



**Report of the
Statewide Initiative
On Mandatory Minimum Penalty
Enforcement**

**State Water Resources Control Board
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Statewide Initiative on Mandatory Minimum Penalty Enforcement



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Executive Summary

On January 1, 2000, new legislation (Senate Bill 709) required that certain permit violations under the *Water Code* be subject to mandatory minimum penalties (MMP). While the State Water Resources Control Board and the Regional Water Quality Control Boards (collectively Water Boards) did assess MMPs as a result of the new legislation, the [2007 Water Boards' Enforcement Report](#) showed that 7,880 violations (from Jan. 1, 2000 through Dec. 31, 2007) had not received a penalty at or above the mandatory minimum amount.

In February 2008, the State Water Board's Office of Enforcement (OE) began examining many of the violations subject to MMPs in the California Integrated Water Quality System (CIWQS) dating back to January 1, 2000 that had not received an enforcement action to assess a MMP. After discussing the ways to efficiently address these outstanding violations, the Water Boards started the *Statewide Initiative for MMP Enforcement (Initiative)*.

The Initiative's goal was to substantially reduce the MMP enforcement backlog by December 31, 2008. Violations occurring on or before December 31, 2007 were considered backlogged violations for the purposes of the Initiative. For administrative efficiency and taking advantage of the enforcement focus offered by the Initiative, several regions used the Initiative to address MMP violations that occurred after December 31, 2007.

The Initiative validated information in CIWQS about MMP violations to ensure that the database accurately reflected MMP violations and the actions that had been taken to address them. As the first step, Water Boards' staff reviewed the data in CIWQS used to generate notices of violations for the MMP enforcement backlog. The data updating process continued as a coordinated effort of State and Regional Water Board staff until data for all facilities with MMPs had been internally validated to ensure that accurate notification letters would be sent. In total, State and Regional Water Boards' staff identified 12,348 backlogged violations from 464 facilities that had not received any enforcement action.

Once violation information had been reviewed and validated, the Initiative used a phased approach of first resolving uncontested MMP violations by sending letters (expedited payment letters) to facilities with alleged MMPs, and offering them the opportunity to resolve their

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violation(s) by acknowledging them and providing full payment of any accrued mandatory penalties. Based on the response to this initial correspondence, the Water Boards would sequence and process the remaining nonresponsive and/or contesting facilities for formal MMP enforcement hearings. In some regions, Notices of Violation (NOV) were followed up by Administrative Civil Liability (ACL) complaints. In others, the NOV's were combined with an offer to settle the violations.

Water Boards staff worked together to eliminate or reduce the MMP backlog. State Water Board staff provided ongoing technical and administrative assistance to Regional Water Board staff to begin this Initiative. The Initiative progressed in a dynamic way such that issues and solutions that arose in one region were shared by a statewide Coordinating Committee.

As of March 31, 2009, the backlog of MMP violations without enforcement actions had been substantially reduced. Several Regional Water Boards have addressed all outstanding violations, and most of the remaining Regional Water Boards are nearly finished. The Water Boards have addressed 13,812 MMP violations from 455 facilities statewide through enforcement activities related to the Initiative (which included some violations occurring after the Dec. 31, 2007). The enforcement activities consist of 123 ACL complaints and 332 expedited payment letters.

Out of the 455 enforcement actions initiated, 228 matters have been resolved or settled which means that the Initiative resulted in liabilities of \$15,595,500, which consist of:

- \$ 7,689,504 as liabilities paid (or to be paid) to the Cleanup and Abatement Account;
- \$ 7,075,750 as payments toward completion of compliance projects for facilities serving small communities with financial hardship; and
- \$ 830,246 as liabilities suspended pending completion of supplemental environmental projects.

If the remaining MMP violations in progress are resolved in the Water Boards' favor, it would generate an additional \$ 26,414,000 in liabilities.

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Mandatory Minimum Penalty Amounts 2000-2008, Potential and Resolved



The Initiative has also resulted in a more accurate and complete recording of violations. The Office of Enforcement tracked progress resolving the covered MMP violations and created this report which includes a description of challenges encountered in carrying out the Initiative, lessons learned, and recommendations for improving the MMP statutes and for improving the Water Boards' MMP requirements.

The primary limit on the Water Boards' ability to respond to MMP violations is the lack of resources to evaluate, analyze, and prosecute the MMP violations. While the Initiative allowed the Water Boards to substantially reduce the number of outstanding MMP violations, it did so with a redirection of resources from other enforcement priorities. Unless there is a fundamental change in the resources available to the Water Boards, or the Water Boards can engineer significant process efficiencies in the management of these violations, the backlog may return and with it, a reduction in compliance with the effluent and reporting requirements subject to MMP enforcement.

Description of the Problems

California Water Code section 13385 mandates the penalties for violations of National Pollutant Discharge Elimination System (NPDES) permits. The violations which are subject to the mandatory penalties are referred to as MMP violations. [2007 Water Boards Enforcement Report](#) (2007 Report) (mandated by California Water Code section 13385(o), using information from the Water Boards' data system, the California Integrated Water Quality System (CIWQS), indicated that 7,880 violations (from Jan. 1, 2000 through Dec. 31, 2007) had not received a penalty at or above the mandatory minimum amount.

According to the 2007 Report, CIWQS showed 18,442 MMP violations occurred between Jan. 1, 2000 and Dec. 31, 2007. Of those violations, 10,562 (57%) were recorded as having received a minimum or greater penalty. The report noted that some of the reported effluent violations might qualify for statutory exemptions.

TABLE 1:1 STATUS OF VIOLATIONS SUBJECT TO MMPS FROM JANUARY 2000 TO DECEMBER 2007				
Regional Office	Total MMP Violations	Violations With MMP Enforcement	Violations Without Completed MMP Enforcement	% Without
1	1,440	862	578	40%
2	1,494	1,034	460	31%
3	758	526	232	31%
4	7,571	4,207	3,364	44%
5F	1,107	678	429	39%
5R	113	68	45	40%
5S	3,519	1,493	2,026	58%
6A	5	0	5	100%
6B	92	5	87	95%
7	854	534	320	37%
8	754	616	138	18%
9	735	539	196	27%
TOTAL	18,442	10,562	7,880	43%

¹ From Table 11 of the 2007 Enforcement Report showed the number of violations that had penalties issued by each Regional Water Board office.

