

Frequently Asked Questions (FAQs) for Environmental Justice Communities Outreach:

1. Q: What are the administrative penalties regulations?
A: These regulations are used by enforcement agencies like the Department of Toxic Substances Control (DTSC) and the Certified Unified Program Agencies (CUPAs) in assessing penalties for violations of the hazardous waste control laws of California. Penalty assessments are done on a case by case basis.
2. Q: Where are these administrative penalties regulations found?
A: The administrative penalties regulations are found in the California Code of Regulations, title 22, sections 66272.60-66272.69. During today's meeting, we will provide you copies of these administrative penalties regulations (Handout #1) and an interactive case study (Handout #2) you can work on to further get an idea of how penalties are assessed using these regulations.
3. Q: What is our project all about?
A: The purpose of this rulemaking project is to assess the current administrative penalties regulations for possible revisions. The first part of this project is to gather comments and opinions about these regulations. At the same time, we would also like to gather ideas about possible alternatives that could go into the revisions.
4. Q: What is our purpose during this meeting?
A: Our main purpose for being here is to inform stakeholders regarding this project and to provide an avenue and several ways for stakeholders to submit comments and opinions regarding the current penalty regulations.
5. Q: How far are we in this project?
6. A: The two main phases of any rulemaking project is first the more informal pre-Administrative Procedure Act (pre-APA) phase and the next is the more structured APA phase. Currently we are in the early stages of the pre-APA phase. At this stage we are gathering information that we can use in drafting the revised penalties regulations. This involves stakeholder meetings and consultations to gather opinions/comments about the current regulations and alternatives that could be included in the revisions. The next step is to start preparing the regulations package including a draft of the revised penalties regulations.
7. Q: Where can the public and other stakeholders send comments and opinions regarding the current administrative regulations?
A: Comments can be sent by email to the following address: PenaltyRegs@dtsc.ca.gov. We will provide you with some guide questions (Handout #3) you can use when providing comments. Attached to the guide questions are blank pages where you can write your comments and opinions. We also included an envelope with postage addressed to DTSC that you can use to send your written comments.

Handout #2: Interactive Example Case of How the Penalty Regulations are Applied:

Case: During a routine inspection by the Department of Toxic Substances Control (DTSC) of Just-O-Kay (JOK) Auto Shop, inspectors observed a rusty 55-Gallon drum leaking used oil to a secondary containment. JOK was in violation of hazardous waste control regulations for storing used oil, which is a hazardous waste in California, in a container that is not in good condition. According to the HW label on the drum, the initial date of accumulation is 15 days prior to the day of inspection. JOK had the same violation three years ago. JOK is located in an industrial-zoned area. There are no schools, residences, and large bodies of water nearby. Given the information above, follow the steps below to determine the penalty:

1. Determine Potential for Harm:
 - a. There are three categories to choose from: major, moderate, and minimal.
 - b. The definitions of the categories, factors to consider, and other considerations when determining Potential for Harm are on Page 7 of Handout #1 (Current Administrative Penalties Regulations).

What is the Potential for Harm for this violation (major, moderate, or minimal)? _____

2. Determine the Extent of Deviation:
 - a. There are three categories to choose from: major, moderate, and minimal.
 - b. The definitions and other considerations for Extent of Deviation are on Page 8 of Handout #1.

What is the Extent of Deviation for this violation (major, moderate, or minimal)? _____

3. Based on the Potential for Harm and Extent of Deviation, select the Initial Penalty Amount from the corresponding range in the Penalty Matrix on Page 8 of Handout #1. Encircle the range where the determined categories of Potential for Harm and Extent of Deviation, respectively, intersect in the Penalty Matrix. Select an initial penalty amount within this range based on the nuances of Potential for Harm and Extent of Deviation. What is the initial penalty amount? _____

4. The initial penalty amount from #3 is adjusted based on the Violator's Intent. The Adjustment Factors and the corresponding circumstances are on page 11 of Handout #1. The adjustment factor (AF_i) can range from a downward adjustment of 100% (-100) to an upward adjustment of 100% (+100).

What is the adjustment factor (AF_i) for this violation? _____

Calculate the adjusted initial penalty (AIP) using the following equation:

$$AIP = IP \times \left(1 + \frac{AF_i}{100}\right)$$

What is the adjusted initial penalty (AIP)? _____

5. The initial penalty is increased by the amount of economic benefit. Page 11 of Handout #1 lists what are the different types of economic benefit.

For the example case above, the inspection team determined that the amount of economic benefit to the business is very minimal since they have available personnel to contain the leak and available empty 55-Gallon drums to properly contain the used oil.

The amount of economic benefit is: _____

6. Multiple Instances: Enforcement agencies have the discretion to assess a single penalty for multiple violations for certain cases listed on page 13 of Handout #1. Since it is discretionary, the enforcement agency may or may not apply this step. For the example case, there was only one violation observed hence this step is not applicable.

