not be immediately used against them to assess penalties. To increase compliance among small businesses with such fears, the EPA created the Small Business Policy.

III. Small Business Policy

Small businesses were not taking advantage of the Environmental Audit Policy.⁴⁰ The EPA determined that more incentives had to be given to encourage small businesses to comply and more assistance had to be provided to small businesses trying to comply with environmental regulations.⁴¹ The Clean Air Act ("CAA") Amendments of 1990 required states to establish Small Business Assistance Programs, which help small businesses with technical and environmental compliance.⁴² Under the CAA amendments, state programs which were consistent with federal guidelines could aid small businesses by one of two methods.⁴³ State programs could refrain from penalizing small businesses that voluntarily sought compliance assistance⁴⁴ and corrected violations discovered through compliance assistance within a specified period of time.⁴⁵ In the alternative, state programs could keep confidential the information identifying the names and locations of specific small businesses with violations revealed through compliance assistance.⁴⁶

The Pennsylvania Department of Environmental Protection ("DEP") has created its own Small Business Assistance Program

40. *See* Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,985.

41. *See id.*

42. *See id.* at 27,984. Under the CAA, each state had to create a Small Business Assistance Program as a portion of the state implementation plan, which provides the EPA with the methods the state intends to employ to meet air quality standards. 42 U.S.C. §§ 7407, 7661f (1994).

43. *See* Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,984.

44. *See id.*

45. *See id.*

46. *See id.* The option to keep information identifying small businesses confidential is only available in states having a Small Business Assistance Program independent of the state enforcement program. *See id.* at 27,984-27,985.

which focuses on helping small businesses comply with environmental regulations.⁴⁷ Pennsylvania also has a policy similar to the Environmental Audit Policy, which allows corporations and businesses to avoid civil and criminal penalties by discovering and promptly disclosing environmental violations to the DEP.⁴⁸ Pennsylvania's programs and policies will be closely examined in Part V of this Comment.

A. Purposes of the Small Business Policy

The purpose of the interim policy is to encourage small businesses to comply with environmental statutes and regulations by participating in compliance assistance programs and conducting environmental audits.⁴⁹ Small businesses participating in compliance assistance programs, conducting environmental audits, and correcting violations within a specified period of time will be rewarded by receiving lesser penalties.⁵⁰ The EPA hopes that by providing guidance for state and local governments to offer incentives to small businesses, more businesses will have the capabilities to police themselves for environmental violations.⁵¹

B. Applicability and Conditions of the Small Business Policy

There are several conditions that a small business must meet before penalties from environmental violations can be reduced.⁵² The Small Business Policy is only advantageous to small businesses.⁵³ A small business, according to the Policy, is a facility operated by a person, corporation, partnership, or other entity employing 100 or fewer employees.⁵⁴ The employees must be full-time employees, and can include contractual employees.⁵⁵ Some critics are concerned this definition of "small business," which is a

47. See *Small Business Assistance Program Home Page* (visited Jan. 14, 1999) <http://www.dep.state.pa.us/dep/deputate/airwaste/aq/small_business/small_business.htm>.

48. See *Final Environmental Compliance Audit Policy* *supra* note 35.

49. See Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,985.

50. See *id.*

51. See *id.*

52. See *id.*

53. See *id.*

54. See Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,985.

55. See *id.*

simplified version of the CAA definition,⁵⁶ is too narrow and excludes some small businesses that would otherwise participate in the Small Business Policy.⁵⁷

For a small business to avoid or mitigate penalties from its violation of an environmental statute or regulation, it must satisfy four criteria.⁵⁸ The small business must make a good faith effort to comply with environmental regulations by either conducting an environmental audit or participating in a compliance assistance program.⁵⁹ Environmental audits can be performed either by the business itself or by an independent contractor.⁶⁰ All violations discovered during the environmental audit must be promptly reported in writing to the EPA by the small business.⁶¹

Small businesses that are unable to perform or afford environmental audits can participate in a compliance assistance program, supported by the government.⁶² In a compliance assistance program, government agents perform on-site evaluations and inform the small business of any environmental violations.⁶³ Findings of the agents are not confidential and businesses are only given a

56. The CAA defines "small business" as (1) owned or operated by a person that employs 100 or fewer individuals; (2) is a small business concern as defined in the Small Business Act; (3) is not a major stationary source; (4) does not emit 50 tons or more per year of any pollutant; and (5) emits less than 75 tons per year of all regulated pollutants. See 42 U.S.C. § 7661f(c)(1) (1994).

57. See Anne Piscatella, *Interim Policy on Compliance Incentives for Small Businesses*, 2 ENVTL. LAW. 799, 813 (1996). Critics have suggested that a more useful definition of small business may be found in the Small Business Administration's ("SBA") Size Standards because SBA standards are tied to particular Standard Industrial Classifications ("SIC") Codes. SIC Codes are considered a better indicator of what constitutes a small business within a given industry than the CAA's numerically-based definition, which is not suited for use in all environmental policies. *Id.* at 813-814.

58. See *Interim Policy on Compliance Incentives for Small Businesses*, 61 Fed. Reg. at 27,985-27986.

59. See *id.* at 27,985.

60. See *id.*

61. See *id.*

62. See *id.* The Small Business Policy is a federal policy. Because compliance assistance programs are part of that policy, they are paid for by the federal government. Some state governments may pay for compliance assistance depending on the Small Business Assistance Program. See *id.* at 27,984; see, e.g., *Small Business Assistance Program Home Page*; *supra* note 47.