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Table 2 lists the number of facilities in each Regional Water Board that had one or more MMP violations, the number of facilities for which MMPs have been issued for all MMP violations, and the number of facilities that would require at least one enforcement action to cover the outstanding MMP violations. As shown, 491 or more enforcement actions were identified as necessary to cover the 7,880 violations subject to MMPs.

Table 2:² FACILITIES WITH MMP VIOLATIONS AND PENDING ENFORCEMENT ACTIONS JANUARY 2000 TO DECEMBER 2007			
Regional Office	Facilities With MMP Effluent Violations	Facilities With All MMP Penalties Issued	Facilities With Pending MMP Penalties
1	35	7	28
2	59	15	44
3	29	4	25
4	283	19	264
5F	20	2	18
5R	17	7	10
5S	69	15	54
6A	1	0	1
6B	3	1	2
7	20	2	18
8	19	4	15
9	22	10	12
TOTAL	577	86	491

After some initial data modifications, as of June 1, 2008, CIWQS showed approximately 7,203 MMP violations (almost all recorded for the period Jan. 1, 2000 through Dec. 31, 2007) had not received an enforcement action initiated to resolve the violation. These violations were considered “backlogged” and the reduction of these backlogged violations became a priority for the Water Boards.³

² From Table 2 of the 2007 Enforcement Report lists the number of facilities in each Regional Water Board that had one or more MMP violations, the number of facilities for which MMPs have been issued for all MMP violations, and the number of facilities that would require at least one enforcement action to cover the outstanding MMP violations.

³ Accurate reporting on the progress of the Initiative proved difficult due to the dynamic, “real-time” nature of the CIWQS database functionality. The database generates information based on the current status of the data that exists in the system and does not allow the user to create historical reports. In order to track the progress of the Initiative over the course of a year, the Office of Enforcement captured information relating to outstanding violation counts at the start of the process, and then used the preliminary numbers as a point of reference point to measure progress.

Goals of the Initiative

The Water Boards began its Statewide Initiative for MMP Enforcement with the following goals:

1. To eliminate or substantially reduce the MMP enforcement backlog by December 31, 2008 when the next *California Water Code section 13385(o)* report would be compiled. A violation would be "addressed" when the Water Boards took an affirmative act to resolve the violation with the discharger. The expectation was that once a violation was "addressed", the enforcement activity would be carried forward until the violation was fully resolved through the assessment of a penalty for the violation or a modification of the violation.
2. To validate the information in CIWQS regarding MMP violations to ensure that it accurately reflects MMP violations and the actions that have been taken to address them.
3. To identify enforcement issues with the MMP process to be addressed with potential statutory amendments, policy changes, or other process improvements.

Background on the MMP Statutes

California Water Code sections 13385 and 13385.1 require assessing MMPs for specified violations of NPDES permits. For violations that are subject to those MMPs, the Water Boards must either assess an Administrative Civil Liability (ACL) for the minimum penalty or, at their discretion, assess an ACL for a greater amount.

California Water Code section 13385(h) requires an MMP of \$3,000 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 30 days the report is late.

The Water Boards are also required by *California Water Code section 13385(i)* to assess MMPs of \$3,000 for multiple chronic violations. This penalty applies when the discharger does any of the following four or more times in any period of six consecutive months:

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1. Violates effluent limitations;
2. Fails to file a report of waste discharge pursuant to *California Water Code section 13260*;
3. Files an incomplete report of waste discharge pursuant to *California Water Code section 13260*; or
4. Violates a toxicity effluent limitation where the WDR does not contain pollutant-specific effluent limitations for toxic pollutants.

California Water Code section 13385(j) includes several limited exceptions to the MMP provisions. The primary exceptions are for discharges that are in compliance with a cease and desist order or a time schedule order under narrowly specified conditions.

California Water Code section 13385.1, effective January 1, 2004, defines the term "effluent limitation" and expands the definition of a "serious violation" in *California Water Code section 13385(h)* to include failure to file a discharge monitoring report for each 30 days it is late. Section 13385.1 also re-defines MMPs as applicable only to permits containing effluent limitations in which the location of the discharge is specified.

[AB495](#) (Montanez) (Stats. 2005, ch. 145 (A.B.495), § 1) amended *Water Code section 13385.1*, effective January 1, 2006, to remove the requirement for the discharge location to be specified in the WDRs. As a result, wastewater dischargers regulated under the NPDES wastewater program and the NPDES stormwater program are subject to the MMP if the location is specified in waste discharge requirements for violations occurring from January 1, 2000 to December 31, 2005. Most general NPDES permits, including stormwater NPDES permits, do not specify the location⁴ of discharge and are therefore not subject to MMPs for effluent or reporting violations occurring from January 1, 2000 to December 31, 2005 but they are applicable to violations occurring from January 1, 2006 on.

⁴ The location of the discharge for an enrollee under a general permit is specified in the Notice of Intent or Request of Waste Discharge application submitted to the Water Boards and may also be typically included in the enrollment letter and in the specific monitoring and reporting programs. Since those documents are not clearly incorporated in the permit, the location is not specified in waste discharge requirements for general permit enrollees.

Compliance Projects for POTWs Serving Small Communities in Lieu of Penalties

Instead of assessing all or part of a MMP against a publicly owned treatment works (POTW) serving a small community, the State or Regional Water Board, pursuant to *California Water Code section 13385(k)* may require the POTW to spend an equivalent amount toward a compliance project proposed by the POTW.

Supplemental Environmental Projects in Lieu of Penalties

Instead of assessing penalties, the State or Regional Water Board may suspend part of the penalty amount and allow for the funding or performance of a supplemental environmental project (SEP) in accordance with the enforcement policy of the State Water Board. If the penalty amount exceeds \$15,000, the portion of the penalty that may be directed to a SEP may not exceed \$15,000 plus 50 percent of the penalty amount that exceeds \$15,000.

Overview of the Initiative

The Initiative was designed to reduce the backlog through a phased approach of first resolving uncontested MMP violations with minimal, additional staff time by sending letters to facilities with MMPs and notifying them of the alleged violation(s) and offering them the opportunity to resolve their violation(s) by acknowledging them and providing full payment of any accrued mandatory penalties. Based on the response to the initial contact correspondence to facilities subject to the MMPs, the Water Boards would sequence, and process remaining MMP enforcement hearings. Facilities were to be addressed on a flow basis beginning July 1, 2008, as CIWQS data was validated for each facility.

