

PUBLIC WORKSHOP ON THE ASSESSMENT OF ADMINISTRATIVE PENALTIES REGULATIONS TO EVALUATE POSSIBLE REVISIONS

September 18, 2019

From 9:30 am to 12:45 pm

Auditorium

Department of Toxic Substances Control (DTSC)

700 Heinz Avenue, Suite 200, Berkeley, California 94710

OUTLINE

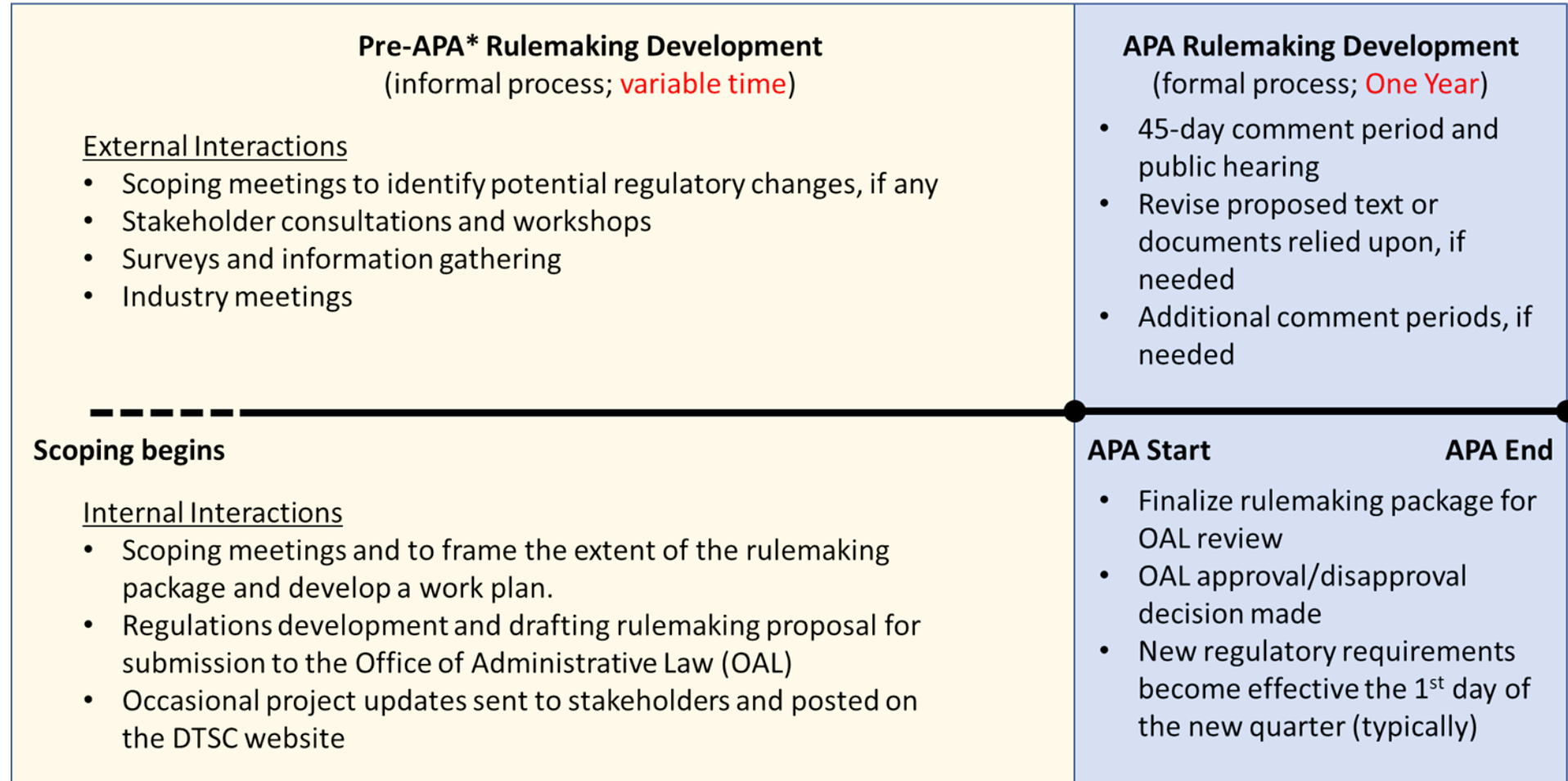
- Purpose of this public workshop
- History and general overview of the administrative penalty regulations
- The penalty determination process
 - Example
 - The Penalty Matrix
- Modified world café format