63. See *Interim Policy on Compliance Incentives for Small Businesses*, 61 Fed. Reg. at 27,985.

limited amount of time within which they must disclose the violations to the EPA or the violations will be reported to EPA compliance officials.⁶⁴

For a small business to avoid penalties under the Small Business Policy, the business cannot have previously violated the same requirement.⁶⁵ Businesses that have already been subject to compliance action⁶⁶ by a government agency for a violation of the same requirement within the past three years are not first time violators and cannot enjoy the benefits of the Small Business Policy.⁶⁷ If a business has received penalty mitigation for the same or a similar violation in the past three years, then the Small Business Policy does not apply.⁶⁸ Also, a business that has been subject to two or more enforcement actions for environmental violations in the past five years cannot mitigate penalties under the Small Business Policy.⁶⁹

Small businesses must also correct violations within the shortest practicable period to be eligible to avoid penalties under the Small Business Policy.⁷⁰ Businesses have 180 days following the discovery of a violation to correct the problem.⁷¹ If a small business intends to correct a problem by implementing pollution prevention measures, then an additional 180 days can be allotted from the discovery to the remediation of the violation.⁷² A violation can be corrected by implementing a plan to prevent a recurrence of the violation and remediating any environmental harm associated with the violation.⁷³

Finally, the small business policy only applies if the violation has not caused actual serious harm to public health, safety, or the environment.⁷⁴ The violation must present an imminent and substantial endangerment to public health or the environment, or

64. See Piscatella, *supra* note 57, at 805; see also Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,985.

65. See Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,985.

66. Compliance actions can include an information request, a warning letter, a notice of violation, a field citation, or a citizen suit. See *id.*

67. See *id.*

68. See *id.*

69. See *id.*

70. See Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,985.

71. See *id.*

72. See *id.*

73. See *id.*

74. See *id.*

present a significant health, safety or environmental threat.⁷⁵ If the small business' violation presents any of these threats or involves criminal conduct, the business cannot afford itself of the advantages of the Small Business Policy.⁷⁶

C. *Incentives for Compliance with the Small Business Policy*

The EPA will eliminate civil penalties for the violations of small businesses that comply with all of the Small Business Policy's conditions.⁷⁷ Small businesses that require an extension of the 180 day period to remedy violations will not receive gravity-based penalties, but the EPA may still seek penalties in the amount of the economic benefit the business received through noncompliance.⁷⁸ Even if the conditions of the Small Business Policy have been satisfied, a small business that has been economically benefited by committing environmental violations can have the full amount of that benefit taken by the EPA.⁷⁹ By eliminating the economic benefit of violating environmental statutes and regulations, the EPA encourages businesses to follow the Environmental Audit and Small Business Policies and comply with environmental laws.⁸⁰ The small business that violates environmental regulations may otherwise have an advantage over businesses that are in compliance.⁸¹ Thus if small businesses were permitted to retain the amount of money they received through noncompliance, the complying businesses would be given a disincentive to remain in compliance.⁸²

Finally, the EPA can mitigate penalties for small businesses that have a documented inability to pay all or some of the penalties assessed.⁸³

The goals of the Small Business Policy is to penalize businesses for violations while still enabling them to continue operations.⁸⁴ If the EPA utilized the Small Business Policy to shut down

75. See Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,985-27,986.

76. See *id.* at 27,986.

77. See *id.*

78. See *id.*

79. See *id.*

80. See Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,986.

81. See also *id.*

82. See also *id.*

83. See *id.*

84. See *id.*

businesses, no business would have any incentive to comply with the Policy.

D. Definition of Environmental Audits

The Small Business Policy's definition of environmental audits does not appear to diverge from the EPA's normal Environmental Audit Policy.⁸⁵ Like the Environmental Audit Policy, the Small Business Policy stipulates that violations must be discovered through a voluntary environmental audit, not through legally required monitoring ordered through a regulation, statute, or agreement.⁸⁶

The original 1995 Small Business Policy, which only permitted small businesses to receive penalty relief after identifying environmental violations through compliance assistance programs, did not give small businesses the option of utilizing environmental audits to discover violations.⁸⁷ The 1996 Policy listed two reasons for allowing discovery through environmental audits.⁸⁸ First, critics of the initial 1995 Policy cited the few government agency sponsored compliance assistance programs available to small businesses.⁸⁹ By giving businesses the option of performing environmental audits, as well as participating in compliance assistance programs, more businesses are able to seek the advantages of the Small Business Policy.⁹⁰ Second, compliance assistance programs receive funding from the government. Thus, businesses willing to spend their own money to voluntarily discover violations of environmental statutes

85. See Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,987; see also Audit Policy Incentives for Self-Policing, 60 Fed. Reg. at 66,711.

86. Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,987; Audit Policy Incentives for Self-Policing, 60 Fed. Reg. at 66,709. The Small Business Policy does not apply in several circumstances, including: (1) emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required; (2) violations of National Pollutant Discharge Elimination System discharge limits detected through required sampling or monitoring; or (3) violations discovered through an audit required to be performed by the terms of a consent order or settlement agreement. See Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,987.

87. See Interim Policy on Compliance Incentives for Small Businesses, 60 Fed. Reg. at 32,677; see also Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,985.