Verifying Data and Validation Process

As the initial step of the Initiative, data in CIWQS was used to generate notices of violations for the existing MMP enforcement backlog (the backlog for purposes of this Initiative is comprised of MMPs accrued through December 31, 2007, although some Regional Water Boards choose to address MMP violations occurring after December 31, 2007 to bring MMP enforcement up-to-date. Data in

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CIWQS was updated on an ongoing basis as a coordinated effort of State and Regional Water Boards staff. This update process began in March and continued until data for all facilities with MMPs had been preliminarily validated so that accurate notification letters could be sent.

It was important for the Water Boards' staff to validate the MMP data, both to limit challenges to the enforcement actions and to increase the likelihood of a favorable response to the initial correspondence offering facilities the option of resolving their violations through the expedited acceptance of responsibility and payment of penalties. The transaction costs for State and Regional Water Boards' staff, and for the dischargers, would increase for facilities where inaccuracies in the Water Boards' data were identified first by the dischargers and not by the Water Boards' staff.

Data Validation Goals

State and Regional Water Boards' staff worked together to address data validation issues as they arose. As part of the validation effort, some regions were required to clean up a significant amount of data that was erroneously transferred from the former data system, SWIM, to CIWQS. State Water Board resources were available in the form of a data validation and assistance team (DVAT). The DVAT provided whatever level of assistance was requested by a Regional Water Board to achieve the data validation goals of this Initiative. The assistance available from DVAT ranged from deployment of State Water Board staff to a Regional Water Board office for facility file review, reconciliation of MMP information and modifications to the CIWQS database, and telephone support to address issues, questions, and technical difficulties that arose. The DVAT addressed issues in the Los Angeles Regional Water Board, the Regional Water Board with the most permitted NPDES facilities and the most potential MMP violations.

The data validation revealed many errors in the Water Boards' violation database. These errors included but were not limited to inaccurate entry of violation information, double counting violations, violations that were not MMP violations, undercounting reporting violations, and questionable exemptions of violations. For the most part, the problems were data transfer, data entry and violation interpretation issues and were not directly attributable to the design or operation of the Water Boards' CIWQS system.

New Procedures to Streamline the Resolution Process

The Initiative decided that dischargers would receive notices which invited alleged violators to participate in an expedited settlement process and which would include a notice of violation based on the validated CIWQS data. Alleged violators were given the opportunity to also correct Water Boards' data regarding alleged violations.

Before notifying dischargers, Water Board staff was asked to review the violations to categorize the violators as follows:

1. **Category One** - dischargers whose violations can be resolved by payment of the MMP amount; and
2. **Category Two** - dischargers whose violations warranted a discretionary penalty above the minimum penalty amount.

Historically, most enforcement actions by the Regional Water Boards had not sought additional, discretionary penalties above the mandatory minimum amounts so that the number of dischargers which would be placed in the second category was expected to be small as compared with those placed in the first category. Based on past Regional Water Board practices, the expectation was that no more than 10 percent of the targeted facilities to be placed in the discretionary penalty category. As it turned out, less than 1 percent of the facilities subject to MMPs were determined by Regional Water Board enforcement staff to warrant higher, discretionary liabilities.

The dischargers were divided into a subcategory of "small communities with financial hardship" which could qualify for consideration of a compliance project pursuant to *Water Code section 13385(k)* in lieu of an ACL. It was critical for the Regional Water Boards to determine which facilities might qualify for treatment as a "small community with financial hardship" to provide those facilities with all of the options provided by law.

The Regional Water Boards were not required to use the phased approach. Several relied on their traditional approach of using administrative civil complaints as the first step in addressing the alleged MMP violations with the dischargers. Some used a modified approach using a notice of violation to allow the discharger to provide information about the alleged violations followed up by an ACL complaint.

Expedited Payment Requests/Notices of Violation

Except where a Regional Water Board had decided to proceed with an ACL complaint, the initial correspondence to the alleged violators provided the following information and options for the discharger:

1. An opportunity for the discharger to pay its MMP amount (the notice would indicate that the discharger can opt to pay only a portion of the MMP, if the discharger believes some violations are in error or are subject to an affirmative defense);
2. The discharger agreement to pay its MMP amount was memorialized as a stipulated ACL order so that the promise to pay was fully enforceable as a formal order of the Water Boards.
3. A mechanism for payment and a time for submitting payments for uncontested violations; and
4. For small community dischargers who may qualify for a compliance project, the notice advised those dischargers of their rights to have such a project considered.

Where the expedited payment letter resulted in the discharger's payment of an MMP amount, the resolution was recorded in the Water Boards' data system as an ACL order for that liability. An example of an expedited payment letter is provided as Attachment 1.

Public/Legislative Communication Strategy

This Initiative was intended to be well publicized. The Office of Public Affairs and the Office of Legislative Affairs developed and coordinated the communication strategy. A briefing on the Initiative was provided to legislative staff. The Office of Enforcement provided regular public updates on the status of the Initiative through the State Board Executive Director's Monthly Report.

Enforcement Against Dischargers Did Not Resolve All Violations in Expedited Payment Offers or Notices of Violation

After the time for providing payments had run out, the Office of Enforcement, the Office of Chief Counsel, and Regional Water Board enforcement staff reviewed the remaining unresolved violations, including those facilities for which partial payments had been received. State and Regional Water Board staff worked in teams to identify enforcement actions that could be clustered together for a complaint/hearing process in a specific region. This stage involved additional data review and required a temporary redirection of resources to complete the hearing process.

For example, in the Los Angeles Regional Water Board, the enforcement staff intends to develop ACL complaints so that they can perform hearings on groups of five-to- ten ACLs during a single hearing docket. Similar types of facilities and violations will be considered during sequential hearings on the same day to provide efficiency but preserve the dischargers' due process rights. The ACL enforcement actions have been and will continue to be brought using Office of Enforcement, Office of Chief Counsel, and Regional Water Board staff as prosecutors.

Coordination Between State and Regional Water Boards

The Initiative was the product of State and Regional Water Boards' staff working together to address the MMP backlog and pursue new MMP violations more promptly.

State Water Board staff provided assistance to Regional Water Board staff on the start of this Initiative. Assistance ranged from State Water Board staff assuming the lead administrative role for MMP enforcement for all or some facilities within a Regional Water Board's jurisdiction to State Water Board staff undertaking significant data verification/validation. The Initiative was carried out in a dynamic way so that procedural issues and their solutions could be shared with a state-wide Coordinating Committee.