PURPOSE OF THIS PUBLIC WORKSHOP

- Inform the public that DTSC is reviewing the current penalty regulations for possible revisions.
- Gather comments and opinions from the public regarding what in the penalty regulations needs to be reexamined and revised.
- Present and gather information about some possible alternative concepts that could go into the revisions
- Gather public comments regarding these alternative concepts

General Rulemaking Process

*Administrative Procedure Act



HISTORY OF THE PENALTY REGULATIONS

- Prior to July 1997 DTSC assessed administrative penalties based on the California HSC, section 25187(a)(4)
- Pursuant to Senate Bill 523: interim regulations on July 1, 1997.
- DTSC adopted Article 3 as permanent regulations on August 28, 2001.
- Statutory change of maximum penalty from \$25,000 to \$70,000, effective Jan. 1, 2018
- Emergency regulations to amend subsection (d) of 22 CCR 66272.62 (The Penalty Matrix) were filed on July 5, 2018
 - Increased the maximum penalty amount per violation per day from \$25,000 to \$70,000.

WHAT ARE THE PENALTY REGULATIONS?

- Used by regulators in determining administrative penalties.
- Located in California Code of Regulations, title 22, sections 66272.60 to 66272.69.
- Based on the following statutes:
 - Authority: Sections 25150 and 58012, Health and Safety Code.
 - Reference: Sections 25117.6, 25180(d), 25187, 25187.8(g), 25189.2, 25244.18(d)(2), 25244.21(a) and 25244.21(b), Health and Safety Code; and Section 11425.50, Government Code.

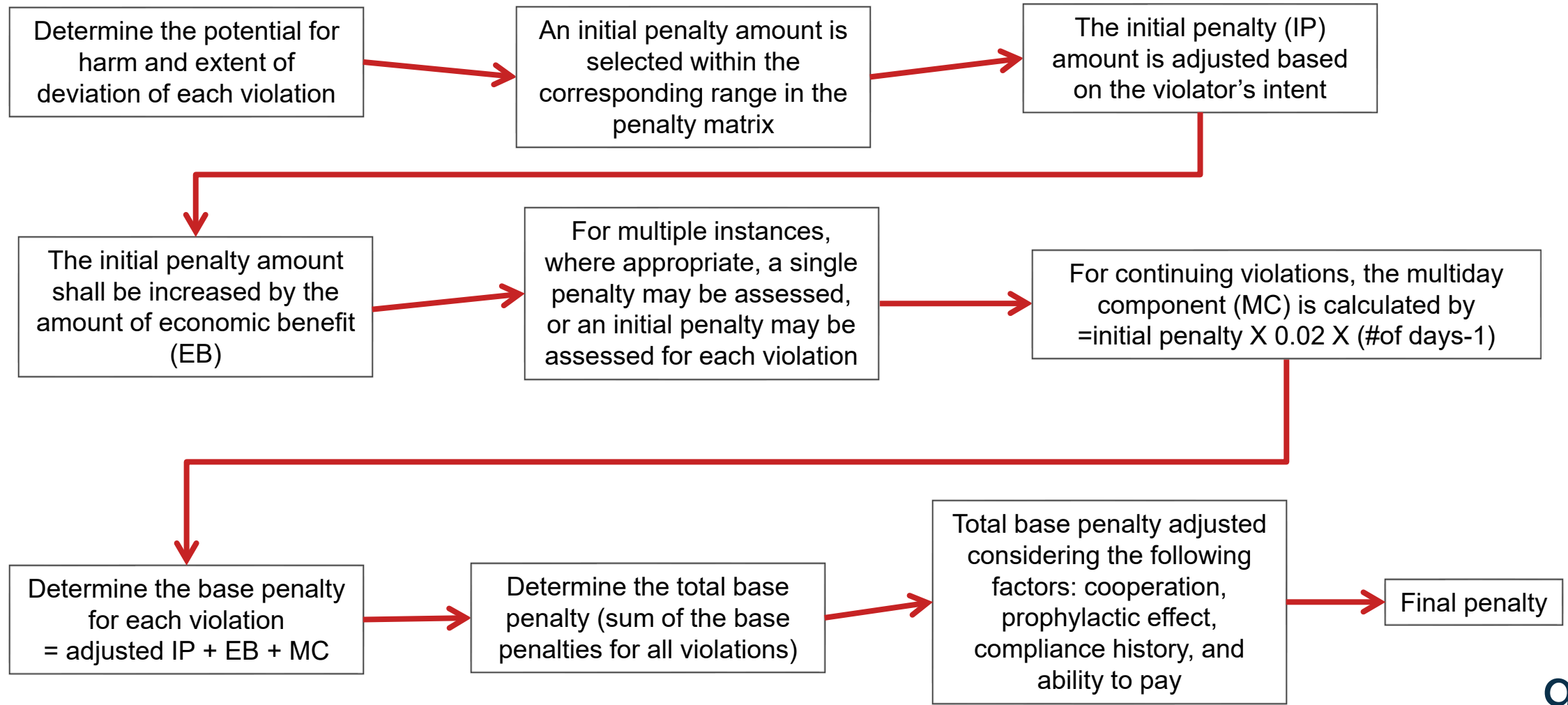
STATUTES: HEALTH AND SAFETY CODE, SECTION 25187(a)(2) -WHEN CALCULATING A PENALTY, YOU SHALL CONSIDER:

