

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

DTSC Chatsworth Regional Office; August 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:

- Labeling – poor housekeeping examples: one employee deviating from regs.
- Example: small fire from batteries
 - Where would you place it? Major or moderate
 - Who packaged it poorly? Who is at fault?
- Who is at fault should be considered more.
 - Look more at contributing causes in terms of a violation. Ex. Did a HW arrive improperly labelled/packaged to the facility?
- How will these penalties affect smaller businesses?
 - Ability to pay
- Quicker to take a small percentage of the penalty rather than calculate the whole penalty.
- Strict liability – intent is not proven
- Classify the business into categories and use that to calculate penalties (small versus large)
- Amount and nature of substance involved should be more tangible and defined into a matrix of sorts
 - Extremely hazardous
 - Corrosive, ignitable, etc.
 - Some vagueness works better for regulators (ex. fire)
- Perhaps too harsh of penalties when you have a minimal harm and major deviation. Example: waste oil or paperwork
- Violation history; new to the business should be considered
- Minimal potential for harm could have a lesser deviation
 - Example: waste oil - minimal potential for harm and major deviation – overly aggressive
- There should be more consideration for penalties on small violations
 - Take 20% off penalty and offer settlement to decrease time.
- Potential for harm definitions
 - Comprehensive, a little subjective.
 - Threat to the environment is subjective

- Some categories are hard to quantify
 - Pounds of batteries, amount released
 - Waste amount/characteristics
- What does “release” mean?
 - In secondary containment? Air? Offsite versus onsite?
 - Needs clarification.
 - Example: double walled tank, spilled into managed secondary containment. Is this release considered the same as if it went offsite?
 - How well did emergency procedures function?
 - Get to the root of the violation cause.
- Minor violations should have less of a penalty
 - Example: paperwork errors
- These classifications could be arbitrary
 - Matrix for waste should be included to help make determination
 - What state is it in?
 - What is it?
 - Amount?
- Size of facility needs to be included
 - Small facility versus large facility
- Generators rely on a service provider to fix problems
 - Do they show good faith effort by hiring someone?
- Self-reporting discount?
 - Part of cooperation?

Group 2 Discussion:

- Difficult to prove intent
- Very subjective - depends who is making the determination
- Too many possibilities
- Language is too vague – categories for degree of potential for harm and extent of deviation
- Extent of deviation – length of time out of compliance should be included in making this determination
- Clearer way of defining potential for harm/extent of deviation
- Everyone considers a threat/potential for harm in a different way, different perspectives
- Definitions should be revised
- So broad of a topic; examples sometimes don't help
- Looking at compliance history and see how long they take to come into compliance
- Variabilities are so great
- Have more explanations
- Examples should be in a fact sheet of different scenarios (including potential for harm/extent of deviation process)
- Different perspectives – different outcomes
- Some agencies don't understand the penalty regulations and they are still using the 25 K statutory maximum.
 - Training is needed regarding the current regulations
- Penalty matrix presented as a range and agencies could choose lower or higher range depending on who is making the determination which lead to inconsistencies.

Group 3 Discussion:

- Major (potential for harm) easily understood (Clear).
- Minimal (potential for harm) is vague.
- Potential for harm for minor violations when administrative
 - Regulatory language defining how to deal with and on what is administrative and minor
 - Specific examples in regulations are helpful
- Explanatory/illustrative language in regulations
 - More definitions of key terms
 - How do you measure intent/ know motives?
 - Primary evidence, observation – best direct evidence
- Prior violations should not influence inspection.
- Higher penalties for intentional violations.
- Range in penalties – more guidance on how to apply.
 - Is minimal/minimal - \$0 per violation? How to cite?
 - Minimal/Minimal – no consensus in group if a penalty or \$0 penalty should be applied
- For extent of deviation – moderate and minimal definitions need clarification.
- Potential for harm considerations are vague – need to be more readily defined.
- Violations need to reflect economic circumstances of business – Ability to pay
- Regulators/inspectors may view violations differently – lead to vastly different fines / penalty
- Formulate matrix for potential for harm – uniform
- Pre-establish major/moderate/minimal violations
- What do you do with adjustment factors for potential for harm and extent of deviation?
 - Consider history of company when looking and calculating potential for harm and extent of deviation.
 - Specific same violations that repeat get elevated.

