CALIFORNIA Water Boards

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State Water Resources Control Board

TO: Thomas Howard
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DATE: October 22, 2013

SUBJECT: **MMP ISSUE WHITE PAPER**

I. EXECUTIVE SUMMARY OF ISSUES DISCUSSED

This memorandum identifies problems relating to the Water Boards' implementation of the Mandatory Minimum Penalty (MMP) statute, discusses some of the causes of those problems, and makes recommendations about how to improve efficiencies with respect to implementing the MMP statute.

The Office of Enforcement's (OE) development of an Expedited Payment Letter (EPL) protocol to screen out uncontested MMP cases has resulted in high-level efficiencies for uncontested cases, and has eliminated many of the inefficiencies that plagued the Water Boards' early efforts to implement the statutory scheme. Nearly 75 percent of MMP cases are resolved efficiently through this process without being contested by dischargers. Other MMP-related protocols developed by the Office of Information Management and Analysis (OIMA), in consultation with OE, have resulted in greater efficiencies in compliance determinations by staff and a high level of transparency with respect to the implementation of the MMP statute. However, substantial inefficiencies remain with respect to how the Water Boards resolve contested MMP cases.

Between 2009 and 2012 alone, the MMP statute generated a little more than $20 million in funds for the Cleanup and Abatement Account, Supplemental Environmental Projects (SEPs), and Compliance Projects for small, disadvantaged communities. Of this $20 million, over $17 million was paid by dischargers without being contested, while just over $3 million was paid by dischargers after being ordered to do so at a contested adjudicatory hearing. *See* Table 1.

Table 1 – MMP Actions in Dollars

	Uncontested	Contested
2009	$6,291,859	$ 814,000
2010	$3,298,875	$ 711,000
2011	$4,535,573	$1,060,000
2012	$3,267,051	$ 466,500
Total	**$17,393,358**	**$3,051,500**

OE estimates that considerably more staff time has been expended issuing MMP orders for the approximately $3 million in penalties obtained at contested adjudicatory hearings than has been expended with respect to the over $17 million in penalties that were not contested, including SEP and Compliance Project approval and oversight.

OE proposes to adopt the EPL protocols in every region to streamline implementation of the MMP process in uncontested cases. To achieve greater efficiency while, at the same time, providing an appropriate level of due process, OE proposes adoption of a streamlined administrative proceeding for contested MMP cases, and the creation and broad distribution of updated Question and Answer (Q & A) documents addressing common technical and legal arguments raised by the regulated public. Implementing these recommendations does not require statutory or regulatory amendments.

Finally, due to the MMP statute's demonstrable effect on late reporting violations, OE provides a discussion of the possibility of expanding the MMP statute to encompass late reporting violations for other core regulatory NPDES programs, such as Non-15, Title 27 and 401 Water Quality Certification. We recommend more study before undertaking such an expansion, which would require a statutory amendment.

II. BRIEF BACKGROUND OF MMP STATUTE

A. MMPs Defined

California Water Code section 13385(h)[1] **requires** the assessment of a $3,000 MMP for each "serious" violation. A "serious" violation is defined as any waste discharge that exceeds the effluent limitation for a Group I pollutant by 40 percent or more, a Group II pollutant by 20 percent or more, or failure to file a discharge monitoring report for each complete period of 30 days the report is late. The Water Boards are also required by section 13385(i) to assess a $3,000 MMP for multiple non-serious or "chronic" violations. These MMPs apply when the discharger does any of the following four or more times in any period of six consecutive months:

- Violates effluent limits;
- Fails to file a report of waste discharge (ROWD) pursuant to section 13260;
- Files an incomplete ROWD pursuant to section 13260; or
- Violates a toxicity effluent limitation where the Waste Discharge Requirements (WDRs) do not contain pollutant-specific effluent limitations for toxic pollutants.

The statute provides no discretion for the Water Boards to settle or compromise the MMP for less than $3,000 per violation, but it does allow them to consider imposing a discretionary liability of up to $10,000 per violation plus up to $10 per gallon of waste discharged.