- Nature, circumstances, extent & gravity of violation.
- Violator's efforts to "prevent, abate, or clean up conditions" posing a threat to public health or the environment.
- Violator's ability to pay.
- Prophylactic effect of the penalty.

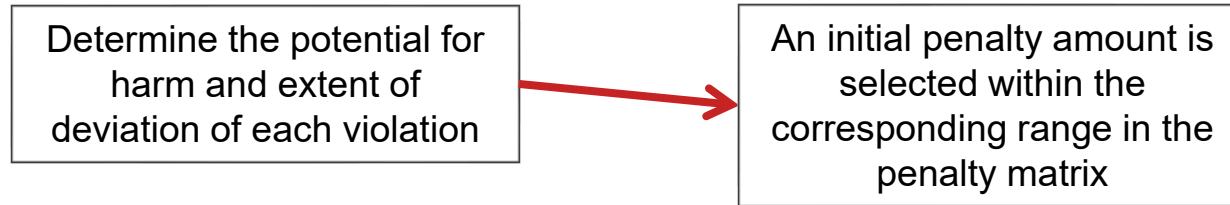
STATUTES: HEALTH AND SAFETY CODE, SECTION 25189.2 -LIMITS THE PENALTY TO \$70,000

- For each separate violation, or
- For continuing violation, for each day the violation continues.
- \$70,000 per day per violation
- Statutory maximum

FLOW CHART OF THE PENALTY DETERMINATION PROCESS



FLOW CHART OF THE PENALTY DETERMINATION PROCESS



Penalty determination example

- Inspection ABC: Observed a Violation, Violation X
- Step 1a: Determine the potential for harm and extent of deviation for each violation.
 - Categories for Degree of Potential for Harm [22CCR 66272.62(b)]: Major, Moderate, or Minimal
 - Potential for Harm Factors:
 - The characteristics of the substance.
 - The amount of the substance.
 - The extent to which human life or health is threatened.
 - The extent which animal life is threatened.
 - The extent to which the environment is threatened.
 - The extent to which potable water supplies are threatened.
 - For Violation X: Potential for harm is **Minimal**
 - Categories for Extent of Deviation [22CCR 66272.62(c)]: Major, Moderate, or Minimal
 - For Violation X: Extent of deviation is **Moderate**