Group 4 Discussion:

- Major, moderate, minimal harm categorization – not clear
- Deviation – determines intent, somewhat clear
- How do you define toxicity? It's grey
- How do you define harm? It's not clear
- Harm and deviation – both subjective
- Ability to pay and prophylactic effect may mitigate
- Possible options for financial hardships
- More clarification needed for harm
- How do you quantify harm? i.e.\$/gallon. How do you model threat to the environment?
- Purpose of fine? Be in compliance. Solution to violators
- Deviation is more important. You have to consider threat to violator. More outreach?
- Problem: DTSC and CUPA don't see things the same way (in citing violations)
- More outreach is needed
- Education is needed than litigation. i.e. you have x amount of days to fix violation
- Consultation services are needed. Give people a chance to comply before issuing violations.
- Problem: regulations are difficult for business especially mom and pop business because small.
- Problem: penalty and need to increase business to pay
- Problem: CUPA, fire department and DTSC disconnect. Different interpretation. They will say everything is okay when it is not.
- Explanation to base penalty is subjective
- Understand categories of potential harm but not mechanism
 - How do you define major, moderate
- Changes to penalty? Have consulting department, education.
- Have DTSC consultation services and charge facility if violations were found - give facility penalty.
- Provide training and charge facility.

- Do you give credit for facility in compliance? If some violation, understandable.
- CUPA and DTSC not consistent
- No one like regulations – facilities. Increase outreach/education
- Online training available for businesses: have consultation. Charge facilities pay.
Chance to answer questions.

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:

- Like adjustment factors
 - Helps regulators identify business that are cooperative
 - Put \$ back into business
 - Usually either 50% or 0% for adjustment
 - Very subjective (0-50%)
- Adjustments give ability to help facilities that made good faith efforts to comply
 - Group like the adjustments
- If violations are beyond your control, you aren't the violator
 - Ex. A car crash into a building.
- Minimal potential for harm/major deviation: there should be a cap on penalties
 - Regulators dragging their feet against what is cited
 - Min/major, \$42,000 too much
 - Excluding recalcitrant violators
- Good faith efforts – regulators being overly critical, too subjective?
 - Settlement meetings help resolve subjective-ness
 - Must be able to demonstrate some element of complying with the violation/regulation.
- 0-50, 50-100 usually either 0 or 50. Never in between.
 - Too arbitrary
 - Should be yes or no
- Inspector S.O.P. – always issuing exact highest penalties
 - Subjective

Group 2 Discussion:

- 70K is too high
- More consistency among all programs/agencies regarding fines
 - Cal-ARP, Air Board, Cal-OSHA, CUPA Agencies
- How did they come up with 70K
- Increase in penalties to deter dumping hazardous waste, but a labeling issue is now penalized within higher range.
- Labeling violation should set a fix amount (1,000)
- Setting fixed amounts for common violations
- 1 Drum or 1 day? What is an occurrence
- No method to this madness
- Set fixed amounts for different waste streams
- No more than one penalty matrix
- Make things simple
- Less penalties; more education
- As private industry – we cannot control everything and employees' actions all the time. Regulators should come and allow us to get into compliance within allowed time. If it doesn't get done then set a fine.
- Industry should know the regulations.
- Violations depend on regulators. Some more stringent than others.
- Cannot separate potential for harm and extent of deviation
- A violations potential for harm should not be considered more than the extent of deviation. They should be equal
- Making these determinations depends on regulators
- The initial penalty adjustment factor regulations are clear, but how do you prove intent? How do you prove all the criteria?

Group 3 Discussion:

- How to revise penalty matrix:
 - All violations defined and have penalty amount
 - Violations that have no penalty, just get an SOV
 - Matrix for first offender and matrix for repeat offenders
 - Repeat offenders handled with elevated matrix
 - Consider willingness to comply of company, ISO Certification, efforts
 - ISO Certifications – major consideration that company wants to comply
 - Fines lead to better compliance in future
 - Inconsistency with inspectors, some may choose not to write minimal/minimal
 - Language in SOV/NOV that explains next occurrence may result in a penalty/fine
 - Penalty matrix base upon Small/medium/large business
 - If regulations properly define potential for harm – no need for secondary matrices.
 - Sub-categories in matrix- minimal/moderate/major with steps
 - Matrix for California/RCRA violations
 - May be over-regulating when considering risk
 - One person in the group prefers a penalty matrix weighted for potential for harm.
 - Two participants in the group prefer a matrix with equal weight for potential for harm and extent of deviation.