88. See Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,984.

89. See *id.*

90. See *id.*

and regulations should not be penalized if they do not want to or are unable to participate in compliance assistance.⁹¹ Today, small businesses wanting to avoid penalties under the Small Business Policy can choose to either participate in a compliance assistance program and pay to have an environmental audit performed.⁹²

E. Definition of Compliance Assistance Programs

Small businesses that are unable to afford the costs associated with an environmental audit can participate in compliance assistance programs.⁹³ In compliance assistance programs, information or assistance is provided by the EPA or another government agency to enable a small business to identify, correct, and disclose violations, and remain in compliance with environmental laws.⁹⁴ The information provided in compliance assistance can vary from being either very basic to extremely technical in nature.⁹⁵ Only when on-site compliance assistance is utilized by a business is penalty mitigation of the Small Business Policy permitted.⁹⁶ Other forms of compliance assistance do not expose a business to a risk of enforcement, thus a small business does not require protection from penalties when off-site compliance assistance is utilized.⁹⁷

Many of the goals and conditions of the Small Business Policy are similar to those of the Environmental Audit Policy.⁹⁸ The Small Business Policy is an attempt on behalf of the EPA to make compliance with environmental regulations a simple process for small businesses and encourage them to police themselves for violations.⁹⁹ The Small Business Policy shows that the EPA intends to be lenient in assessing penalties to small businesses for environmental violations.¹⁰⁰ In the Small Business Policy, equivalent emphasis is placed on the use of compliance assistance

91. *See id.*

92. *See id.* at 27,985.

93. *See* Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,985.

94. *See id.* at 27,986.

95. *See id.*

96. *See id.*

97. *See id.*

98. *See* Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,985; *see also* Audit Policy Incentives for Self-Policing, 60 Fed. Reg. at 66,706-66,711.

99. *See* Interim Policy on Compliance Incentives for Self-Policing, 61 Fed. Reg. at 27,985.

100. *See also id.* at 27,984-27,985.

programs as on environmental audits to discover violations.¹⁰¹ This too serves to distinguish the Small Business Policy from the Environmental Audit Policy, which does not emphasize compliance assistance.¹⁰² Despite the benefits given to small businesses through the Small Business Policy, large corporations still have advantages over small businesses in compliance with environmental regulations.

IV. Disadvantages of Small Businesses in Environmental Compliance

Large businesses have several advantages over small businesses in compliance with environmental regulations and laws.¹⁰³ The Small Business Policy and the CAA's Small Business Assistance Programs are evidence of the EPA's recognition that small businesses need assistance. EPA provides incentives to small businesses to comply and remain in compliance with environmental laws.¹⁰⁴ Such programs also represent efforts on behalf of the states and the federal government to aid small businesses in compliance with environmental laws.

A. *Advantages of Financial Resources*

There are several factors that result in large corporations having advantages over small businesses in environmental compliance. The most important that contributes to all other factors is financial resources.¹⁰⁵ Large businesses and corporations usually have substantially greater financial resources than small businesses. As a result, large corporations can afford to pay for periodic environmental audits, technical advisors, and legal counsel.¹⁰⁶ Larger corporations also have more money to afford to pay for equipment or research to put them in compliance with environmental laws.

1. Greater Access to Information, Advice, and Services.—Corporations with vast financial resources have an advantage at every step in the process of environmental compliance. Financial

101. *See id.* at 27,985.

102. *See* Audit Policy Incentives for Self-Policing, 60 Fed. Reg. at 66,706.

103. *See* Geltman & Mathews, *supra* note 7, at 400-401.

104. *See* Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,984 (1996); *see also* 42 U.S.C. § 7661f (1994).

105. *See* Geltman & Mathews, *supra* note 7, at 400-401.

106. *See id.*

resources contribute to corporations having more access to information and services than small businesses.¹⁰⁷ Financial resources enable large corporations to afford services in complying with the conditions of the Environmental Audit Policy. Even if a small business has the financial resources to pay for an environmental audit, it may not have or be able to afford to have the staff of people with the technical or legal expertise to understand or act on audit results.¹⁰⁸ Thus, small businesses are left in a situation of being ignorant about the steps they should take.

Due to their lack of information and services, small businesses are forced to follow the advice of the EPA or a state agency if they choose to participate in compliance assistance or perform an environmental audit.¹⁰⁹ The EPA and state agencies have their own goals that are separate from those of any particular small business. As a result, the advice given to a small business would not necessarily reflect the best interests of the small business, but instead would further the goals of those agencies. Fearing being compromised in such a situation, many small businesses fail to seek compliance assistance.¹¹⁰

Disclosure requirements, which are the same for the Environmental Audit and Small Business Policies, are that businesses must fully disclose a violation to the EPA or a comparable government agency within ten days after a violation is discovered.¹¹¹ In satisfying disclosure requirements, small businesses are at a disadvantage over larger corporations because small businesses may not have the funds necessary to receive legal counseling prior to disclosure.¹¹² Large corporations often have legal staffs that can advise their clients regarding disclosure.

2. *Greater Access to Legal Counsel.*—Small business owners are often concerned about the confidentiality of the information discovered during compliance assistance.¹¹³ At the federal level, an agency performing an environmental audit or assessment for a business can disclose environmental violations to the EPA if the

107. *See id.*

108. *See also id.* at 406-407.

109. *See also id.* at 402-403.

110. *See also* Geltman & Mathews, *supra* note 7, at 402-403.

111. *See* Interim Policy on Compliance Incentives for Self-Policing, 61 Fed. Reg. at 27,987 (1996).

112. *See* Geltman & Mathews, *supra* note 7, at 406-407.

