

**Guide Questions and Documentation of Small Group Discussions**  
**Public Workshop on Administrative Penalties Regulations**  
**to Evaluate Possible Revisions**

DTSC Sacramento Regional Office, June 7, 2019

**Topic 1:** Determining the Potential for Harm and Extent of Deviation for Each Violation (30 minutes)

- Step 1a of penalty determination process
- 22 CCR 66272.62 (a) to (c): pp. 7-8 of handout #1
- 1. Currently, there are two factors used to determine the initial penalty, namely “potential for harm” and “extent of deviation”. In your opinion, what factors should the initial penalty for each violation be based on?
- 2. What changes should be made to the categories for degree of potential for harm and extent of deviation, and their definitions?

Additional questions to consider:

1. What are some other ways we might calculate initial penalties?
2. Do we need to have more explanations to the initial and base penalty calculation? If so, please specify the nature of what the explanation should include or address.
3. Do you understand the categories for degree of potential for harm, and extent of deviation, and are they intuitive? If your answer is no, how should the categories for degree of potential for harm and extent of deviation, and their definitions, be revised?
4. What changes can be made to the penalty regulations to enhance fairness and consistency?
5. In what ways do you think the current regulations most lead to inconsistent results?

### Group 1 Discussion:

- Regulated entities:
  - recognition for compliance.
  - understanding of established business practices.
  - Grace period for when regulations change.
  - Sliding scale for performance for a regulated entity.
  - Regulated entity figured into penalty matrix and given “adjustment credit”.
- Whole different entry for non-regulated/not in system:
  - Higher deviation.
  - Outside system/ no permit/ non-compliant = highest penalty.
  - Targeted regulatory efforts towards violators not in program.
- Potential for Harm:
  - Facility not penalized for factors they have no control over (“low birth weight”).
  - Proximity to EJ community influencing penalty.
  - Enviroscreen score as influence on potential for harm calculations versus not using E’screen score for potential for harm calculations.
  - For violations with no physical release, minimize potential for harm.
  - Actual release or exposure treated more severe; “paperwork” very minor.
  - Potential for harm/extent of deviation calculations vague and lead to excess penalties.
  - Decreases for penalties imposed also subjective and not consistent.
  - Distance of violation from sensitive areas – consider.

### Group 2 Discussion:

1. Limited options; no middle range.
2. 'Knowing' should be included in the violation classification.
3. More examples of situations. Is it a repeat? Are they cooperative?
4. Class 1 = major; Classes should tie in with whether major/minor.
5. Same in each program.
6. Defined program for all CUPAs. Penalties assigned for specific violations.
7. Clear guidance for businesses and CUPAs.

### Group 3 Discussion:

- Potential for harm (3 out of 6 is major) and extent of deviation - limits to help but varies in interpretation.
- Extent of deviation – you don't want something strict but broad. Is it in procedures?
- It's not inspector that makes decision, whole team gets involved.
- Local procedures are adequate. What is seen in field is based on experience.
- It's vague – extent of deviation.
- Discussion of additional questions:
  - Discussion of additional question #1:
    - Two of them are broad.
    - Accountability (of how the penalty amounts in the matrix were determined)
  - What dictates low to high end of deviations?
  - How do you pick the cost (penalty) in the matrix? You're left with 3 choices; how is that made?
  - Unknowingly/knowingly, clarification is needed.
  - Low/med/high penalty needs to be standardized.
  - Hard time with major, minimal definitions with legal.
  - Application of max cost in the range needs clarification.

**Topic 2: The Penalty Matrix and Initial Penalty Adjustment Factors [22 CCR 66272.62 (d) and 22 CCR 66272.63] (30 minutes)**

- Steps 1b, 2a, and 2b of penalty determination process
  - 22 CCR 66272.62 (d) and 22 CCR 66272.63: pp. 8 & 11 of handout #1
1. How should the penalty matrix, set forth in 22 CCR 66272.62 (d), be revised?
  2. The following are some alternatives to the current penalty matrix: (i) set penalties for common violations; (ii) two or more separate penalty matrices; and (iii) penalty matrix that is weighted for potential for harm. See handout of examples of penalty matrix alternatives. Identify the alternative(s) that would be a good replacement for the current penalty matrix? Please describe how the alternative(s) you identified will function?
  3. How should the regulations for initial penalty adjustment factors [22 CCR 66272.63] be revised?

**Additional questions to consider:**

1. Should DTSC continue using one penalty matrix for all violations or would you prefer a system where we establish two or more separate penalty matrices?
2. If DTSC had two or more separate penalty matrices, should those matrices be categorized by the type of violation or the type of waste stream involved?
3. Do you prefer DTSC to establish set penalties for common violations?
4. Do you prefer DTSC to establish set penalties for common violations? Do you think that having set penalties for common violations, in addition to the penalty matrix, will streamline the enforcement process?
5. In general, when determining a penalty, should a violation's potential for harm be considered more than the extent of deviation?
6. Are the initial penalty adjustment factor regulations clear or do they need more clarification?

### Group 1 Discussion:

- Weighting deviation more than potential for harm is backwards. Potential for harm should be primary consideration; de-emphasize deviation.
- Actual harm is issue, most critical factor.
- In pass/fail deviation, how can you calculate extent of deviation? How to standardize?
- Establish public process for establishing set violations for common violations.
- Collect and tabulate and agree on the common violations and severity = consistency.
- Set penalties would streamline process.
- Set penalties preferred.
- Penalty adjustment factors are too variable; not clear.
- Greater penalties for egregious violations, simplify.
- Facility with good compliance history/cooperative gets violations but still weighted/adjusted during penalty calculation.
- Simplify penalty adjustment regulations → “good” and “bad” facilities.
- Establish a scale for prophylactic effect.
- Prophylactic effect already covered by economic benefit.
- Total factor (compliance history, intent, cooperation) considered then apply simple penalty.
- Recalcitrant violators receive enhanced penalties.
- Enhancement/benefits/no penalties for self-reporting (incentive).
- Enhancement/benefits/no penalties for cooperation.
- Reductions for cooperation.