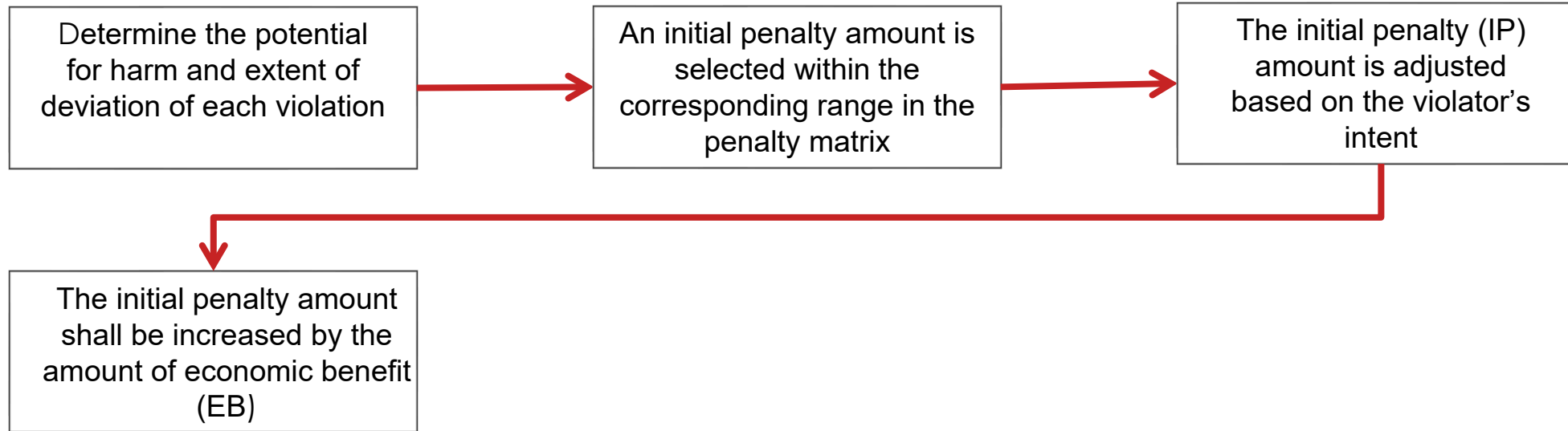
Penalty Determination Example Continued

- Step 1b: An initial penalty amount is selected within the corresponding range in the Penalty Matrix [22CCR 66272.62(d)]

Determination of Initial Penalty Matrix (in dollars)

<i>Extent of Deviation</i>	<i>Potential Harm</i>		
	<i>Major</i>	<i>Moderate</i>	<i>Minimal</i>
	70,000	56,000	42,000
Major	(63,000)	(49,000)	(29,400)
	56,000	42,000	16,800
	56,000	42,000	16,800
Moderate	(49,000)	(29,400)	(11,200)
	42,000	16,800	5,600
	42,000	16,800	5,600
Minimal	(29,400)	(11,200)	(2,800)
	16,800	5,600	0

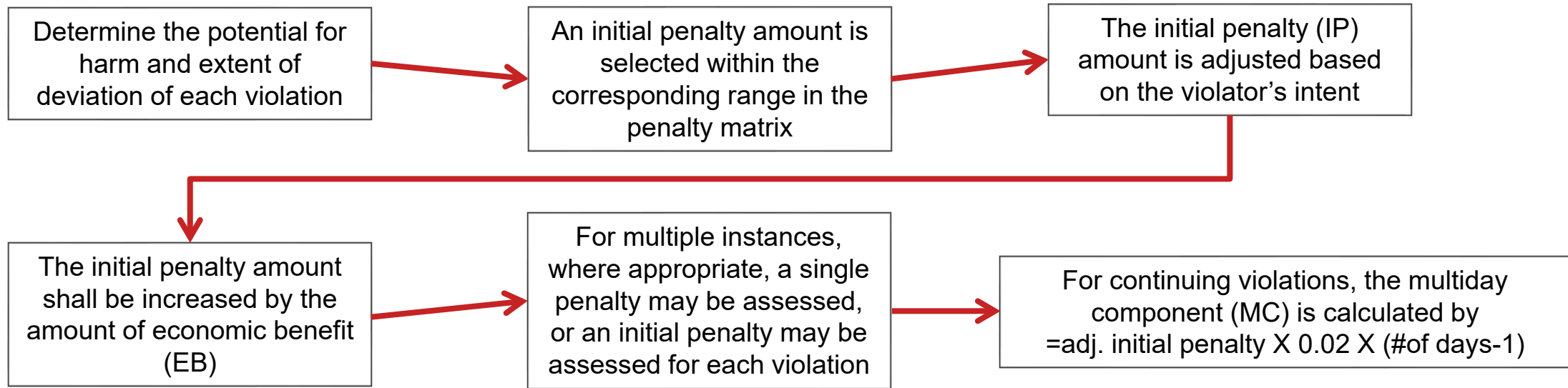
FLOW CHART OF THE PENALTY DETERMINATION PROCESS