113. *See* Interview with Greg Czarnecki, Small Business Ombudsman (Jan. 4, 1999).

business does not disclose them.¹¹⁴ The fact that the information gained by the business through assistance from the government is not confidential may discourage businesses from seeking compliance assistance.¹¹⁵

The EPA defends the lack of confidentiality in compliance assistance programs as crucial to the goals of the Environmental Audit Policy.¹¹⁶ The Environmental Audit Policy gives businesses incentives to correct a problem without facing penalties, but only for a specific amount of time.¹¹⁷ Without the promise of confidentiality, the EPA still has the authority to deal with criminal acts of businesses and serious environmental problems.¹¹⁸ By retaining their authority in such matters, the EPA can keep businesses from benefiting from their criminal acts.¹¹⁹ Also, the EPA has knowledge of the methods employed by businesses to resolve their environmental problems and can oversee the correction of violations.¹²⁰

Large corporations have employed methods to keep environmental audit findings confidential.¹²¹ Large corporations often hire attorneys to oversee environmental audits.¹²² Then, if the environmental audit results are requested for disclosure in litigation, the corporation can claim attorney-client privilege or work product doctrine to keep the environmental audit findings confidential.¹²³

The goal of the EPA set forth in the Environmental Audit and Small Business Policies is to encourage businesses to police themselves for environmental violations.¹²⁴ Self-policing and disclosing violations to the EPA places businesses in a position in which they are vulnerable to lawsuits.¹²⁵ Small businesses have neither the resources to finance an environmental audit nor the legal staff to oversee such audits to preserve their confidentiali-

114. See Piscatella, *supra* note 57, at 805.

115. See also *id.* at 805-806.

116. See *id.* at 807.

117. See *id.*

118. See *id.*

119. See also Piscatella, *supra* note 57, at 807.

120. See also *id.*

121. See Geltman & Mathews, *supra* note 7, at 398-400.

122. See *id.*

123. See *id.* at 398-399.

124. See Audit Policy Incentives for Self-Policing, 60 Fed. Reg. at 66,706 (1995); see also Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,985 (1996).

125. See Geltman & Mathews, *supra* note 7, at 398.

ty.¹²⁶ As a result, small businesses may ultimately decide that the consequences of participating in compliance assistance outweigh the benefits of the Environmental Audit and Small Business Policies.¹²⁷ Small businesses will take their chances that they will not be caught violating environmental laws, and thus the goal of the EPA to have businesses comply with environmental regulations through self-policing will not be realized.¹²⁸

B. Creation of an Environmental Audit Privilege

State legislators have recognized that small businesses are reluctant to perform environmental audits without an assurance that the government will not use the information obtained against it.¹²⁹ As a result, several states¹³⁰ have created an environmental audit privilege making environmental audit findings subject to discovery proceedings, but inadmissible as evidence in any legal action.¹³¹ Businesses would not need to hire an attorney to retain confidentiality.¹³² Thus, an environmental audit privilege would enable more small businesses to keep environmental audit findings confidential, a privilege only larger corporations could afford in the past.¹³³

126. *See id.* at 400.

127. *See* Audit Policy Incentives for Self-Policing, 60 Fed. Reg. at 66,707-66,708 (1995); *see also* Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,984-27,985 (1996).

128. *See also* Audit Policy Incentives for Self-Policing, 60 Fed. Reg. at 66,706 (1995).

129. *See* Geltman & Mathews, *supra* note 7, at 400.

130. *See id.* at 400 n.19. Geltman states that over thirty states have considered an environmental audit privilege, and nineteen have actually enacted such legislation into law. The following states have enacted environmental audit privilege legislation: Arkansas, ARK. CODE ANN. § 8-1-301 (Michie 1996); Colorado, COLO. REV. STAT. §§ 13-25-126.5(3), 13-90-107(j), 25-1-114.5 (1996); Idaho, IDAHO CODE § 9-801 (1996); Illinois, 205 ILL. COMP. STAT. 5/52.2 (West 1996); Indiana, IND. CODE ANN. § 13-10-3 (Michie 1996); Kansas, KAN. STAT. ANN. § 60-3332 (1995); Kentucky, KY. REV. STAT. ANN. § 224.01-040 (Michie 1996); Michigan, 1996 Mich. Pub. Acts 132; Minnesota, MINN. STAT. § 115.074 (1996); Mississippi, MISS. CODE ANN. § 49-2-51 (1996); New Hampshire, 1996 N.H. Laws 4; Ohio, 1996 Ohio Laws 257; Oregon, OR. REV. STAT. § 468.963 (1993); South Carolina, 1996 S.C. Acts 384; South Dakota, S.D. CODIFIED LAWS § 1-40-33 to 37 (Michie 1996); Texas, TEX. REV. CIV. STAT. ANN. art. 4447cc-> 1 (West 1996); Utah, UTAH CODE ANN. § 19-7-101 (1995); Virginia, VA. CODE ANN. § 10.1-1193 (Michie 1996); Wyoming, WYO. STAT. ANN. § 144.765 (Michie 1996).

131. *See, e.g.*, KAN. STAT. ANN. § 60-3333 (Supp. 1997).

132. *See* Geltman & Mathews, *supra* note 7, at 400; *see, e.g.*, COLO. REV. STAT. § 13-25-126.5 (Supp. 1996); KAN. STAT. ANN. § 60-3332 (Supp. 1997); VA. CODE ANN. § 10.1-1198 (Michie 1996).

133. *See* Geltman & Mathews, *supra* note 7, at 400.