B. Affirmative Defenses and Exemptions from the MMP Requirements

Section 13385(j) enumerates limited affirmative defenses and exemptions to the MMP provisions. The affirmative defenses and exemptions are listed in sections 13385(f), and (j)(1) - (j)(3): single operational upset; act of God; act of war; effect of natural disaster that could not have been prevented by exercising due care and foresight; intentional act of a third party; operation of a new or reconstructed treatment plant, under specified circumstances; and discharge allowed by a Cease and Desist and/or Time Schedule Order issued by the Water Boards.

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[1] All further statutory references are to the California Water Code and will be cited simply as "section" followed by the section number unless expressly indicated otherwise.

III. REALIZATION OF BENEFITS AND EFFECTIVENESS OF CURRENT EFFORTS BY OE AND REGIONAL WATER BOARDS TO IMPLEMENT THE MMP STATUTE

A. EPLs Provide Greater Efficiencies

In 2008, OE began an MMP Initiative to reduce the backlog of outstanding MMPs. As part of this initiative, OE developed an "expedited payment program" whereby non-controversial MMPs could be resolved without the need to issue a formal Administrative Civil Liability Complaint (ACLC)[2] and schedule an evidentiary hearing. Some of the Regional Water Boards have been quite successful at reducing staff time and administrative costs by using the EPL process.

As demonstrated in Table 2, 75.5 percent of MMPs are resolved without a hearing before the Water Boards, either through the EPL process or after issuing an ACLC which is uncontested. The 24.5 percent of matters that do proceed to hearing are the exception, not the rule, and usually involve either a non-responsive discharger (one who has not responded to a Notice of Violation (NOV), an EPL, or an ACLC), or a discharger arguing one of the technical or legal issues discussed below.

B. Transparency of Enforcement Enhanced by CIWQS Reporting

OIMA and OE have greatly enhanced the public's ability to track compliance information through the CIWQS database and the integration of MMP data into the MMP Report.

C. Development of Electronic Self-Monitoring Reports Assist in Compliance Assessment

OIMA, with assistance from OE, has developed protocols for electronic self-monitoring reports (eSMR) that assist staff with compliance assessment and with developing lists of effluent and late reporting violations that result in NOVs, EPLs, and/or ACLCs being issued in a more timely manner.

D. The MMP Statute Has Incentivized Timely Reporting Compliance

OE and the Water Boards have effectively employed the MMP statute to incentivize compliance with monitoring and reporting requirements. As shown in Table 3, late reporting violations are trending downward consistently in those programs where the failure to submit required self-monitoring reports is subject to MMPs.

IV. CURRENT PROBLEMS WITH IMPLEMENTING THE MMP STATUTE – RECOMMENDATIONS FOR GAINING EFFICIENCY

The vast majority of the 24.5 percent of MMP cases that have proceeded to a hearing over the last five years fall into three categories: 1) those where dischargers simply do not respond to an NOV, EPL, or ACLC issued by the Water Boards; 2) those where dischargers challenge the technical validity of effluent limit violations determined from self-monitoring reports (SMRs); and 3) those where dischargers are attempting to assert an equitable and/or statutory defense to MMPs that the Water Board must resolve at an evidentiary hearing. Dischargers who fall into one or more of these categories are the principle contributing cause of inefficiencies in processing MMPs, including greatly increasing the time staff must devote to responding to these issues during the EPL or ACL process, during the process leading up to a Water Board hearing, and/or at the Water Board hearing itself. These three circumstances also give rise to a considerable burden on Board Members

[2] ACLC will be used to refer to an Administrative Civil Liability *Complaint*, which initiates an MMP action, and ACLO will be used to refer to an Administrative Civil Liability *Order*, which concludes it.

themselves as they must prepare for these hearings by studying the submitted materials and then spending valuable meeting time holding a hearing.