Penalty determination example

- Step 2a: The initial penalty (IP) amount is adjusted based on the violator's intent (intent factor, IF) [22CCR 66272.63(a)]
 - Violation X: No adjustment ($IF = 1$) because violation indicated neither good faith efforts nor intentional failure to comply; adjusted initial penalty (AIP) is still at \$11,200
 - $AIP = IP \times IF = \$11,200 \times 1 = \$11,200$
- Step 2b: The initial penalty amount shall be increased by the amount of economic benefit (EB)[22CCR 66272.63(c)]
 - Includes: avoided costs, delayed costs, increased profits, avoided interest.
 - Violation X: avoided costs of \$5,000;
 - $Penalty = AIP + EB = \$11,200 + \$5,000 = \$16,200$

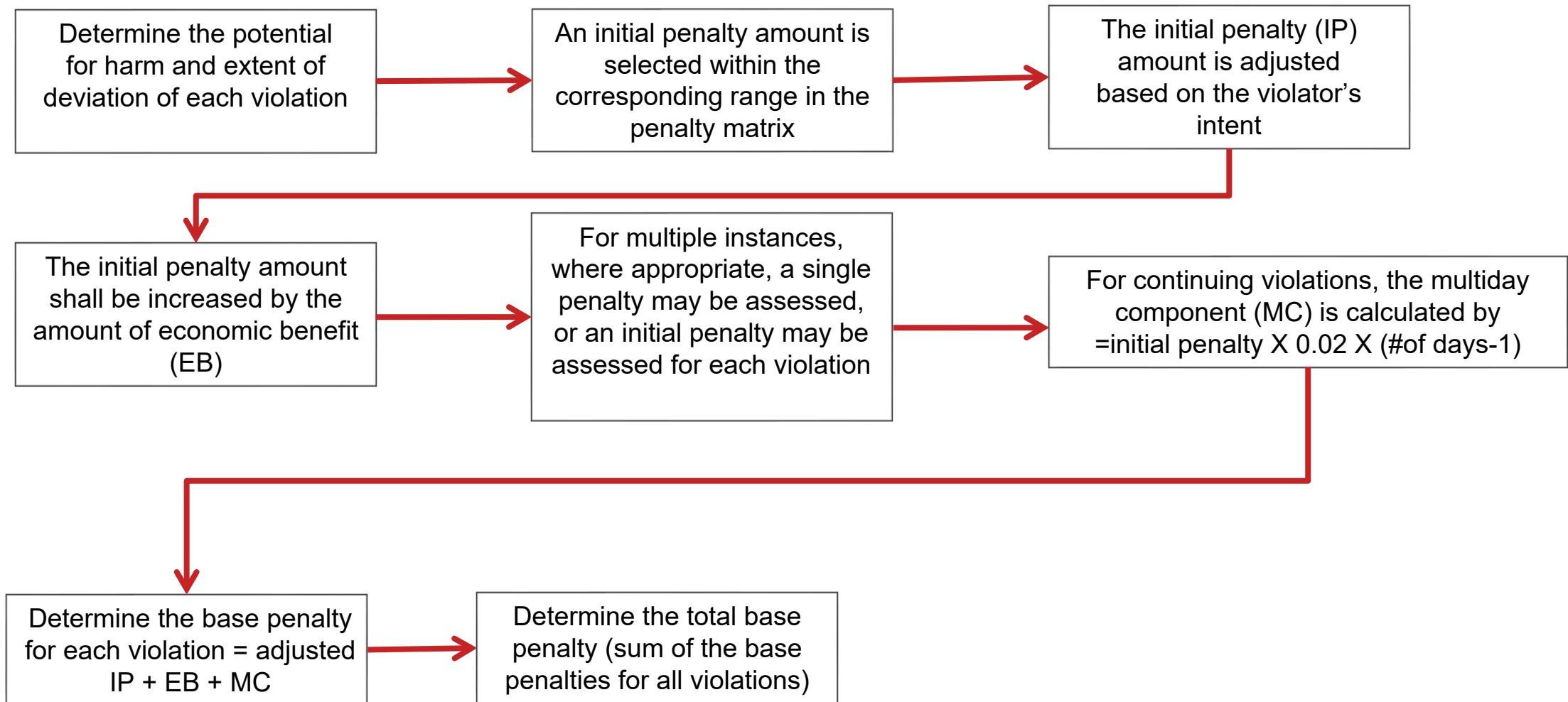
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Penalty determination example continued...