The environmental audit privilege requires that no person involved in the preparation of or in possession of an environmental audit can be compelled to disclose the information contained in the audit.¹³⁴ The findings of the environmental audit are inadmissible as evidence in certain proceedings without the written consent of the owner or operator asserting the privilege.¹³⁵ The text of some environmental privilege statutes include a clause granting businesses immunity against administrative or civil penalties for voluntarily disclosing violations of environmental regulations.¹³⁶ Thus, some states have created a statutory environmental audit policy. Environmental audit legislation usually includes definitions of terms, such as environmental audit report, and environmental self-evaluation or assessment.¹³⁷ The environmental audit privilege statutes explain when the audit is privileged¹³⁸ and the process for reviewing information from the audit.¹³⁹ Some states that have created environmental audit privileges have decided to nullify the privilege.¹⁴⁰ The addition of an environmental audit privilege would mostly affect small businesses. As stated previously, large corporations have had some success keeping audit findings confidential through the use of the attorney-client privilege and the work product doctrine.¹⁴¹

The Environmental Audit and Small Business Policies offer businesses adequate incentives for complying with environmental

134. See, e.g., VA. CODE ANN. § 10.1-1198 (Michie 1996).

135. See *id.*

136. See, e.g., UTAH CODE ANN. § 19-7-101 (1998); VA. CODE ANN. § 10.1-1199 (Michie 1996).

137. See, e.g., COLO. REV. STAT. § 13-25-126.5 (Supp. 1996); KAN. STAT. ANN. § 60-3332 (Supp. 1997); UTAH CODE ANN. § 19-7-103 (1998); VA. CODE ANN. § 10.1-1197.1 (Michie 1996).

138. Often, states only allow that the information be privileged in administrative proceedings or civil suits. Some states, such as Kansas, allow the privilege to be used in criminal proceedings in cases not specified in the statute. See, e.g., KAN. STAT. ANN. § 60-3333 (Supp. 1997); UTAH CODE ANN. § 19-7-105 (1998).

139. In many statutes, the person seeking disclosure of the environmental audit findings can request an *in camera* review of the audit by a court of record. The court of record determines through the *in camera* review that all or part of an environmental audit report is not privileged and orders disclosure of those sections that are not privileged. The portions of the report which are privileged still cannot be disclosed. The party requesting disclosure of the environmental audit findings has the burden of establishing a prima facie case of privilege. See, e.g., UTAH CODE ANN. § 19-7-106 (1998).

140. See, e.g., IDAHO CODE § 9-801 (1998). Idaho's environmental audit privilege went into effect on July 1, 1995, and was declared null and void December 31, 1997. *Id.*

141. See Geltman & Mathews, *supra* note 7, at 398-400.

regulations and statutes.¹⁴² However, small businesses are still disadvantaged by the fact that they rarely have the financial resources that are available to large corporations.¹⁴³ Fewer financial resources results in small businesses lacking access to information, services, and advice. Thus, small businesses are left without knowledge of the advantages and consequences of participating in a compliance assistance program. Their fear of finding violations, being assessed penalties, and paying expenses to comply with environmental regulations keeps small businesses from attempting to contact compliance assistance programs.¹⁴⁴ Ultimately, the disadvantaged position of small businesses hinders the EPA's goal of encouraging self-policing among small businesses.¹⁴⁵

V. Pennsylvania Compliance Assistance Programs

Most states have made efforts to encourage and assist businesses in environmental compliance. Pennsylvania's efforts to aid businesses in complying with environmental regulations can be divided into two categories.¹⁴⁶ Pennsylvania has a Final Environmental Compliance Audit Policy ("Pennsylvania Environmental Audit Policy").¹⁴⁷ The Pennsylvania Environmental Audit Policy is a general policy that offers incentives for environmental compliance to all businesses.¹⁴⁸ The Small Business Assistance Program in Pennsylvania offers aid to small businesses in their efforts to comply with environmental statutes and regulations.¹⁴⁹

A. *Pennsylvania Environmental Audit Policy*

The Pennsylvania Environmental Audit Policy is an effort on behalf of the DEP to encourage voluntary compliance of environmental requirements by use of environmental compliance audits and Compliance Management Systems.¹⁵⁰ The Pennsylvania Environ-

142. See Audit Policy Incentives for Self-Policing, 60 Fed. Reg. at 66,707-66,708 (1995); see also Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. at 27,984-27,985 (1996).

143. See Geltman & Mathews, *supra* note 7, at 400.

144. See *id.* at 406-407.

145. See Audit Policy Incentives for Self-Policing, 60 Fed. Reg. at 66,706 (1995).

146. See *Final Environmental Compliance Audit Policy*, *supra* note 35. See also *Small Business Assistance Program Home Page*, *supra* note 47.

147. See *Final Environmental Compliance Audit Policy*, *supra* note 35.

148. See *id.*

149. See *Small Business Assistance Program Home Page*, *supra* note 47..

150. See *Final Environmental Compliance Audit Policy*, *supra* note 35. The Policy defines Compliance Management System as that portion of an Environ-

mental Audit Policy can be differentiated from the EPA's Environmental Audit Policy because Pennsylvania's policy tends to focus almost entirely on voluntary discovery and prompt disclosure.¹⁵¹ While voluntary discovery and prompt disclosure are conditions of the EPA's Environmental Audit Policy, they are not its central focus.¹⁵² The discovery portion of the Pennsylvania Environmental Audit Policy requires that the business perform a voluntary environmental audit or have a Compliance Management System.¹⁵³ Thus, the Pennsylvania Environmental Audit Policy rewards businesses that have made efforts to organize their compliance efforts and have their own compliance policy in place.¹⁵⁴

The Pennsylvania Environmental Audit Policy explains and emphasizes the use of Compliance Management Systems by businesses as a plan for attaining and remaining in compliance.¹⁵⁵ The Pennsylvania Environmental Audit Policy also has general rules for both civil penalties¹⁵⁶ and criminal penalties.¹⁵⁷ The

mental Management System having at least the following elements: (1) an environmental policy requiring conduct of operations in compliance with environmental requirements; (2) incentives to encourage employees to ensure compliance; (3) a clear definition of responsibility for compliance for each facility or operation; (4) adequate resources dedicated to compliance assurance activities; (5) training for employees with responsibilities related to compliance operations; (6) systematically implemented procedures for bringing about compliance at each facility or operation; (7) regular facility or operation-specific reviews of compliance; (8) a mechanism to ensure prompt action to correct noncompliance and address the underlying cause; (9) effective management oversight of compliance and compliance correction; and (10) a regular management review of compliance performance and management systems to identify needed improvements including a review of pollution prevention opportunities. The Environmental Management System is that part of the overall management system which includes organizational structure, planning activities, responsibilities, practices, procedures, processes and resources for developing implementing, achieving, reviewing and maintaining the environmental policy. *Id.*