Group 4 Discussion:

- Would it vary for tiered permitting?
- Depending on revenue
- UW should have separate matrix
- Different categories of business should have different matrices. i.e. transfer station, transporter.
- Type of waste stream should be involved in matrix
- Predetermined amount matrix
- Issue: other department water issue notice to comply. Complicated matrix.
- Have fixed fees instead regulatory process. i.e. labeling
- Establish minimal amount; Adjustment factor is subjective
- Matrix is too subjective, penalties should provide incentive
- Where does funding from DTSC come from?
- Penalties should stimulate compliance.
- There should be a review board. i.e. increases by 50%, 100% is subjective
- A lot of changes with medical waste starting July 1
- There should be consistency
- Matrix shouldn't be as complicated as it is
- Should a violation's potential for harm be considered more than extent of deviation?
YES
- Adjustment factor regulations clear? NO

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:

- Regulations (fine)- stay away from multiple violations usually
 - Good because it makes it easier to hold facilities accountable.
 - Hard to see every day, so hard to fight in court.
- Regulator inform they will be penalizing as soon as they know
 - Makes settlements easier
 - Transparency is better
- Cooperation factor helpful
 - Either 25 or nothing
 - Anything between is subjective
 - Consider increasing the amount to 50
- Prophylactic effect – increase fines to deter engaging in a practice
 - Example: fine plating shops using a new process, explain to community, increase fines to deter a trend.
- Compliance history should be increased – more than 10%
 - Shows more of how the business is run.
 - Needs to be worth more
 - ISO14001 certificate should be worth more.
- Ability to pay: just because you're a big company, doesn't mean you should get the max penalty
 - Compliance = the goal
 - Take 20% off the penalty + consent order to cut through legal time
- Difference in enforcement → CUPA: favorable to businesses in city compared to State
 - Needs to be the same across the board

Group 2 Discussion:

- 22CCR 66272.64(b)(2) and (3) are not clear
 - Not clear → are they talking about a single penalty or multiple? Confusing
- (b)(3) What is considered independent? Substantially distinguishable?
 - Example:
 - 2 drums in one area with no labels
 - 2 drums in another area with no labels
 - Are these 2 violations or 4 violations?
- 66272.65 – no revisions
- Will CUPA be applying these penalty regulations?
- Input to revise the regulations or to revise DTSC policies? Statewide?
- Should the regulations sections regarding base penalty and adjustment to the total base penalty be revised?
 - No adjustments.
 - Yes, multiple incidents of the same violation should be weighed more.
 - History of multiple violations – how to address?
 - Suspension warning
 - Increase permit fees
 - Monetary fines
- Yes, general adjustments to the base penalty for cooperation, prophylactic effect, and compliance history are appropriate, but makes it a more complex process.
- Simplicity is key.

Group 3 Discussion:

- Ten violations all different versus 10 violations of exact same issue – different deviation
- Number of violations in one storage area versus violations throughout facility - different deviation
- For multiple number of random violations – is less of an issue than a number of the exact same violations
 - Multiple random violations may indicate problems with compliance
 - Multiple exact same violation may be due to ignorance/lack of knowledge.
- Economic benefit with other added criteria
- Multiple day violations are more weighted when Major/moderate
- Multiple day violations are equal to number of occurrence when minimal
- Weighted scale or maximum penalty for recalcitrant offenders.
- Minor violations escalated versus kept minor if paperwork
- Do adjust downward adjustment of penalty based upon cooperation and history; and define: reduce by X%.
- Mitigating factors to base penalty
 - Consider response time/urgency
 - Degree of cooperation
- Prophylactic effect – track fines, statewide, average fine, max for violations, database

Group 4 Discussion:

- Multiple day violation should be revised
- It's a violation of some code, should be considered one and the same.
- It should be code violation (citation), not instances
- If multiple violations, can't make adjustments. Should have categories.
- Multiday? 30-40 day should have fine. There should be grace period for compliance.
- Similar arrangement like CalOSHA? DTSC provided service before. Issue: people did not call. DTSC image? Facilities are scared.
- Assessing penalties for multiple violation – It should be under 1 violation
- Facility has history of violations? Offer compliance training and charge them a fee. We have CA compliance school.
- Answers to guide question #4: Adjustment to base penalty for cooperation is not so clear. Adjustments for prophylactic effect should have a range.
- Answers to guide question #5: Mitigating factors when calculating base penalty:
 - Potential for harm to human and environment
 - history with same mistakes
 - If violator had relationship with CUPA and DTSC finds something wrong
 - Disconnect with DTSC and CUPA
 - Ability to pay
 - Number of employees should be considered for ability to pay
 - Cooperation

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:

- For which minor violations should DTSC apply small, set penalties?
- Should a violation with potential for harm be penalized less than a violation that causes actual injury or damage to environment?
- Is there a different approach to these penalty regulations that DTSC has not appeared to consider?
- 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?
- Do you have any general concerns regarding the current penalty regulations and/or the discussed alternatives?
- Which DTSC staff classification should calculations violation penalties – the inspector, the inspector's management, or a Hazardous Waste Management Program attorney?