7. Continuing Violations: The multiday component (MC) of the penalty shall be calculated by:
 $MC = AIP \times 0.02 \times (\# \text{ of violation days} - 1)$
 For the example case the violation occurred for 15 days. Therefore, the MC is calculated by:
 $MC = AIP \times 0.02 \times (15 - 1) = \underline{\hspace{2cm}} \times 0.28 = \underline{\hspace{2cm}}$
 The AIP in the equation above is the AIP calculated from #4.

8. Calculate the Base Penalty (BP) using the following equation:
 $BP = AIP + EB + MC = \underline{\hspace{2cm}}$

The calculated BP should not exceed the Statutory Maximum (SM). To calculate SM:

$$SM = \$70,000 \times (\# \text{ of violation occurrence}) \times (\# \text{ of days the violation occurred})$$

The SM for this case is: $SM = \$70,000 \times 1 \times 15 = \$1,050,000$

If BP is greater than SM, then BP is capped by the SM.

9. Calculate the Total Base Penalty (TBP). The Total Base Penalty of a case is calculated by adding the base penalties of all violations included in the case. For this example case, the TBP is equal to the BP because there was only one violation included in the case. $TBP = BP = \underline{\hspace{2cm}}$

10. Adjustments to the Total Base Penalty:

- a. Cooperation: The Adjustment Factor (AFc) and Corresponding Circumstances for cooperation are on page 21 of Handout #1. AFc is negative (-) if it is a downward adjustment. For the example case, the AFc is: $\underline{\hspace{2cm}}$
- b. Prophylactic Effect: The total base penalty may be adjusted upward or downward to ensure that the penalty is sufficient to provide a prophylactic effect. For the purposes of calculations, let's designate AFpe as the Adjustment factor for Prophylactic Effect. AFpe is negative (-) if it is a downward adjustment. For the example case, the AFpe is: $\underline{\hspace{2cm}}$
- c. Compliance History: The total base penalty may be increased or decreased due to compliance history. Considerations for this adjustment are on page 21 of Handout #1. For the purposes of calculations, let's designate AFch as the Adjustment Factor for Compliance History. AFch is negative (-) if it is a downward adjustment. For the example case, the AFch is: $\underline{\hspace{2cm}}$
- d. Ability to Pay: Payment may be extended over a period of time if immediate, full payment would cause extreme financial hardship. If full payment would cause extreme financial hardship, the penalty may be reduced provided that the violator has submitted the necessary financial information to assess ability to pay. For the purposes of calculations, let's designate AFatp as the Adjustment Factor for Ability to Pay. AFatp is negative (-) if it is a downward adjustment. JOK did not request for an ability to pay review. For the example case, the AFatp is: $\underline{\hspace{2cm}}$

The calculation for the Final Penalty, which is equal to the Adjusted Total Base Penalty (ATBP), is as follows: $FP = ATBP = TBP \times \left(1 + \frac{AFc}{100} + \frac{AFpe}{100} + \frac{AFch}{100} + \frac{AFatp}{100}\right)$

Handout #3: Guide Questions for Submitting Comments to DTSC

Topic 1: Determining the Potential for Harm and Extent of Deviation for Each Violation

- 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:

- 3. What are some other ways we might calculate initial penalties?
- 4. 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.
- 5. 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?
- 6. What changes can be made to the penalty regulations to enhance fairness and consistency?
- 7. In what ways do you think the current regulations most lead to inconsistent results?

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

➤ 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 frequently observed violations; (ii) two or more separate penalty matrices; and (iii) penalty matrix that is weighted for potential for harm. Identify 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:

4. 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?
5. 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?
6. 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?
7. In general, when determining a penalty, should a violation's potential for harm be considered more than the extent of deviation?
8. Are the initial penalty adjustment factor regulations clear or do they need more clarification?
9. Should the regulation for economic benefit be more specific such as having a prescribed equation or method to calculate for dollar estimates?

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]

➤ 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:

3. What should DTSC consider when assessing penalties for multiple violations?
4. 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?
5. If a facility has a history of multiple violations, how can we best address this issue?
6. Do you think general adjustments to the base penalty for cooperation, prophylactic effect, compliance history, and ability to pay are appropriate? If not, could these adjustments be reworked to be more appropriate?
7. What mitigating factors should be considered when calculating a base penalty?

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

➤ 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:

4. For which minor violations should DTSC apply small, set penalties?
5. Should a violation with potential for harm be penalized less than a violation that causes actual injury or damage to environment?
6. Is there a different approach to these penalty regulations that DTSC has not appeared to consider?
7. 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?
8. Do you have any general concerns regarding the current penalty regulations and/or the discussed alternatives?
9. Which DTSC staff classification should calculate violation penalties – the inspector, the inspector's management, or a Hazardous Waste Management Program attorney?

Comments Form:

Instruction: If providing comments using the guide questions please write topic number and question number before your answer/comments. Please attach additional pages if needed.