- Step 3: Multiple Instances: separate initial penalty or a single penalty may be assessed for certain cases as listed in 22 CCR66272.64(b)
 - Violation X: only one instance
- Step 4: For continuing violations, the multiday component is calculated by
=adjusted initial penalty X 0.02 X (# of violations days – 1) [22CCR 66272.65]
 - Violation X: violation occurred in a total of 31 days.
 - Multiday component = AIP x 0.02 x (# of violations days – 1)
 - Multiday component = \$11,200 x 0.02 x (31– 1) = \$6,720

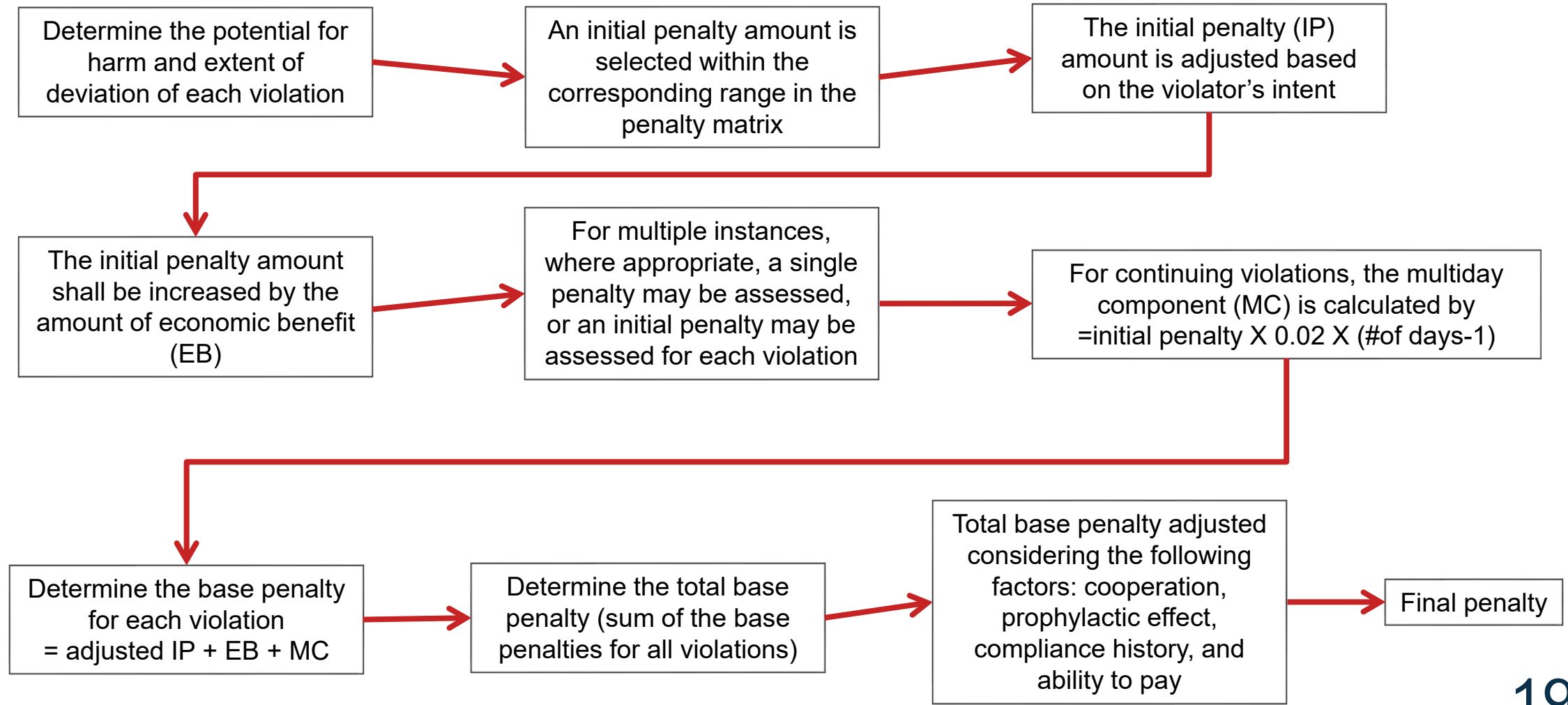
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Penalty determination example continued...

