

# **Penalty Policy Development – Adjustment factors**

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## Section 66641.9

“In determining the amount of administrative civil liability, the commission shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the violation is susceptible to removal or resolution, the cost to the state in pursuing the enforcement action, and with respect to the violator, the **ability to pay, the effect on ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability,** economic savings, if any, resulting from the violation, and **such other matters as justice may require.**”

# Enforcement Policy Goals

- Deterrence

- Deter violator from future violations
- Deter similarly situated parties from committing the same violations

***Important that non-compliance not be seen as a cost saving measure for financially troubled entities***

- Fairness

- Preventing violators from gaining a competitive advantage
- Facilitating timely resolution of enforcement actions

***Should not reward businesses that fail to properly incorporate environmental compliance costs in their operations***

- Consistency

- Promoting consistent treatment of similar violations

***Regulated entities must understand risks and be encouraged to act rationally and promptly***

- Transparency

- Ensure that BCDC's enforcement process and enforcement decisions are clearly communicated

# Agency approaches to ability to pay

(first of three slides with this title)

## US EPA Guidance on Evaluating Ability to Pay:

Agency must show that it has taken into account the applicable statutory factors, and violator's ability to pay is one of the factors to be considered in determining the appropriateness of a civil penalty.

### *In re New Waterbury* (EAB 1994):

EPA not required to establish that respondent can, in fact, pay a penalty. EPA only needs to produce some evidence regarding general financial status from which it can be inferred that respondent's ability to pay should not affect penalty amount.

# Agency approaches to ability to pay

(second of three slides with this title)

## SWRCB:

Water Boards consider the ability to pay and the ability to continue in business as defenses available to dischargers to mitigate a potential civil liability

If staff anticipates that a discharger's ability to pay or ability to continue in business will be a contested issue in the proceeding, staff should conduct a simple preliminary financial investigation based on publicly available information prior to issuing the Administrative Civil Liability Complaint

Burden is on violator to produce evidence to rebut staff showing and demonstrate that it lacks an ability to pay

# Agency approaches to ability to pay

(third of three slides with this title)

## VA DEQ:

Burden to demonstrate an inability to pay rests on the Responsible Party

Responsible party must provide information sufficient to allow calculation of potential ability to pay, and failure to provide sufficient information will result in a determination that the Responsible Party has the ability to pay a penalty

“[I]t is important that the regulated community not perceive the violation of environmental requirements as cost savings for financially-troubled businesses, and DEQ will, in appropriate circumstances, continue to seek civil charges or civil penalties where a business has failed to allocate environmental compliance costs in their business operations.”

# Questions regarding ability to pay

- Should guidance on assessing ability to pay be included in a BCDC penalty policy?
- If so, how should ability to pay be addressed?
  - Treated as a defense, with burden of raising on the alleged violator?
  - Burden of demonstrating on the alleged violator?

# Agency approaches to culpability & violator conduct

(first of four slides with this title)

## McAteer-Petris Act section 66641.5:

(b) In addition to any other penalties, any person or entity who intentionally and knowingly undertakes any activity requiring a permit pursuant to subdivision (a) of Section 66632 without that permit, or who intentionally and knowingly violates any term or condition of any permit issued by or on behalf of the commission, is subject to a civil penalty of not less than one hundred dollars (\$100), nor more than ten thousand dollars (\$10,000), per day for each day in which that violation occurs or persists

(c) . . . Whenever a person or entity has intentionally and knowingly violated this title or any term or condition of a permit issued by or on behalf of the commission, the commission may maintain an action, in addition to the actions authorized pursuant to subdivisions (a) and (b), for exemplary damages. In determining the amount to be awarded, the court shall consider the amount of damages necessary to deter further violations.



# Agency approaches to culpability & violator conduct

(second of four slides with this title)

## McAteer-Petris Act section 66641.5:

(e) Civil liability may be administratively imposed by the commission in accordance with Section 66641.6 on any person or entity for any violation of this title or any term or condition of a permit issued by or on behalf of the commission in an amount which shall be not less than ten dollars (\$10), nor more than two thousand dollars (\$2,000), for each day in which that violation occurs or persists, but the commission may not administratively impose a fine or more than thirty thousand dollars (\$30,000) for a single violation.

# Agency approaches to culpability & violator conduct

(third of four slides with this title)

## VA DEQ:

Culpability (e.g. degree that should have known that requirement was being violated or should have known of hazards), can increase civil penalty amount

Cooperativeness and quick settlement or good faith effort to comply can allow for downward adjustment of gravity component of civil charge

# Agency approaches to culpability & violator conduct

(fourth of four slides with this title)

## SWRCB:

Gravity-based penalty increased for intentional misconduct or gross negligence.

Penalty adjusted downward only where discharger demonstrates that it has exceeded the standard of care expected of a reasonably prudent person to prevent a violation

Gravity-based penalty increased where discharger's response to a violation falls below the normally expected response

Penalty adjusted downward where response is above and beyond what would be reasonably expected

# Questions regarding approaches to culpability & violator conduct

- Should a draft penalty policy include upward and downward adjustments for addressing culpability and violator conduct?
- What are the goals in including this?
  - Penalizing entities that ignore a significant risk or act intentionally?
  - Providing incentives or disincentives for prompt resolution of violations?

**Additional questions or comments?**