MMP Initiative Outputs and Outcomes

When the Initiative began in June 2008, CIWQS reported 477 facilities with 7,203 violations (through Dec. 31, 2007) without enforcement. Those violations were considered backlogged

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violations. Even after the initial violation validation efforts, it appears that the number of violations were undercounted in June 2008 by more than 5,000 violations, as the current data indicates that the MMP Initiative has addressed 12,219 out of 12,348 backlogged violations. This represents a discrepancy of 40 percent between what was actually recorded as violations in June 2008 and what should have been recorded.

As of March 31, 2009, the backlog of MMP violations without enforcement actions has been substantially reduced. So, one goal of the Initiative has been met.

Several Regional Water Boards have addressed all outstanding violations in their jurisdictions, and most of the remaining Regional Water Boards are nearly finished. As part of their enforcement efforts, several regions chose to address violations outside of the backlog period (violations occurring on or after Jan. 1, 2008). The status of all MMP enforcement actions are identified in the spreadsheets attached as Attachment B ⁵.

As a result of the MMP Initiative, the State and Regional Water Boards have addressed 13,812 violations from 455 facilities statewide. The Initiative has also resulted in a more accurate and complete recording of violations. The enforcement activities have consisted of 123 ACL complaints and 332 expedited payment letters.

As of March 31, 2009, the enforcement activities have resulted in the following⁶:

- Assessing and collecting \$4,747,004 in administrative civil liability;
- Assessing an additional \$2,942,500 in administrative civil liability which had not yet been collected; and
- Funding of 15 Supplemental Environmental Projects in the amount of \$830,246.

⁵ The information presented in Attachment 2 captures the initiation of each Expedited Payment Offer, while the CIWQS database and 13385 Report incorporates the resolution of the enforcement action as an Administrative Civil Liability (ACL) Order.

⁶ This information does not include 7 ACL Complaints issued in early 2009, by Central Valley Regional Water Quality Control Board, addressing 75 MMP violations that occurred during 2008.

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- Imposing \$7,075,750 in compliance projects to resolve enforcement actions against 14 publicly owned treatment works serving small communities with financial hardship.
- There are 9 remaining facilities with approximately 129 backlogged violations which still need to be initially addressed as part of the Initiative with either a notice of violation, expedited payment offer, or ACL action.

Region Number	No. of Facilities with backlog MMP Violations	No. of Backlogged MMP Violations
3	2	55
5	3	7
7	2	27
8	2	40

There are 171 facilities representing 6,772 violations which have been notified of liability but dispute that liability and there is no final resolution. Of those unresolved matters, 4,874 violations are effluent limit violations and 1,898 violations are reporting violations. Of these contested matters, one is seeking discretionary liability in excess of the MMP amount.

The information regarding the disputed violations is below:

Region Number	No. of Facilities with Disputed Violations	No. of Effluent Violations in Dispute	No. of Reporting Violations in Dispute	No. of ACL Complaints Issued
1	1	11	0	1
2	2	12	0	0
3	7	35	1	1
4	116	2,338	1,894	0
5	28	2,188	3	26
7	14	282	0	14
9	3	108	0	3

The remaining unresolved violations, 1,836, are in an information exchange/violation verification process with the dischargers. It is anticipated that based on past practice, a number of these violations will be resolved through this process.

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These disputed and unresolved violations represent a substantial workload for one or more regions. The table shows that many of the regions have already initiated formal ACL proceedings actions for their disputed matters; however, Los Angeles Regional Water Board has not yet started formal enforcement action for any of the 116 facilities which contest liability. If all of the 171 facilities which dispute their violations proceed to a contested hearing it is likely to adversely impact some of the regions ability to handle other pressing enforcement priorities, to provide hearing resources for those disputed matters, and to process new MMP violations.

Special Issues With Effluent Violations

There is a lack of knowledge of permit requirements among many dischargers. The Regional Water Board enforcement staff noticed that many dischargers simply mail in lab data with no understanding of the consequences of failed results. Also, samples were being collected when there was no discharge, and samples were being collected from the wrong area. This appears to be the result of simply paying a lab to collect and analyze samples with no regard for why the samples were being collected.

Some Regional Water Board staff reported that during the violation validation review, they were unable to pursue certain alleged violations because of ambiguities in the discharger's permit. The Regional Water Boards' staff experience with the Initiative and with permit interpretation problems has encouraged staff to provide greater clarity and better enforceability of the terms of discharge permits

Special Issues With Reporting Violations

Category I: Failure to file monitoring reports by specified deadline in NPDES Permit Monitoring and Reporting Program (MRP).

General Description of the Violation: Category I violations are straightforward instances of noncompliance with the deadlines for discharge monitoring reports required by the NPDES Permit's MRP. Dischargers either will conduct monitoring and fail to submit the quarterly reports to the Regional Water Board by the required deadline, or will not conduct monitoring at all for a reporting period. Dischargers generally have not disputed the assessment of MMPs for this category of misconduct.

Category II: No discharge to surface waters - No report

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Common Factual Circumstances of the Violation: Category II violations arise in the context of a General NPDES Permit. The Standard Provisions, General MRP Requirements include a provision stating, “[i]f no flow occurred during the reporting period, the monitoring report shall so state.” Additionally, the General Permit’s individual MRP prescribed by the Regional Water Board’s Executive Officer will specify a reporting period and deadlines for when the reports are due. Moreover, the Permit’s individual MRP prescribed by the Regional Water Board’s Executive Officer will include a provision similar to the Standard Provisions which states, “If there is no discharge during any reporting period, the report shall so state.”

Description of the Violation: A discharger enrolls under a General Permit on July 1, 2006. The General Permit contains the provisions described above in the Permit’s MRP. The discharger does not actually discharge until April 15, 2007. The discharger does not submit discharge monitoring reports for the third quarter of 2006, fourth quarter of 2006, and first quarter of 2007 telling the Regional Water Board that no discharges occurred during that reporting period. The discharge monitoring report for the second quarter of 2007 (the quarter in which the discharge occurred) is submitted to the Regional Water Board. From July 1, 2006 up until the second quarter of 2007, the discharger failed to submit a discharge monitoring report to the Regional Water Board.

Issues Raised by Dischargers Related to the Alleged Violation:

1. Requiring a report where there is no discharge does not further the intent of *California Water Code section 13385.1* because submitting a quarterly report to the Regional Water Board to state that there is no discharge of effluent does not “ensure compliance with limitations contained in waste discharge requirements” because there are no effluent limitations to comply with if the permit holder is not discharging.
2. During the period of no discharge, the discharger would not have been required to have coverage under the permit, so assessing penalties for that time period where no reports were submitted is contrary to the California Water Code.