Group 1 Discussion:

- Example: 5 – 55 gallon used oil
 - Wrote in sharpie on drums “used oil”
 - Made an attempt to label so not major deviation
 - Versus spraying used oil as dust suppressant
- Why do we have this section?
 - Incurred with larger violations
- When do you add penalties to a minor violation?
 - Matrix on wastes
 - These additional penalties (\$5600) are too high
- Facilities in egregious categories - give regulators more weight with additional minor violations
- More regulation on generators and to prevent problems.
 - Example: Truck shows up on fire, penalized for it – responsible for generator education?
 - Generators aren’t properly separating wastes and that’s coming down the line
 - Generators need more education
 - Some of the classifications need to be tightened up to relieve arbitrary decisions.
 - Container size: less than 55 gallons
 - Corrosive, flammable, toxic, extremely hazardous
 - Provide more guidance on quantity – helps regulators arrive at same point
 - Should administrative items be a different category?
- Increasing penalties could dissuade facilities from reporting and operating in California.
 - Example: Li battery and solar panel recycling
 - When it leaves the state, it increases carbon footprint.
 - Making a facility to properly address all the Li battery would be 150 million.

- Most businesses won't make that decision.
- Example: plastics recycling too expensive here in CA.
- Forcing recycling to stay in the state needs to be compounded with a great program to help reduce cost..

Group 2 Discussion:

- Not aware of minor violations subject to a penalty. Not clear in regulations. This needs to be defined.
- No to small set penalties.
- How should violations that result in actual harm be penalized, compared to similar violations that can only be assessed for potential for harm?
 - It's addressed in your classification of the penalty – Actual are referred to the DA and potential are handled administratively.
 - Yes, a violation with potential for harm be penalized less than a violation that causes actual injury or harm.
- Yes, DTSC should consider computer software/ new technology to generate penalties
- General concerns already addressed
- DTSC should take a team approach (not individual) to calculate penalties

Group 3 Discussion:

- Timeframe for payment?
 - Minor violation set, but with appeal rights
- Potential harm is same as actual harm
 - Actual harm gets elevated to civil/criminal
 - Harm/degree of harm identified – damage, death, pollution, illness
- Regulations clearly define DTSC role, CUPA role – consistency statewide
 - Same checklist and interpretation over regions to be consistent
 - CUPA – unified, but vary by county
 - Regulations make interpretation more difficult
 - Manuals to govern inspections and procedures leads to better tracking
 - Uniform penalty calculation (Software)
- Discussion of Additional Questions
 - Paperwork, admin, not training, no HW training Doc, Minor? May be difficult to prove/resolve
 - Interview staff; training record not accessible, presented later is minor.
 - Potential for harm same as actual harm
 - Voluntary compliance /audit inspection – no penalty
 - Outreach compliance assistance
 - Use software to make procedure more efficient
 - Do not use software to calculate or interpret penalty.
 - Not clear how to operate in ranges (Max/mod/min)
 - CUPA and DTSC collaborate on matrix for consistency
 - DTSC gives oversight
 - Too many inspectors – inconsistent
 - Manager – more realistic
 - Attorney - more defensible.

Group 4 Discussion:

- Minor violation subject to a violation
- Opinion regarding small set penalties:
 - Fine shouldn't be there
 - Minor violation regulation is confusing; Don't understand them.
 - Don't fine them; Send violators to compliance school
- Define minor violation
 - Paper waste violation
 - Put a timeframe to attend compliance school
 - If actual harm, there should be litigation; Look at intent
- Have compassion, education before litigation
 - Provide a checklist for facilities to be in compliance; made available to permittee
- Answer to additional questions:
 - Additional question #1: Small set penalties? None
 - Should a violation with potential for harm be penalized less than a violation that causes actual injury or damage to environment? Yes
 - Is there a different approach to these penalty regulations that DTSC has not appeared to consider? Education and closer working relationship with CUPA. Have workshops with business owners. Education before penalty, i.e. labeling; Give person a break the first time.
 - 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? There are too many subjective elements. Use more software. Issue: Are people going to use the software?
 - Do you have any general concerns regarding the current penalty regulations and/or the discussed alternatives? Subjective, excessive amount and should take into consideration the environment. Don't feel comfortable with multiple factors for penalty
- Which DTSC staff classification should calculations violation penalties – the inspector, the inspector's management, or a Hazardous Waste Management

Program attorney? Have a separate panel or agency that sets fee and have public input. One representative from facility – private sector. No regulators, none of the three staff classifications. No attorneys. Have an engineer.

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