- **Time Devoted to Resolving MMP Matters in Non-Responsive Discharger Cases**

Despite being issued an NOV, EPL, or ACLC by the Water Boards, some dischargers simply fail to respond to these regulatory measures. Therefore, the only way to resolve the outstanding violations subject to MMPs is to proceed to a Water Board hearing to have an ACLO adopted. If the discharger does not appear at the Water Board hearing, these matters usually present a small burden on the Board Members since the proposed orders are usually adopted on consent. However, even uncontested matters continue to impose a substantial burden on staff to prepare the materials for the agenda and hearing and, in approximately half of these cases, the discharger does appear unannounced and the Board Members spend considerable time holding a hearing.

- **Time Devoted to Resolving Technical Arguments Regarding Compliance Assessment**

Because MMPs must be assessed when specific violations occur, a considerable amount of staff time is devoted to responding to discharger arguments questioning staff's best professional judgment in reviewing violations, raising data quality issues, and interpreting ambiguous permit provisions.

- **Time Devoted to Resolving Legal Arguments Regarding Equitable and/or Statutory Affirmative Defenses**

Dischargers often attempt to raise affirmative defenses, but fail to realize that equitable defenses are legally cognizable under the MMP statute only in extraordinary circumstances (such as manifest injustice), if at all, and/or are unaware of their burden of proof and the necessary elements that must be demonstrated for a successful assertion of one of the statutory defenses.

- **Time Devoted to Holding Adjudicatory Hearings to Resolve Technical and/or Legal Issues**

Preparation for and holding an adjudicatory hearing before the Water Boards requires a substantial amount of time and effort by staff to meet the deadlines in the matter's corresponding hearing procedures and present the matter to the Water Board. Adjudicatory hearings also require the Board Members to expend considerable time and effort resolving contested MMP violations.

Table 2: Percentage of discretionary and MMP matters heard by the Regional or State Board

	All ACL Orders			Non-MMP ACL Orders			MMP ACL Orders		
	Issued/ Adopted	To Hearing	% To Hearing	Issued/ Adopted	To Hearing	% To Hearing	Issued/ Adopted	To Hearing	% To Hearing
2008	106	28	26.4	24	10	41.7	82	18	22.0
2009	192	65	33.9	29	24	82.8	163	41	25.2
2010	129	34	26.4	31	15	48.4	98	19	19.4
2011	160	67	41.9	56	34	60.7	104	33	31.7
2012	151	57	37.7	65	36	55.4	86	21	24.4
Total	**738**	**251**		**205**	**119**		**533**	**132**	
Average			**33.2**			**57.8**			**24.5**

**Source of data: CIWQS*

A. Streamlining Administrative Processes for MMPs Consistent with Due Process Requirements

1. Streamlining Administrative Processes in Uncontested MMP Actions

In 2008, OE began an MMP Initiative to reduce the historic backlog of outstanding MMPs. As part of this initiative, OE developed an "expedited payment program" whereby non-controversial, non-contested MMPs could be resolved without the need to issue a formal ACLC, draft and issue hearing procedures, and schedule an evidentiary hearing. The EPL process consists of a letter sent to the discharger identifying the effluent limitation or late reporting violations that are subject to an MMP. Monitoring and reporting programs for NPDES permits typically require dischargers to enumerate violations being reported in an SMR, but staff frequently detects additional violations after reviewing the data. The letter explains the mandatory nature of the civil liability and offers to resolve the matter without issuance of a formal ACLC and hearing if the discharger signs and submits a waiver of its right to a hearing and agrees to pay the MMP following a 30-day public comment period.[3] At the close of the comment period, the waiver is signed by the Executive Officer or Director and is treated as an Order. An invoice is then sent to the discharger to remit payment.

EPLs save time by avoiding the need to issue an ACLC and prepare for, schedule, and hold an adjudicatory hearing. Several Regional Water Boards use this process effectively. OE recommends that all of the Regional Water Boards implement the EPL process.[4] Doing so will minimize staff time and resources spent resolving **uncontested** MMP actions by eliminating the need to draft formal complaints and hearing notices and schedule hearings.