151. See *Final Environmental Compliance Audit Policy* (last modified Feb. 5, 1997) <http://www.dep.state.pa.us/dep/SUBJECT/Final_policies/audit_policy.htm>; Audit Policy Incentives for Self-Policing, 60 Fed. Reg. 66,706 at 66,708-66,710 (1995).

152. See *Final Environmental Compliance Audit Policy*, ; see also Audit Policy Incentives for Self-Policing, 60 Fed. Reg. at 66,708-66,710.

153. See *Final Environmental Compliance Audit Policy*, *supra* note 35.

154. See *id.*

155. See *id.*

156. The general rule for civil penalties basically requires that the violation be voluntarily discovered and promptly disclosed following an environmental audit or other self-assessment conducted pursuant to a Compliance Management System. To avoid civil penalties, the business must provide the DEP with a full description of the violation and the business must promptly initiate and pursue action to

general rule for civil penalties can be differentiated from the rule for criminal penalties because the DEP has the authority to decide to not assess civil penalties to a business.¹⁵⁸ In the case of criminal penalties, the DEP has only limited authority to make such decisions because the Office of Attorney General has the ultimate authority to assess criminal penalties.¹⁵⁹ Finally, the Pennsylvania Environmental Audit Policy outlines exceptions which make the rules of the Policy inapplicable.¹⁶⁰

B. Pennsylvania Small Business Assistance Program

The CAA amendments of 1990 required each state to establish Small Business Assistance Programs.¹⁶¹ The Pennsylvania DEP has created its own Small Business Assistance Program, which has three components: the Small Business Ombudsman, the Compliance Advisory Panel, and the Airhelp/Envirohelp Hotline and Website.¹⁶² Each component will be closely examined in this subpart.

correct or eliminate the violation. *See Final Environmental Compliance Audit Policy, supra* note 35.

157. *See id.* Under the general rule for criminal penalties, the ultimate authority for determining whether or not to pursue criminal actions lies with the Office of Attorney General. In some cases, the Office of Attorney General delegates its authority to initiate criminal sanctions to the DEP. The DEP also has the authority to refer matters to the Office of Attorney General for investigation. In the Pennsylvania Environmental Audit Policy, the DEP states that it will not exercise its limited authority if a disclosure of a violation discovered in an environmental audit or another self-assessment conducted pursuant to a Compliance Management System meets the following requirements: (1) disclosure to the DEP is made promptly after the information or knowledge concerning the violation is discovered; (2) reasonable action is promptly initiated and diligently pursued to correct or eliminate the violations pursuant to a compliance schedule; and (3) the person making the disclosure provides a full written description of the condition including a compliance schedule to address the violation and cooperates with the DEP regarding its investigation of the disclosed condition. *Id.*

158. *See id.*

159. *See id.*

160. *See Final Environmental Compliance Audit Policy, supra* note 35. The exceptions that make the rules of the Pennsylvania Environmental Audit Policy inapplicable include the following: (1) the discovery was not voluntary within the meaning of the Policy; (2) the violation was committed intentionally or knowingly by the person making the disclosure; (3) action was not promptly initiated and diligently pursued to correct or eliminate the violation; (4) significant environmental harm or a significant public health effect was caused by the violation; (5) repeated violations reveal a pattern of conduct or condition which should have been addressed earlier; (6) the violation or disclosure involved fraud. *Id.*

161. *See* 42 U.S.C. § 7661f (1994).

162. *See Overview of the State Small Business Assistance Programs* (visited Jan. 4, 1999) <http://www.smallbiz-enviroweb.org/programs_overview.asp>.

1. *Small Business Ombudsman.*—A Small Business Ombudsman serves as the small business community's representative in situations in which small businesses are impacted by the CAA.¹⁶³ Under the CAA, the role of the Small Business Ombudsman is to review and provide recommendations to the EPA and state and local air pollution authorities regarding development and implementation of regulations that impact small businesses.¹⁶⁴ The Small Business Ombudsman also assists in notifying the small business community of information relevant to small businesses.¹⁶⁵ The Small Business Ombudsman may refer small businesses in need of help to the appropriate specialists and conduct studies evaluating the effects of the CAA on small businesses.¹⁶⁶

The Small Business Ombudsman for Pennsylvania, Greg Czarnecki,¹⁶⁷ has a more comprehensive role than that designed by the CAA.¹⁶⁸ Czarnecki serves as the Pennsylvania DEP spokesperson to the small business community and investigates complaints from the small business community about the DEP.¹⁶⁹ Czarnecki provides confidential assistance to small businesses within Pennsylvania needing help with environmental issues.¹⁷⁰ He reports on the performance of the Small Business Assistance Program to the Governor and the EPA.¹⁷¹ Czarnecki also provides information to small businesses needing financial assistance to implement pollution prevention practices and comply with environmental regulations.¹⁷²

163. *See id.*

164. *See id.*

165. *See id.*

166. *See id.*

167. Czarnecki holds a bachelor's degree in biology from Gannon University and a master's degree in biology from Edinboro University. He served as a senior biologist with Andrew Martin Associates, Inc., in Erie and as a lecturer in biology at Gannon University. He has experience as a chemical technologist. Czarnecki was appointed to his position by Governor Tom Ridge on July 31, 1997. *See Greg Czarnecki, Small Business Ombudsman* (last modified Sept. 2, 1998) <<http://www.dep.state.pa.us/dep/deputate/pollprev/Ombudsman/biograph.htm>>.