### Group 2 Discussion:

1. Add 'Knowing'.
2. One penalty matrix not two.
3. economic benefit or single/multi penalty should not be a discretion (should be required).
4. Economic benefit not easy to determine.
5. If there is economic benefit – ability to pay should be taken out.
6. Set penalties for common violations.

### Group 3 Discussion:

- Update of definitions is needed.
- Definition for Major is clear.
- Water board is consistent with matrix; Storm water part is not.
- Lots of options.
- RCRA has ranges but not clear – no midpoint.
  - Matrix not defined.
- Small versus large quantity generator for basis to pay.
- Disclaimer needed – set penalty for common violations.
- DTSC codes confusing.
- Two or more separate matrices – be by size of generator; Different matrix needed to help direct people.
- Size of generator would help industry ability to pay.
- No to potential for harm of a violation considered more than extent of deviation.
- Yes, clarification needed for initial penalty adjustment factors. What range? In what situation would you use upper and lower adjustments.

**Topic 3:** Multiple Violations, Multiday Violations, Base Penalty, and Adjustments to the Total Base Penalty [22 CCR 66272.64, 66272.65, 66272.67, and 66272.68] (30 minutes)

- Steps 3 to 7 of penalty determination process
  - 22 CCR 66272.64, 66272.65, 66272.67, and 66272.68: pp. 13, 15, 19, 21-22 of handout #1
1. How should the regulation sections regarding multiple violations and multiday violations be revised?
  2. How should the regulations sections regarding base penalty and adjustments to the total base penalty be revised?

Additional questions to consider:

1. What should DTSC consider when assessing penalties for multiple violations?
2. Do you think multiple incidents of the same violation should be weighed more than one incident of a violation that occurred over multiple days, vice versa, or should they be equally weighted?
3. If a facility has a history of multiple violations, how can we best address this issue?
4. Do you think general adjustments to the base penalty for cooperation, prophylactic effect, and compliance history are appropriate? If not, could these adjustments be reworked to be more appropriate?
5. What mitigating factors should be considered when calculating a base penalty?

Group 1 Discussion:

- Consider failure to report: consider deviation, should be downgraded to minor.
- Consider language of spill reporting.
- Define violation more precisely, then subsequent days as less severe/ secondary violation.
- Enhanced/elevated violations for multiple/repeat violators' history.
- Education and outreach as a way to get compliance, facility reaches out for guidance.

- Not penalized for audit/compliance.
- Group minor violations into 1 minor violation if similar.

#### Group 2 Discussion:

1. Where does the 2% come from?
2. Define violations that are single day versus multi-day.
3. Cooperation, prophylactic effect, and compliance should be (further) defined or taken out.

#### Group 3 Discussion:

- Multiple violations have large range, some with upper adjustment.
- Have a “settlement amount” – fixed figure.
- Each time go to court bump up penalty.
- Dramatic increase to \$70,000 - too much too fast.
- Multiday based on observed days – only calculate for days inspector comes back and observes violation.
- Make it public how came to decision.
- “Compliance history” element not well known by stakeholders as a factor.
- Drop prophylactic effect – not well understood.



**Topic 4:** Minor Violations Subject to a Penalty [22 CCR 66272.66] and other topics not covered in Part 1-3 (30 minutes)

➤ 22 CCR 66272.66: p. 17 of handout #1

1. Currently, only a very small fraction of Minor violations is subject to a penalty (according to 22 CCR 66272.66). What is your opinion about having small set penalties for Minor violations?
2. How should violations that result in actual harm be penalized, compared to similar violations that can only be assessed for potential for harm?
3. What other comments do you have regarding the penalty regulations that were not discussed previously?

Additional questions to consider:

1. For which minor violations should DTSC apply small, set penalties?
2. Should a violation with potential for harm be penalized less than a violation that causes actual injury or damage to environment?
3. Is there a different approach to these penalty regulations that DTSC has not appeared to consider?
4. Do you believe DTSC should use computer software, which uses a larger matrix of factors, to generate penalties? Is DTSC failing to utilize technological advancements?
5. Do you have any general concerns regarding the current penalty regulations and/or the discussed alternatives?
6. Which DTSC staff classification should calculations violation penalties – the inspector, the inspector's management, or a Hazardous Waste Management Program attorney?

#### Group 1 Discussion:

- Minor violation – set penalties.
- Labeling, closed container, emergency posing, HMBP submitted on time, mislabeled manifests.
- Violation with only potential for harm is less severe than actual harm.
- Yes to computer software to generate penalty numbers.

#### Group 2 Discussion:

1. No small set of penalties/fines for minor violations.
2. Consistency overall – develop electronic (Excel, etc.) to calculate penalties. Mandatory for CUPAs also. Program should prompt staff to populate each factor used to calculate penalties.
3. Program (above) eliminate need for persons of a specific classification to calculate penalties.

#### Group 3 Discussion:

- Minor violations don't warrant a penalty
- Local agencies versus DTSC- different concept of when minor becomes a Class II.
- Software generated penalty – no. Lose control of numbers. Software development is too much overhead; Not effective use of taxpayer's money.