2. Streamlining Administrative Processes in Contested MMP Actions

Currently, when a discharger exercises its right to a hearing in a contested MMP enforcement action, an evidentiary hearing is held before the Water Board or a panel of Board Members. This is often a time consuming process for both the Water Board staff and Board Members. These adjudicatory hearings are governed by the Administrative Procedure Act, and often last several hours during a board meeting. One hundred thirty two (132) of the five hundred thirty three (533) MMP actions (24.5 percent) in the last five years were contested and were decided by the Water Boards after evidentiary hearings. *See* Table 2. While dischargers have the right to an evidentiary hearing, due process does not require the Board Members to hold the hearing. All the Water Boards, including the State Water Board, have adopted general delegations which are broad enough to allow their respective Executive Officers to hold evidentiary hearings and issue decisions on the merits.[5] In regions or specific matters where the Executive Officer is a member of the Prosecution Team, the Executive Officer could sub-delegate this function to another person, such as the Assistant Executive Officer.[6] Allowing the

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[3] The EPL is the functional equivalent of a settlement agreement. Because the MMP statute falls within the Water Boards' delegated authority to implement the federal Clean Water Act, and because that Act requires settlement agreements adopted pursuant to it be noticed for a 30-day public comment period, EPLs are noticed for a 30-day public comment period before they become effective.

[4] Although all Regional Water Boards have general delegations, the executive officers should explain this process to their boards at a public meeting and obtain the boards' buy-in before implementing the EPL process. This can take the form of a specific delegation resolution, or a less formal discussion as part of the Executive Officer's Report or an enforcement report.

[5] It is advisable for each Regional Water Board to adopt a specific delegation for the purpose of designating a hearing officer to hold evidentiary hearings and issue orders in contested MMP actions.

[6] Since Porter-Cologne allows delegations to a panel of the board but not to individual board members, a Regional Water Board cannot delegate the hearing function to one or two board members.

Executive Officers or sub-delegees to hold evidentiary hearings and issue ACL orders in MMP cases would free up valuable Board Member and Board meeting time.[7] Hearings could also be scheduled at times and heard at locations more convenient for the hearing officer, the discharger and/or the public than regular Board meetings. MMP hearings scheduled between regular board meetings would allow more efficient schedule management for line and executive staff.

The hearing process could be further streamlined if the discharger agrees not to present or cross-examine witnesses at an oral hearing,[8] and elects to have the contested MMP heard vis-a-vis a "paper" hearing. Dischargers could agree to take limited staff depositions in lieu of presenting live testimony, although in some cases doing so would eliminate the increased efficiency of a paper hearing. The paper hearing itself could be held by a specific delegate of the Water Board. This type of proceeding has already been utilized for the issuance of Cleanup and Abatement Orders. Essentially, the parties submit all evidence and argument in writing without live testimony. The hearing officer then reviews the record and makes a decision. This process would eliminate the need for an oral hearing altogether. OE expects that a significant number of dischargers will elect to have a paper hearing since it saves the discharger the time and expense of making a formal appearance.

B. Minimizing Technical Arguments Regarding Compliance Assessment That Lead to Contested Proceedings

Given the mandatory nature of MMPs, the Water Boards lack the discretion not to assess MMPs once it is determined that specific types of effluent limit violations have occurred. Because of this prescriptive statutory scheme, dischargers often spend a considerable amount of time arguing whether effluent limit violations determined from SMRs are actual violations for which MMPs must be assessed. Violation disputes generally arise out of confusion regarding how violations are counted and/or when they occur, or out of data sampling and analyses problems.[9]

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[7] The Los Angeles Regional Board has delegated authority to its Executive Officer to act as a hearing officer and render decisions in MMP cases where less than $30,000 is at issue.