168. *See Pennsylvania Small Business Ombudsman* (last modified Sept. 2, 1998) <<http://www.dep.state.pa.us/dep/deputate/pollprev/Ombudsman/ombudsma.htm>>; *see also* 42 U.S.C. § 7661f(a)(3) (1994).

169. *Pennsylvania Small Business Ombudsman, supra* note 168.

170. *See id.*

171. *See id.*

172. *See d.*

2. *Compliance Advisory Panel.*—The Compliance Advisory Panel renders advisory opinions regarding the effectiveness of the Program, difficulties encountered, and degree and severity of enforcement.¹⁷³ The Compliance Advisory Panel must report on the compliance of the Small Business Assistance Program with other acts.¹⁷⁴ The Panel must also submit periodic reports to the EPA's Small Business Ombudsman and review information for small businesses to ensure it is understandable to the layperson.¹⁷⁵

Pennsylvania's Panel, called the Small Business Compliance Advisory Committee, discusses the Small Business Assistance Program, including the calls handled by Airhelp,¹⁷⁶ the Airhelp newsletter, site visits, form reviews, the website, and conferences, seminars, and expositions attended by Airhelp staff.¹⁷⁷ The minutes from the July 22, 1998, meeting show that the Small Business Compliance Advisory Committee discusses issues pertaining to the actual aid given to small businesses, such as small business contract renewal and small business loan fund legislation.¹⁷⁸ The Compliance Advisory Committee also discusses specific environmental regulations, and keeps abreast of any changes made to such regulations.¹⁷⁹

3. *Assistance Provided by Airhelp.*—Pennsylvania established a hotline and website called Airhelp, which aided small businesses

173. See *Overview of the State Small Business Assistance Programs* (visited Jan. 4, 1999) <http://www.smallbiz-enviroweb.org/programs_overview.asp>.

174. See *id.*

175. See *id.*

176. Airhelp is the prior name of the present Envirohelp assistance service. Airhelp aided small businesses in finding information about air quality requirements and pollution prevention options. The Airhelp program was expanded in January of 1999 to include other types of environmental compliance. The author will refer to Airhelp and Envirohelp as separate entities. See *Airhelp Website* (visited Jan. 4, 1999) <<http://www.pa-airhelp.org/>>; see also *Envirohelp Website* (visited Jan. 14, 1999) <<http://www.pa-envirohelp.org/>>.

177. See *Small Business Assistance Program Compliance Advisory Committee Meeting* (visited Jan. 14, 1999) <<http://www.dep.state.pa.us/dep/Subject/advcoun/smallbiz/min9807.htm>>.

178. See *id.* The Small Business First Fund is an option that is presently available to small businesses. Pennsylvania offers low-interest loans to small businesses. The loans can be used to come into compliance with environmental regulations or to adopt pollution prevention practices. See *Small Business First Fund* (visited Jan. 14, 1999) <<http://www.pa-envirohelp.org/sbff.html>>.

179. See *Small Business Assistance Program Compliance Advisory Committee Meeting*, *supra* note 177. Information was presented regarding the draft solvent metal cleaning regulation that had been developed and would be discussed at an upcoming Air Quality Technical Advisory Committee meeting. Proposed revisions of the air monitoring program were also presented. *Id.*

in complying with air quality regulations. Airhelp has provided several success stories to show the types of aid that the service offered to small businesses.¹⁸⁰ Airhelp assisted a school in applying for a natural minor permit for the school's boilers.¹⁸¹ The Airhelp staff told the school representative how to estimate the actual and potential emissions from the boiler and complete the application.¹⁸² As a result, the school was able to complete the permit application process.¹⁸³

In another case, a plant engineer for a small metal parts manufacturer attended an Airhelp seminar on regulatory requirements for solvent-based degreasers.¹⁸⁴ After attending the seminar and reading an Airhelp compliance guide, he decided that his facility's large perchloroethylene-filled, open-top vapor degreaser was not in compliance with federal and state air regulations.¹⁸⁵ After Airhelp had several telephone conversations with the engineer and performed a site visit, the company replaced the noncompliant degreaser with four smaller units that exceeded federal requirements.¹⁸⁶ Airhelp has continued to work with the company to help it comply in other areas of environmental regulation.¹⁸⁷

In a third situation, a manufacturer of electronic components needed help understanding the federal degreasing and electroplating standards.¹⁸⁸ He had been warned by the DEP that the facility might be subject to air permitting requirements.¹⁸⁹ After Airhelp staff visited the site, they decided that the company was not subject to the electroplating standard.¹⁹⁰ Several areas of noncompliance

180. See Pennsylvania Small Business Assistance Program, *Airhelp Success Stories* (undated) (unpublished paper on file with the author). Airhelp provided the author with success stories, but was unable to disclose the names of the businesses involved because the businesses aided by Airhelp were given confidential assistance. See also Interview with Greg Czarnecki, Small Business Ombudsman (Jan. 4, 1999).

181. See Pennsylvania Small Business Assistance Program, *Airhelp Success Stories* (undated) (unpublished paper on file with the author).

182. See *id.*

183. See *id.*

184. See *id.*

185. See *id.*

186. See Pennsylvania Small Business Assistance Program, *Airhelp Success Stories* (undated) (unpublished paper on file with the author).