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Category III: Limited Term Discharge – Limited Purpose Discharge

Common Factual Circumstances of the Violation: See Category II factual circumstances. In addition to the facts stated above in Category II, upon application for coverage under a General Permit, the discharger either gives the Regional Water Board written notice of its intent for a limited term discharge or the Regional Water Board acknowledges in writing that the discharger's intent for enrolling under a General Permit is for a limited term or limited purpose (i.e. in the Fact Sheet).

Description of the Violation: A discharger enrolls under a General Permit on July 1, 2006. The General Permit contains the provisions described above in the Permit's MRP. The Fact Sheet from the Regional Water Board states that the discharger proposes to discharge groundwater associated with well redevelopment and pumping tests. The Fact Sheet also specifies the project will last for "about one month." In its application to enroll under the General Permit, the discharger indicated that there would be a one-time continuous discharge during the pumping test. During the month of October 2007, the discharger conducts a pumping test resulting in one discharge on October 15, 2007. The discharger fails to submit discharge monitoring reports for the third quarter of 2006, fourth quarter of 2006, first quarter of 2007, and third quarter of 2007, the time prior to the month of the one-time continuous discharge. The discharger submits a discharge monitoring report for the fourth quarter of 2007 (the quarter in which the discharge occurred). The discharger then fails to submit discharge monitoring reports beginning the first quarter of 2008 to the present.

Issues Raised by Dischargers Related to the Alleged Violation:

1. The General Permit was only intended to cover the one month period in which the discharger conducted the pumping test which resulted in the one-time continuous discharge.
2. Dischargers should not be assessed penalties for failure to submit a discharge monitoring report for the reporting period prior to the actual discharge period and the reporting period after actual discharge occurred because the discharger was not required to have a permit during those periods since it was not discharging waste within the meaning of Porter-Cologne Water Quality Control Act.
3. *California Water Code section 13385.1* does not apply for periods in which the permit holder did not discharge because it does not ensure compliance with effluent limitations since there are no

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effluent limitations with which to comply if the permit holder is not discharging.

These issues will be resolved or clarified as the Regional Water Boards proceed to hearings on contested MMP matters or by recommended policy changes.

Other Common Challenges to the Imposition of MMPs Pursuant to *California Water Code Section 13385.1*

One of the common arguments against the MMPs for failure to submit reports is that the proposed penalty amount is excessive in relation to the alleged violation. For example, penalties under *California Water Code section 13385.1* are assessed for each complete period of 30 days following the deadline for submitting a report. Dischargers argue that these penalties are potentially infinite because once monitoring and reporting for the requisite period is missed, dischargers cannot go back and recreate and submit the data for that reporting period. MMPs for missing reports continue to be assessed and reassessed for each 30-day following the deadline for submitting. The chart below shows how MMPs for discharge monitoring reports can accumulate over one year for reports that are due quarterly.

Reporting Deadline	1Q 2006	2Q 2006	3Q 2006	4Q 2006
+ 30 days	X			
+30 days	X	X		
+30 days	X	X	X	
+30 days	X	X	X	X

X = MMPs assessed

In this situation, the mandatory minimum required by law is \$30,000 for a one-year period for a report due during the first quarter of the year. Staff thinks that consideration should be given to whether the accumulation of these penalties should be limited (see Recommendations).

Additional Enforcement Issues

California Water Code section 13385(j) provides the Water Boards with several affirmative defenses and exceptions to violations for which MMPs will not apply. According to the statute, exemptions may be granted for violations that occur during periods of start-up and testing at new or reconstructed POTWs, or new or reconstructed waste treatment units, violations addressed by a Regional Water Board-issued

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CDO or TSO, violations caused by intentional acts of a third party, natural disasters or phenomena, and multiple violations caused by a single operational upset. The CIWQS database allows staff to exempt violations for these reasons, but also provides staff with the ability to enter exemptions for other reasons.

The data suggests that some regions may be exempting violations not authorized by law, specifically those violations identified as “other” types of exemptions. Based on the information available in CIWQS, 5,544 violations have been exempt from MMPs since January 1, 2000. Of the total number of exemptions, 4,154 violations qualify based on clear, legally valid justifications and are easily identified in CIWQS. The remaining 1,390 exemptions have been entered into the database for other reasons which are less clearly linked to the statute.

Upon further analysis, these violations appear to be (1) legitimately exempted but, incorrectly categorized as other types of exemptions, (2) technically or legally invalid violations which should be re-categorized in CIWQS as dismissed or, (3) violations which have been exempted for reasons not authorized by the law.

About 352 of the exemptions in question appear to be legally valid and qualify as an exemption. These include 185 exemptions based on Regional Water Board determinations that violation of mass rate limitation exceedances during extreme wet weather qualifies as an event of exceptional, inevitable, and irresistible character and may be exempted pursuant to *California Water Code section 13385(j)(1)*. The remaining, legally valid, miscategorized exemptions are based on post-violation permit amendments and Regional Water Board issuance of cease and desist order or time schedule orders.

Of the 1,038 remaining exemptions in question, 727 are based on subsequent information that negates the violation. While penalties should not be assessed for these violations, they do not qualify for an exemption as outlined in *Water Code section 13385(j)*. These invalid violations should be identified in CIWQS as dismissed rather than exempted. The majority of identified dismissible violations are the 597 violations that occurred before January 1, 2006 at facilities enrolled under general permits which no longer qualify for MMPs. The remaining 130 exemptions that should be re-classified as “dismissed” are those based on invalid data, violations that were created in error, or dismissal of penalties based on discharger filing for bankruptcy.

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Most importantly, 311 exemptions appear to be based on misinterpretation of the statute, misunderstanding of the MMP report functionality, or lack any supporting information to determine why the penalty has been eliminated. The largest apparent error is the practice of exempting three or fewer chronic violations if no fourth, MMP-able, violation occurs within 180 days. These exemptions are legally invalid and unnecessary since CIWQS will not generate MMPs for violations which do not qualify as a chronic, MMP violation. Exemptions have been granted on the basis of exceeding the statute of limitations for MMP. There are no statutes of limitation that apply to administrative proceedings to assess MMP. Late reporting violations have also been exempted upon receipt of overdue monitoring reports, which violates the penalty assessment requirements of *California Water Code section 13385(i)*.

These justifications are not authorized by law and penalties need to be assessed for these violations. Such exemptions should be reviewed with legal counsel. Where the exemption is erroneous, the discharger should be notified of the violation and the appropriate enforcement should be commenced to address the violation.