[8] All adjudicative proceedings before the Water Boards are governed by Chapter 4.5 of the Administrative Procedure Act (APA) (commencing with section 11410.10 of the Government Code). State Water Board regulations also incorporate sections 801 through 805 of the Evidence Code and section 11513 of the Government Code. (Cal. Code Regs., tit. 23, § 648(b).) Section 11513 provides that each party shall have the right "to call and examine witnesses, to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in direct examination; to impeach any witness regardless of which party first called him or her to testify; and to rebut the evidence against him or her. If respondent does not testify in his or her own behalf he or she may be called and examined as if under cross-examination." State Water Board regulations confer power on the hearing officer to waive hearing requirements unless they are mandated by state or federal law. (Cal. Code Regs., tit. 23, § 648(d).) . Because section 11513 is only applicable as a function of the regulations, the hearing officer can waive cross-examination except to the extent due process or other constitutional provisions require it. (See, *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267 [right to confrontation and cross-examination in administrative hearings depends upon nature of interest involved].) Given the nature of interests involved in a penalty hearing, the hearing officer should not deny these procedural safeguards in cases involving a factual dispute, unless the discharger stipulates to a paper hearing.

[9] Ambiguous effluent limitations, and ambiguous permit terms can also be the source of technical disputes over whether there has been a violation and/or whether the violation is subject to an MMP. Resolving these issues is a part of an ongoing effort being undertaken by the Division of Water Quality (DWQ) in cooperation with the Regional Water Boards. OE is committed to working with DWQ to share its experiences and understandings to help minimize issues, including those relating to MMPs, which arise from interpretive problems with the substantive terms of permits. This topic is beyond the scope of this memorandum.

1. Recommendations for Minimizing Compliance Determination Disputes

Dischargers and, occasionally, staff have expressed confusion over how violations are counted and how staff determines whether a violation occurred. For example, dischargers frequently argue that chronic MMPs only accrue when the same limitation is exceeded four or more times in a 180-day period, but the plain language of section 13385(i) indicates that any combination of effluent limitation violations occurring within a 180-day period triggers MMPs for chronic violations. Also, dischargers frequently err when calculating the date of violation for effluent limitations with average or median periods. Generally, the date of violation is the last day of the limitation averaging period. Accordingly, violations of weekly average limits occur on Saturday, and violations of monthly average limits occur on the last day of the month, regardless of when and how many samples were collected during the week or month. Finally, the Water Boards' current convention regarding how it sequences serious and non-serious violations that occur on the same date is to count the non-serious violations first, then count the serious violations. The convention provides a consistent approach to ordering same-day violations (e.g., multiple monthly average violations in the same month) and avoids inconsistent assessments for similar situations.

Some of these issues are addressed in the 2001 *SB 709 and SB 2165 Questions and Answers* (2001 MMP Q & A) document prepared by the Office of the Chief Counsel. However, others are not. The 2001 MMP Q & A should be updated to address some of the most common discharger questions and misconceptions. An updated Q & A should be prepared for staff, and an MMP Frequently Asked Questions (FAQ) or Fact Sheet document should be prepared by OE and Office of Chief Counsel, sent to the discharger as part of the EPL package, and links to the documents should be posted in appropriate locations on the State and Regional Water Board websites.

2. Recommendations for Minimizing Data Quality Related Delays

Questions regarding the quality of data used to assess compliance with effluent limitations are often raised by dischargers after issuance of an NOV, ACLC, or EPL. At other times, staff will note discrepancies in laboratory reports as part of the file review. In either case, the discharger has the burden of proving sample results are not representative of actual conditions. Nevertheless, Regional Water Board line staff frequently experience uncertainty regarding how to proceed or what to recommend with respect to use of the analytical results in question because they do not have sufficient expertise with standard United States Environmental Protection Agency (U.S. EPA) testing protocols and/or laboratory procedures. Regional Water Board line staff's inability to resolve these issues quickly, leads to inefficiencies and delays in finalizing an MMP action. Examples of data quality issues include, but are not limited to, allegations of laboratory error, claims of matrix interference or analyte-specific interference, failure of laboratory to identify and/or address the interferences, contentions that there was a sampling error, detection of analyzed constituent in blank, and split samples with different results from different accredited laboratories. Compliance determination staff may be uncertain what resources are available in other areas of the Water Board system to help resolve these issues. If the Environmental Laboratory Accreditation Program (ELAP) is transferred to the State Water Board from the Department of Public Health, the Water Boards should gain significant in-house expertise and be better enabled to expeditiously and accurately address these matters, which expertise could also be leveraged to train current Regional Water Board line staff. If this transfer does not occur, Regional Water Board staff with compliance determination functions should undertake significant training in standard U.S. EPA testing methods and laboratory functions.