- Step 5: Determine the Base Penalty for each violation
 - For Violation X:
 - Base Penalty= (AIP + EB) + Multiday component
 - Base Penalty= (\$11,200 + \$5,000) + \$6,720
 - Base Penalty = \$16,200 + \$6,720 = \$22,920
 - Statutory Maximum = \$70,000 X # of violation occurrence X # of days
 - Statutory Maximum = \$70,000 X 1 occurrence X 31 days = \$2,170,000
- Step 6: Determine the Total Base Penalty (TBP)
 - Sum of the base penalties for all violation
 - $TBP = BP_1 + BP_2 \dots + BP_n$
 - Case ABC has only 1 violation: Total base penalty = base penalty = \$22,920

FLOW CHART OF THE PENALTY DETERMINATION PROCESS



Penalty determination example continued...

- Step 7: Adjustments to Total base penalty
 - Cooperation [22CCR 66272.68(a)]: downward adjustment of up to 25% - upward adjustment to 100%
 - Case ABC, Violation X: violator demonstrated a good faith effort, No adjustment for Cooperation applied
 - Prophylactic Effect [22CCR 66272.68(b)]: penalty may be adjusted upward or downward to ensure that the penalty is sufficient to provide a prophylactic effect
 - [pro-phy-lac-tic: tending to prevent or ward off]
 - Case ABC, Violation X: No adjustment for Prophylactic Effect applied

Penalty determination example continued...

- Step 7: Adjustments to Total base penalty continued...
 - Compliance History [22CCR 66272.68(c)] :
 - Decrease by 5% for each previous consecutive inspection with no violations, up to 10%.
 - Downward adjustment of 15% for ISO 14001 certificate.
 - A history of noncompliance over the past 5 years. Max adjustment factor up to 100%.
 - Case ABC: total penalty decreased by 10% due to having no prior violations
 - Adjusted total penalty (ATP) = $TP \times 90\% = \$22,920 \times 0.90 = \$20,628$
 - Ability to Pay [22CCR 66272.68(d)]
 - Payment extended over a period of time if immediate, full payment would cause extreme financial hardship.
 - If a payment plan would still cause extreme financial hardship, the penalty may be reduced.
 - Case ABC: violator did not request for penalty payments to be extended over a period of time nor did they request for ability to pay review (No Adjustment)
- Final Penalty: \$20,628

EXAMPLES OF SOME ALTERNATIVES TO THE PENALTY MATRIX

- Set penalties for Common violations: Example: Old DTSC field orders.
- Two or more separate penalty matrices: The State Water Board have separate matrices for discharge and non-discharge violations.
- Penalty Matrix Weighted for Potential for Harm: The penalty matrix (p. 2) of the US EPA RCRA Civil Penalty Policy has a non-linear increase in penalty amounts with increase in potential for harm and a close to linear increase in penalty amounts with increase in extent of deviation.

PUBLIC WORKSHOP

- Why we are here today - gather input regarding the current penalty regulations.
- Format: Modified World Café
- Participants form small groups.
- Participants remain with their small group during the duration of the discussions.
- Participants select a facilitator from the small group members.

PUBLIC WORKSHOP

- Each group - assigned a scribe from DTSC staff and provided a flipchart to document discussions.
- Moderator - signal groups to start discussions or move to the next topic.
- The discussions are divided into four topics, up to 30 minutes per topic.
- Participants - encouraged to discuss the topics using the questions listed in the Agenda as a guide.
- Handouts provided with relevant information regarding the topics.

DISCUSSION TOPICS

- Topic 1: Determining the potential for harm and extent of deviation for each violation (Step 1a of penalty determination process)
 - 22 CCR 66272.62 (a) to (c): pp. 7-8 of handout #1
- Topic 2: The penalty matrix (Step 1b) and initial penalty adjustment factors (Step 2a & 2b)
 - 22 CCR 66272.62 (d) and 22 CCR 66272.63: pp. 8 & 11 of handout #1
- Topic 3: Multiple instances (Step 3), multiday violations (Step 4), base penalty (Step 5), and adjustments to the total base penalty(Steps 6 & 7)
 - 22 CCR 66272.64, 66272.65, 66272.67, and 66272.68: pp. 13, 15, 19, 21-22 of handout #1
- Topic 4: Minor violations subject to a penalty and other topics not covered in Parts 1 to 3
 - 22 CCR 66272.66: p. 17 of handout #1

THANK YOU