Unrecorded/Misrecorded Reporting Violations

It is unclear from the data that that all of the reporting violations subject to MMPs have been recorded in CIWQS. Internal discussions within the Water Boards' enforcement staff suggest that some regions may not be recording certain reporting violations correctly, in particular where the failure to report extends over several quarters. Each Regional Water Board enforcement team should revisit its reporting violations to ensure that all of the violations have been recorded and acted upon in accordance with the Initiative.

Emphasis on MMPs Diverted Enforcement Staff From Other Enforcement Matters

The Initiative required the redirection of enforcement resources in every region with a significant backlog. As an example of the impact of the Initiative on enforcement resources, the experience of the Los Angeles Regional Water Board is instructive.

The Los Angeles Regional Water Board faced a backlog of more than 3,400 violations. The Initiative required that the entire enforcement unit of that Regional Water Board to focus exclusively on this task for many months, starting in June 2008. The region also received the assistance of

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State Water Board staff which spent weeks on data validation activities and assisted and continue to assist in bringing enforcement actions on behalf of the region. As a result, many other enforcement tasks were delayed or not accomplished. Those actions included the issuance of discretionary actions where MMP violations were identified in addition to other non-MMP violations. The Los Angeles Regional Water Board initially contemplated bringing at least four ACL actions for discretionary penalties but because of the delay in processing enforcement actions caused by the Initiative, the enforcement staff will now issue the actions as MMPs. If the discretionary component of the case can be issued in a reasonable timeframe, the Los Angeles Regional Water Board intends to bring such actions, in the near term, tasks associated with completing the Initiative still continue. Other enforcement tasks that have been impacted are compliance inspections at NPDES facilities, the revised policy on SEPs, complaint response, the Attorney General enforcement pilot project, addressing non-NPDES enforcement, and SSO general permit enforcement. Of some concern is that the Los Angeles Regional Water Board has not been able to review all the discharger monitoring reports (DMRs) received after the file reviews were conducted for the Initiative. As a result they face the potential of another backlog if it pursues its other enforcement needs.

Identifying Permit Enforceability Issues

- **Permit Limits**
Numerous examples of issues with the enforceability of permits surfaced through this process. A few of these issues include permits with limits based on discharge to ocean waters instead of fresh water, flexible limits that have to be calculated based on samples taken from effluent and receiving water, and court decisions revising limits.
- **Permit Renewal**
Permits were also renewed with outstanding violations leading to permittees claiming the inability to comply was known by, and therefore accepted by the Regional Water Board.
- **Change Of Ownership/Terminated Permits**
Ownership changes were not recorded in some instances. Tracking down previous owners of a facility to issue a settlement offer for violations of a terminated permit proved difficult. Addressing all violations prior to terminating permits will help.

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Other permit-related issues that have surfaced, and still remain to be resolved such as:

- A discharge is for a limited time period , but discharge reports are required for the entire life of the permit;
- The permittee did not discharge when reports were required;
- An intermittent discharge followed by a long period of inactivity; no proof that the permittee received the permit; and
- The effective date of the permit is not clear to the discharger.

DMRs must be expressly required under *California Water Code section 13383* before a serious violation can be established, but the permit and monitoring report do not reference *California Water Code section 13383*.

Impact of Initiative on Discharger Compliance Rates

The data is insufficient to determine whether the Initiative has had a positive influence on discharger compliance rates with the permit requirements subject to MMP assessments. Information in the *California Water Code section 13385(o)* reports indicates that enforcement against MMP violations historically has improved discharger compliance. The anecdotal information received by enforcement staff suggests that the Initiative has increased awareness within the discharger community about their compliance obligations with the effluent limits and the reporting obligations imposed by their permits. The impacts of the Initiative in comparison to the previous MMP enforcement effort can be reviewed in the *Water Boards' Water Code section 13385(o) Enforcement Reports* and the new quarterly updates. An excerpt from the most recent update evaluating MMP enforcement since 2000 can be found at http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/033109_quarterly_update.pdf

Many facilities that were assessed an MMP have indicated to enforcement staff that they are in the process of upgrading or committing to improvements to their facilities so as to avoid future violations. Dischargers notified of reporting violations by the Initiative should be sufficiently educated about their responsibilities so as to meet those obligations on a timely basis and to terminate any outdated or unnecessary permits. If the Initiative has deterred future noncompliance, it is an enforcement success. Whether that success has been cost-

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effective cannot be determined at this time but should be covered in upcoming *Water Code section 13385(o) Enforcement Report* updates.

Impact of Initiative on the Water Boards' Procedures

The Initiative helped the Water Boards understand and address data entry issues related to violation tracking. Preconceived notions of flaws in CIWQS by Water Boards' staff were conclusively demonstrated instead to be primarily problems with data entry due to a variety of reasons, including but not limited to, permit misinterpretation issues, improper recording of violations, and improper recording of exemptions.

The Initiative also showed that the expedited payment process was successful in bringing about a more efficient, less resource-intensive resolution of undisputed MMP violations as compared to the sole use of formal administrative procedures including ACL complaints followed by ACL orders. While that outcome is less clear in the context of MMP enforcement for reporting violations, assuming if there are no amendments to the application of MMPs for reporting violations, if the Water Boards make an expedited payment offer closer in time to the first occurrence of the reporting violation, the likelihood of acceptance will be greater than for an offer made after months or even years after the violations have accumulated.

General Resource Inadequacy for MMP Violations

The Water Boards' statistics indicate that about 2,000 or more new violations subject to MMP enforcement occur every year. We hope that the Initiative has alerted the regulated community to the consequences resulting from the covered violations and that there will be reduction in those violations, particularly reporting violations. Nevertheless, some level of new violations must be anticipated even with the deterrent impact of the Initiative.

The Water Boards' records show that they never obtained resources to address the workload arising from the passage of the MMP statutes. While the use of the expedited payment process makes the process for notifying and collecting an MMP violation from a discharger more efficient, there are still substantial administrative costs associated with the review of monitoring reports, and the identification and processing of an MMP violation. Until MMP violations are electronically self-reported or other process changes are made to reduce the investigative and/or

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administrative burden on the Water Boards, there will still be considerable resource constraints with addressing MMP violations.

Recommendations

The Water Quality Improvement Initiative (WQII) contains a proposed statutory change (*new Water Code section 13385.5*) to allow dischargers pay a liability of \$2,500 instead of \$3,000 per violation, or a discount of \$500 or 16.7 percent if the following conditions are met:

(1) The discharger identifies the specific violation as subject to a mandatory minimum penalty in the discharge monitoring report that covers the time period for reporting that violation.