Updating the MMP Q & A and distributing it more effectively to the regulated public should help minimize the amount of staff time spent engaging with dischargers on compliance determination issues, and help reduce the number of MMP actions that proceed to a contested hearing, by clarifying expectations. Increasing the level of staff expertise on U.S. EPA standard testing protocols and lab procedures through training should help reduce the amount of staff time spent on these issues and increase the efficiency with which MMP actions are processed.

C. Minimizing Legal Argument Regarding Affirmative Defenses and/or Equitable Principles That Lead to Contested Proceedings

Both regulatory and legal staff devote a substantial amount of time responding to dischargers' attempts to assert one of the statutorily enumerated affirmative defenses in section 13385, and/or explaining why other equitable defenses not specifically set forth in the statute, such as laches or inability to pay are inapplicable to MMP violations.

Many discharges fail to recognize or acknowledge that they have the burden of proof on every element necessary to establish an affirmative defense that is set forth in the statute. Still more believe that they can assert affirmative defenses not set forth in the statute by the Legislature.

The State Water Board's recent precedential decisions that equitable defenses such as laches may not be asserted in an MMP action[10] should greatly reduce the number of dischargers asserting these arguments. A large percentage of the contested MMP actions in the last five years included a laches argument.

The MMP Q & A should include a notation on the State Water Board's recent decisions on laches, with a link to the decisions, as well as clarification on the burden of proof and elements necessary to assert one of the statutorily available defenses. OE and the Office of Chief Counsel should prepare short statements to include in the MMP Q & A describing how state and federal case law interpret the necessary elements of the act of God defense, the act of war defense, the intentional act of a third party defense, and the single operational upset defense. These defenses all involve legal terms of art, giving rise to confusion and consternation when interpreted by a layperson or inexperienced attorney. OE and Office of Chief Counsel should strive to animate the defenses with guiding principles from the case law in a way that makes it easy for a layperson and/or the inexperienced legal practitioner to understand the guidance, and give examples of fact patterns where the defense has been upheld.

Finally, dischargers frequently argue they have an inability to pay the MMP and request that a lower amount be imposed. While reducing the amount or changing the due date of an MMP penalty is not permitted by the statute except through a supplementation environmental project (SEP) or compliance project, the Water Boards could allow the use of payment plans to accommodate those dischargers that cannot make a lump sum MMP payment within 30 days of the Water Board's order.[11]

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[10] The precedential orders acknowledge that "manifest injustice" may form the basis of a laches defense, but courts have rarely if ever found facts that actually satisfy the 'manifest injustice" standard.

[11] Section 13323(d) provides that payment of penalties is due "not later than 30 days from the date" the ACLO is issued. Section 13385(m) provides that any person who fails to pay a penalty on time is also subject to, among other things, "an amount equal to 20 percent of the aggregate amount of the person's penalty and nonpayment penalties that are unpaid as of the beginning of the quarter." The Water Boards have avoided potential collection actions and additional late-payment penalties in cases where the Executive Officer enters into an agreement for a payment plan outside the confines of the ACLO. These "side agreements," which are not part of the ACL package presented to the board for approval, are used with some frequency. However, it is not recommended that their availability be widely advertised given the statutory provisions cited above.

