

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

DTSC Berkeley Regional Office; September 18, 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?

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 Discussions:

- Potential for harm means contaminant substance driven
 - Complicated, driven by chemical
 - Waterboard matrix – which factor, is it water body?
 - Nature of site should be considered
 - What can be affected?
 - How regulated body store/left chemical
 - Site specific: the “drain” and where it’s actually going
 - Chemical and engineering control
 - Left with statutes from regulatory
 - Volume? i.e. Quart of oil versus 500 Gallon tank
 - Threshold volume should be considered
 - Potential for harm – based on volume
 - Is amount, proximity, endangered species, sensitive receptors considered?
 - Yes, they are considered. Schools are considered
 - Businesses should be asked why
 - Are sensitive receptors considered? How do you draw the line?
 - Potential for harm – there should be overlap, its already out there because businesses have to identify sensitive receptors and have to put on map.
 - Definitions of min, mod, major are helpful
 - Is there a per day factor? We use multi-day violations.
 - Clarification needed for multiday and because no criteria. It is subjective on inspector.
 - Variation among county inspectors
 - Variation in knowledge
 - For violation with low threat, is there a grace period for them to fix? Short window? Can there be a “fix it” ticket?
 - Add more guideline for CUPA and DTSC to follow for consistency
 - Common observation: too many inspectors with different knowledge

- \$70K is subjective
- CUPAs can use this penalty matrix. It puts businesses at risk because inspected by multiple inspectors and variation.
- Potential for harm should be clarified- should be amended for characteristics of site: extent of containment, endangered species
- Have CalEnviroscreen score be included in regs amendment
- Site specific and proximity needs to be addressed
 - Higher potential for harm for endangered species
- Add site specific characteristics, i.e. berm
- Not all violations warrant a penalty.
- Additional Questions to Consider:
 - Subjective penalty is put on 1 person = not good businesses
 - Fact finding in field then review – the process should be clarified
 - Enforcement should be informational process

Group 2 Discussions:

- Intent – knowledge of rules and regulations
- Violations – compliance history should be applied
 - Start with warning initially
 - Letter of warning for first time offense; violation for second time.
 - “Decision report” in lieu of violation, necessary 2-year period with no violation thereafter.
 - Consider employees that deliberately act to burden employers
- Reward for good behavior – points
- Proactive training and efforts should be considered in inspections
- Transparency in penalty calculations
- Mandatory trainings and workshops
- Website has no/ incomplete compliance information
- Communication, response, and professionalism

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?

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 discussions:

- Potential for harm is described but no separate matrix
- Should DTSC have several penalty matrices similar to the water board?
- Having some idea is helpful
- Mistake: minor violation that is major should be considered
- Does the matrix consider violator's past conduct?
- Intent is hard to prove for companies
 - It is easier to observe continuing and recurring violations
- Is prior conduct/compliance history considered?
 - Is there any data available?
- Downward adjustment of 10% is minimal for companies that go in compliance. 25% reduction is more appropriate.
- Goodwill and fix it ticket should be considered.
- Gallons discharge takes into different math matrix
- Should have two different matrices
 - One matrix for waste handling and one matrix for paperwork issues
 - Record keeping is important, i.e. keeping manifest: major potential for harm is good

Group 2 Discussions:

- Not in favor of one size fits all matrix.
- Ewaste is not as toxic, consider harm to environment and humans
 - Categorize for potential for harm
 - Categorize two matrices by waste stream
- Prefer flat fee for common violations – minimum
 - Above can escalate repeat, 2X. 3X ...
- Above will make penalty process better – streamlined
- Potential for harm should be considered primary factor
 - Minor needs clarification – human influenced, opinion, what level, varies.
 - Major violation much more clear – injury/death.

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?

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 discussions:

- Multiday violations should be revised for flexibility because it can be a one-time violation but major.
- Has to be a violation of title 22
- Violations should be based on facts
 - Intent and what were their actions
 - You keep doing it versus what were you doing?
 - Intent is hard to prove.
 - 1s and 2s unusual – could be individual, sometimes facility don't have control.
 - Routinely process – benefit more than 1's and 2's: behavior change is needed.
 - If facility continues, difference between we got caught and keep doing it (business issue)
- Multiday
 - If someone in the facility knew about it but did not inform
 - You want to be treated as single penalty
 - It is 1 person versus a process violation
- Keep 66272.64(b) regulations for multiple violations: good
 - Are the multiples similar?
 - Give more criteria
 - Is it the same issue?
 - Criteria for why violations should be separated.
- How do you get to the bad actor? Which ones are we going to charge you for?
- Escalating factor
- Penalties should not be based on 8 years ago but on conduct.
- Do we charge higher now? Should be based on conduct
- Conduct should be added
- Water board multiday is similar. It has escalating factor
- Add escalating factor and standard of proof – how many days it lasted

- Compliance history addresses this. Change regulations regarding compliance history

Group 2 Discussions:

- For instances of same violations found X times, consider class of violation, then ask if it is due to training, same employees, lack of materials, out of stock
- For violations of multiple instances versus multiday consider harm and safety – potential for harm should be the primary consideration
- Multi violation facility – training
 - Consider class and potential for harm
 - Consider employee behavior
- Adjust base penalty downwards based on compliance and cooperation.
- Adjust base penalty upwards for major, non-cooperative, harm
- Mitigating factor to consider:
 - Intent
 - Remorse
 - Proactive
 - Dialog

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?

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 Discussions:

- No to small set penalties for minor violations
- If harm actually happened, increase penalty
- Actual harm should be penalized more, have ranges and actual table.
- Needs to be triaged and have own table
- Regulations are intended to protect the public
 - There are rules to prevent harm and harm happened → penalty
- Water board and discharge: harm actually happened makes sense.
- If potential for harm is a fire, it's a big deal.

Group 2 Discussions:

- Small set penalty
 - Submit 4MBP on time
 - Labeling
 - Aisle space
 - Walkthrough inspection logs
- Violations with large potential for harm should be penalized less than one that actually harmed/injured people/environment
 - Actual is worse than potential; death ultimate
 - Violations with potential for harm only should be penalized less but not substantially so.
 - Others in the group think that both violations are equally bad.
- Do you believe DTSC should use computer software, which uses a larger matrix of factors, to generate penalties?
 - If website does not work how could penalty software work?
 - Does technology exist to have penalty calculation software?
 - Technology is available
- Calculate penalty using inspector's matrix, sup matrix, and attorney matrix. Then average the three numbers. Sup can't be inspector's sup.
- Focus on outreach and compliance assistance
 - Presenter of "stewardship: ideal

- Education/ compliance packets / handouts
- “Audit” or “walkthrough” inspection – non-punitive
- However, cite major violation if found
- System of warning (minor or moderate) violations
 - Whereby first offense is L.O.W., then can’t repeat violation for x years
 - If we did, ineligible for L.O.W.
- Executives in corporations should be held accountable for major offenses.
Can’t go bankrupt and avoid enforcement.
 - State level
 - Corporate E Stewardship accountability.