(2) The discharge monitoring report that identifies the violation is timely submitted.

(3) The discharger remits a full payment of two thousand, five hundred dollars (\$2,500) in settlement of the mandatory minimum penalty for a violation within 30 days of submitting the discharge monitoring report.

(b) Any full payment in accordance with subdivisions (a)(1) through (3) shall, upon acceptance by the regional board or the state board, constitute a final resolution of the mandatory minimum penalty and shall not be subject to review by any court or agency. Any settlement of the mandatory minimum penalty for a violation does not require public notice and comment, but all such settlements shall be included in the report required by subdivision (o) of *Section 13385*. The settlement or imposition of a mandatory minimum penalty does not preclude the future settlement or imposition of additional civil liabilities for the same violation, unless the regional board or state board provides notice and a period of at least 30 days for public comment prior to the settlement or imposition of the mandatory minimum penalty.

By its very language, the proposed amendment will address only effluent violations, not reporting violations.

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The WQII further recommends an amendment to *Water Code section 13385.1* to provide the following:

“[F]or a publicly owned treatment works serving a small community, as determined pursuant to *Section 13385, subdivision (k)(2)*, failure to file a discharge monitoring report by a deadline shall not be treated as more than three separate serious violations unless the state board or a regional board has informed the person in writing of the failure to file the report. Any failure to file the report after such written notification shall be treated as a separate violation.”

Stakeholder Suggestions

In response to *Water Code section 13385 Enforcement Report for 2008*, one stakeholder suggested procedures for self-reporting and self-assessment of MMPs. Such procedures would require both a statutory change and new regulations establishing the procedures and processes for dischargers to identify and pay their obligations.

Office of Enforcement's Recommendations

The key to any expedited MMP assessment process will be the clear identification of the enforceable provisions of the permits at issue for potential effluent limit violations and reporting violations. Rather than rely on discharger self-reporting/self-assessment, the Water Boards may want to concentrate on the how violation data is submitted by a discharger, such as by electronic self-reporting. Use of electronic reporting would still rely on notices of violation affirmatively issued from the Water Boards as the triggering enforcement tool for a discharger's payment obligation. Staff thinks that such notices could be more efficiently issued by the Water Boards using those electronic self-monitoring reports. In this way, as opposed to a self-assessment system, the payment amounts for the discharger are endorsed by the Water Boards.

Staff also thinks that the changes regarding reporting violations recommended for small communities by WQII be expanded to include all dischargers unless there is a policy reason to maintain a distinction between small communities and others regarding impacts resulting from reporting violations.

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Potential Policy Changes

To address some of the reporting violation issues noted above, the Office of Enforcement recommends changes to the Water Quality Enforcement Policy. These proposed changes have been reviewed by and coordinated with the Office of Chief Counsel.

Defining a “Discharge Monitoring Report” in Special Circumstances Under *California Water Code Section 13385.1*

Water Code section 13385.1, subdivision (a)(1), states:

“For the purposes of subdivision (h) of section 13385, a ‘serious violation’ also means a failure to file a discharge monitoring report required pursuant to Section 13383 for each complete period of 30 days following the deadline for submitting the report, if the report is designed to ensure compliance with limitations contained in waste discharge requirements that contain effluent limitations.”

The legislative history of *Water Code section 13385.1* indicates that the Legislature enacted the statute primarily to ensure better reporting by dischargers that might otherwise avoid penalties for violations of their *Clean Water Act* permits by failing to submit monitoring reports that could disclose permit violations.

Because penalties under *Water Code section 13385.1* are assessed for each complete 30 days following the deadline for submitting a report, penalties may potentially accrue for an indefinite time. Dischargers that fail to conduct their required monitoring cannot go back and recreate and submit the data for a prior monitoring period. In such a case, an MMP for a missing report will continue to be assessed and reassessed for each 30 days following the deadline for submission until an ACL complaint for MMPs is issued. This policy is designed to assist dischargers in stopping the accrual of penalties for late or missing reports under the special circumstances described below. Nevertheless, under these circumstances, the discharger has the burden of submitting the required documentation.

The following subsections provide more guidance on the definition of a “discharge monitoring report” for the purposes of subdivision (a) of *Water Code section 13385.1* only in situations where: (1) there was a discharge to surface waters, but the discharger failed to conduct any monitoring

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during that monitoring period, or (2) there was no discharge to surface waters during the relevant monitoring period.

Defining a “Discharge Monitoring Report” Where There is a Discharge to Surface Waters and the Discharger Fails to Conduct Any Monitoring During the Monitoring Period

For purposes of *Water Code section 13385.1*, in circumstances where a discharge to surface waters did occur, but the discharger failed to conduct any monitoring during the relevant monitoring period, a “discharge monitoring report” shall include a written statement to the Regional Water Board, signed under penalty of perjury in accordance with 40 Code of Federal Regulations (C.F.R.) 122.41(k) and 40 C.F.R. 122.22(a)(1), stating:

1. That no monitoring during the relevant monitoring period was conducted;
2. The reason(s) the required monitoring was not conducted; and
3. If the written statement is submitted after the deadline for submitting the discharge monitoring report, the reason(s) the required discharge monitoring report was not submitted to the Regional Board by the requisite deadline.

Upon the request of the Regional Water Board, the discharger may be required to support the written statement with more evidence. Requiring dischargers to state under penalty of perjury that it did not conduct monitoring for the required period ensures that dischargers are not conducting monitoring and withholding data indicating there are effluent limitation violations. This approach may not be used if the discharger conducted any monitoring during the monitoring period that it is required to report to the Regional Water Board because the results of that monitoring, even if incomplete, must be submitted to the Regional Water Board. This approach is consistent with the legislative purpose of *Water Code section 13385.1*.

The written statement shall be treated as a “discharge monitoring report” for purposes of subdivision (a) of *Water Code section 13385.1*. If such a statement is submitted, MMPs for late or missing discharge monitoring reports assessed for each 30 days will cease accruing upon the date the written statement is received by the Regional Water Board. While the submission of the written statement provides a cut-off date for MMPs

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assessed under *section 13385.1*, the Regional Water Board, at its discretion, may impose additional discretionary administrative civil liabilities pursuant to subdivision (a)(3) of section 13385.