V. REPORTING VIOLATIONS: PENALTY ACCRUAL TO VERY HIGH LEVELS – POTENTIAL EXPANSION OF MMP REPORTING VIOLATIONS TO OTHER PROGRAMS

A. Addressing the Accrual of Very High MMPs for Late Reporting

Some Regional Water Boards have been reluctant to impose significant MMPs for accrued reporting violations. Many of these cases arose in the context of OE's 2008 MMP initiative, and involved situations where the dischargers simply failed to submit required reports for a number of years, or situations where the Regional Water Boards had failed to timely initiate MMP actions for late reporting. Accordingly, to a great extent, the problem of accrual of extremely high MMPs for late reporting violations has been ameliorated by the Water Quality Enforcement Policy's goal that all MMPs be issued within 18 months of the date a violation accrues, and by the success of the Initiative in bringing current most of the backlogged MMPs. The State Water Board Enforcement Policy's 2010 clarification of the definition of Discharge Monitoring Report, and the adoption of SB 1284, which provided exceptions to MMPs for late monitoring reports under certain circumstances are also likely contributors to reducing the problem. Most Regional Water Boards either achieve or come close to achieving the 18-month goal.

During OE's outreach to the Regional Water Board enforcement coordinators and Assistant Executive Officers, it was suggested by some that a "cap" be placed on MMPs for late reporting. Placing a cap on MMPs for late reporting would require a statutory amendment to section 13385.1. Moreover, a cap is not likely to be an effective way to address skyrocketing penalties for late reporting. Most "good faith" dischargers are now aware that MMPs apply to late reports and, as illustrated by Table 3, late reporting violations are trending downward dramatically.[12] Very high MMPs for reporting violations can be avoided in some cases by educating dischargers about the potential penalties and avoiding MMP backlogs. Some of the historic problems with exorbitantly high MMPs for reporting violations were caused by the Water Boards' failure to widely advertise the effects of the Legislation when it was enacted, and the failure to timely act on violations. With respect to "bad faith" or recalcitrant dischargers, a cap would merely encourage their further recalcitrance and, in fact, potentially incentivize late and non-reporting as a mere cost of doing business.

The problems Regional Water Boards have experienced with exorbitantly high MMP reporting violations may be largely ameliorated and a remnant of the past. For all of these reasons, OE does not recommend seeking a legislative amendment establishing a cap on MMPs for late reporting.

B. Expanding MMPs for Late Reporting to Other Core Regulatory Programs and Other Violations Within the NPDES Program

The data shows that MMPs for late reporting have been steadily decreasing since their peak in 2007. The decreasing trend in late report MMPs indicates that facilities are increasing compliance with reporting deadlines. Expanding MMPs for late reporting in other core regulatory programs, such as Non-15, Title 27 and 401 Water Quality Certification, could lead to the same type of positive trends towards timely reporting in those programs. The California Department of Transportation (Caltrans) has been a particularly recalcitrant reporter under the 401 Water Quality Certification program. Expanding MMPs to cover late reporting for these programs would require a statutory amendment.

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[12] Preliminary results from 2012 show a mere 55 late reporting violations subject to MMPs, but the data has not been verified and was not included in Table 2 for that reason.

TABLE 3: Trends in Late Reporting MMPs

Year	2004	2005	2006	2007	2008	2009	2010	2011
Number of MMPs for late reports	123	227	430	552	329	129	151	110

From Figure 1: NPDES Wastewater MMP violations since 2000 by Type. 2012 13385(o) Enforcement Report.

If late reporting MMPs were to be extended to all WDRs, the problems of large numbers of late reporting ACLOs and many high-dollar late reporting ACLOs could largely be avoided through improved up-front communication with affected dischargers and more efficient and consistent delinquent report notifications using existing functionality in CIWQS. However, expanding MMPs for late reporting for additional program areas may divert limited staff resources from higher enforcement priorities. Moreover, despite quality data relating to Caltrans, it is advisable to verify late reporting is a significant issue in these other program areas on a broader level, and that less controversial regulatory measure such as consistent and timely issuance of NOVs would not be equally effective, before proposing a statutory amendment that could be very controversial.