187. See *id.*

188. See *id.*

189. See *id.*

190. See *id.*

were discovered in the facility's degreasing operations.¹⁹¹ The Airhelp staff provided advice on complying with the approaching deadline under the federal standard.¹⁹² The facility has since implemented improvements in equipment and work practices to comply with the standard, stopped using lip exhausts in degreasers, submitted the required degreaser notification reports to the EPA and filed the required forms.¹⁹³

These examples of the type of assistance Airhelp provides show that small businesses often need help in the process of compliance, such as completing forms and permit applications. Czarnecki stated that small businesses are often afraid to contact Airhelp for assistance because they are concerned about the confidentiality of their communications with Airhelp staff.¹⁹⁴ While these success stories show that hotlines like Airhelp have a record for providing valuable services to small businesses, it is difficult to evaluate Airhelp without any examples of cases in which businesses could not be aided by Airhelp.

4. *Airhelp/Envirohelp Assistance.*—Pennsylvania's Airhelp program has been expanded to offer small businesses assistance in other areas of environmental regulation. Presently, the Pennsylvania hotline and website are called Envirohelp. They help small businesses find information about regulations for air quality, hazardous waste, residual waste, pollution prevention options, and energy efficiency options.¹⁹⁵ The website provides users with announcements about upcoming events, technical information, and downloadable copies of regulations, forms and guidance materials.¹⁹⁶

The purpose of Envirohelp is to help small business owners understand and comply with environmental regulations.¹⁹⁷ Ultimately, Envirohelp's goal is to aid small businesses in becoming more profitable and competitive by reducing raw material use, waste and energy consumption.¹⁹⁸ Envirohelp offers regulatory

191. See Pennsylvania Small Business Assistance Program, *Airhelp Success Stories* (undated) (unpublished paper on file with the author).

192. See *id.*

193. See *id.*

194. See Interview with Greg Czarnecki, Small Business Ombudsman (Jan. 4, 1999).

195. See *Envirohelp Website* (visited Jan. 14, 1999) <<http://www.pa-envirohelp.org/>>.

196. See *id.*

197. See *Small Business Assistance Program Home Page*, *supra* note 47.

198. See *id.*

assistance and free permit application reviews, and free environmental audits and site visits.¹⁹⁹ Small businesses that contact Envirohelp are assured that their questions will remain confidential.²⁰⁰

C. Evaluation of Assistance Available to Pennsylvania Small Businesses

While complementing the EPA's Environmental Audit and Small Business Policies, the Pennsylvania Environmental Audit Policy and Small Business Assistance Program have some of the same flaws as the EPA Policies. Like the Environmental Audit Policy, the Pennsylvania Environmental Audit Policy is a general policy which provides adequate incentives to encourage large corporations to police themselves for environmental violations. However, the Pennsylvania Environmental Audit Policy, like the EPA Environmental Audit Policy, does not provide adequate incentives for compliance to small businesses. It is for this reason that the Small Business Policy and Small Business Assistance Programs exist.

The DEP offers more aid to small businesses with its Pennsylvania Small Business Assistance Program than the EPA offers under the Small Business Policy. One part of the Small Business Assistance Program, the Small Business First Fund offers low-interest loans to small businesses to help them comply with environmental regulations. The DEP has recently expanded the Airhelp program to cover all areas of environmental compliance and renamed the program Envirohelp. Envirohelp offers confidential assistance to small businesses. However, small business owners still fear being assessed penalties for environmental violations.²⁰¹ As a result, many small businesses do not seek assistance from Envirohelp.²⁰²

The Airhelp success stories provide evidence that the Pennsylvania Small Business Assistance Program works well when small businesses take advantage of it. However, many small businesses may not be aware of the services available to them through the Program. More small businesses need to be informed of the services and confidential assistance offered through the Small

199. *See id.*

200. *See id.*

201. *See* Interview with Greg Czarnecki, Small Business Ombudsman (Jan. 4, 1999).

202. *See id.*

Business Assistance Program. Then, Pennsylvania would make great strides towards helping the EPA accomplish its goal of increasing environmental compliance by encouraging businesses to police themselves for violations.

VI. Conclusion

The EPA has created the Environmental Audit and Small Business Policies to increase environmental compliance and encourage more businesses to police themselves for environmental violations. The EPA has been successful at increasing compliance with the Environmental Audit Policy among large corporations. Large corporations have availed themselves of the benefits of the Environmental Audit Policy. Their large financial resources enable them to have greater access to information on environmental compliance than small businesses have. They can also afford technical advice. Large corporations can pay for environmental audits and for attorneys to oversee the performance of the audits. As a result, they may be able to keep the audit findings confidential, thus avoiding some penalties.

Small businesses have limited resources. Small businesses are not only unable to afford information, services, technical advice, and legal counsel, but they may not be able to pay the costs to correct the effect of an environmental violation. These costs or the penalties assessed to a small business may force the business into bankruptcy. Small businesses fearing such a result will avoid policing themselves for environmental violations.

The EPA should offer confidential assistance to small businesses temporarily. The EPA is already lenient in assessing penalties under the Small Business Policy. Many small businesses do not comply with the Environmental Audit and Small Business Policies due to their fear of the unknown. If small businesses are informed that the EPA is offering confidential assistance with little threat of penalties, then small businesses will feel more comfortable contacting the EPA for assistance. As a result of their seeking assistance, small businesses will be more informed about compliance measures and methods for policing themselves for environmental violations. The extra temporary costs of providing confidential assistance will save funds in the future and ensure that the EPA accomplishes its goal of widespread environmental compliance of businesses through self-policing methods.

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