Defining a “Discharge Monitoring Report” Where there is No Discharge to Surface Waters

Some waste discharge requirements and/or associated monitoring and reporting programs for episodic or periodic discharges require the submission of a discharge monitoring report if there were discharges during the monitoring period, or a report documenting that no discharge occurred if there were no discharges during the monitoring period.

A report that is required to be submitted to document that no discharge to surface waters occurred during the relevant monitoring period is not a “discharge monitoring report” for purposes of subdivision (a) of section 13385.1 in the Water Code. Under these circumstances, that report would not ensure compliance with limitations contained in waste discharge requirements that contain effluent limitations, and therefore, the late submittal of such a report would be subject to discretionary civil liabilities, but would not be subject to MMPs.

If such a report has not been received, the Regional Water Board may presume that there were discharges during the relevant monitoring period and may seek to impose MMPs for the failure to submit a timely discharge monitoring report. In such a situation, the Regional Water Board shall not take final action to impose the MMP if the discharger submits a written statement to the Regional Water Board, signed under penalty of perjury in accordance with 40 C.F.R. 122.41(k) and 40 C.F.R. 122.22(a)(1), stating:

1. That there were no discharges to surface waters during the relevant monitoring period; and
2. The reason(s) the required report was not submitted to the Regional Board by the deadline.

On request of the Regional Water Board, the discharger may be required to support the written statement with additional explanation or evidence. Requiring the discharger to state under penalty of perjury that it did not discharge during the relevant monitoring period ensures that dischargers are not discharging and conducting monitoring and then withholding data indicating there are effluent limitation violations.

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If such a statement is submitted, the ongoing accrual of discretionary administrative civil liabilities, which the Regional Water Boards may assess under subdivision (a) (3) of section 13385 of the Water Code, will cease upon the date the written statement is received by the Regional Water Board.

Potential Operational Changes

An operational change recommended by a Regional Water Board is to prohibit permit renewal unless a thorough compliance review and the enforcement initiated to resolve outstanding noncompliance problems. This would necessitate a shift in the prioritization of permits, and how they are issued in the regions. Many of the responses to the expedited payment offers were that the violations were very late, and in many cases, a new permit had been issued and no violation had been identified by the Water Boards.

Dischargers Need Training on Basic Permit Requirements

Another recommendation from a Regional Water Board staff is that dischargers receive training or communication from the Water Boards that would explain the permit requirements. The Regional Water Boards enforcement staff feels that many general permittees often do not understand their permit requirements.

Increased Use of Electronic Self-Monitoring Reports

Assuming that MMPs remain part of the Water Boards' enforcement responsibilities, the Water Boards should use processes which advise the discharger of the violation in a timely manner without undue administrative or transactional costs. The current process, which relies on hard copy submissions by a discharger, then a physical comparison by the Water Boards staff of data against effluent standards or other permit requirements, and finally a NOV or ACL leaves room for improvement.

The electronic self-monitoring reports requested by the Water Boards should be designed to permit the automated issuance of appropriate expedited payment offers while retaining the ability of the enforcement staff to issue discretionary penalties under the appropriate circumstances.

The Water Boards should commit to the use of electronic SMRs and provide the discharger community with sufficient training to use the appropriate forms and methodology.

Setting Expectations for Enforcement Response for MMP Violations

Along with the use of electronic self-reporting, the Water Boards should take advantage of expedited payment offers and other enforcement formats that do not require the initiation of a formal enforcement process, including but not limited to drafting an ACL complaint, to successfully address and resolve an MMP violation.

Conclusion

The Initiative met its goals of reducing the number of MMP violations that had not received enforcement and improving the Water Boards' data related to the identification of these violations. By addressing its backlog of MMP violations, it also educated and reminded the regulated community of the consequences of engaging the proscribed conduct. Many of the backlogged violations have not been resolved and the process needed to bring disputed violations to closure will create a substantial workload for enforcement staff.

Whether the Initiative results in any long-term improvement in the Water Boards' ability to address MMP violations will depend on its success in carrying out the recommendations in this report and obtaining more enforcement resources. The Water Boards' progress will be measured in future reports and information required by *Water Code section 13385(o)*.

Statewide Initiative on Mandatory Minimum Penalty Enforcement



STATE WATER RESOURCES CONTROL BOARD
REGIONAL WATER QUALITY CONTROL BOARDS

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State of California
Arnold Schwarzenegger, Governor

California Environmental Protection Agency
Linda S. Adams, Secretary

State Water Resources Control Board
Charles R. Hoppin, Chair
Dorothy Rice, Executive Director

Statewide Initiative on Mandatory Minimum Penalty Enforcement

Acronyms

ACL	Administrative Civil Liability
CAA	State Water Pollution Cleanup and Abatement Account
Cal EPA	California Environmental Protection Agency
CAFO	Concentrated Animal Feeding Operations
CAO	Cleanup and Abatement Order
CDO	Cease and Desist Order
CIWMB	California Integrated Waste Management Board
CIWQS	California Integrated Water Quality System
CSD	Community Services District
CTR	California Toxics Rule
CWA	Clean Water Act
DA	District Attorney
DMRs	Discharger Monitoring Reports
DVAT	Data Validation and Assistance Team
EO	Executive Officer
ICC	International Code Council
LID	Low Impact Development
MMP	Mandatory Minimum Penalties
MRP	Monitoring and Reporting Program
MS4	Municipal Separate Storm Sewer System
NPDES	National Pollutant Discharge Elimination System
NPS	Non-Point Source
NOV	Notice of Violation
O&M	Operations & Maintenance
OE or Office	Office of Enforcement
PCS	Permit Compliance System
PY	Personnel Year
POTW	Publicly Owned Treatment Works
PUD	Public Utilities District
QA/QC	Quality Assurance/Quality Control
RCRA	Federal Resource, Conservation, and Recovery Act

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Acronyms (*cont.*)

SEP	Supplemental Environmental Project
SIC	Standard Industrial Classification
SIU	Special Investigations Unit
SMCRA.....	Surface Mining Control and Reclamation Act
SMR	Self-Monitoring Report
SSMP.....	Sewer System Management Plan
SSO	Sanitary Sewer Overflow
TSO	Time Schedule Order
US EPA.....	U.S. Environmental Protection Agency
UST	Underground Storage Tanks
Water Boards.....	State and Regional Water Boards
WDR	Waste Discharge Requirements
WOBEL	Water Quality-Based Limitation
WQII	Water Quality Improvement Initiative
WWTP	Wastewater Treatment Plant

Appendices

ATTACHMENT "1" (Redacted version of expedited payment letter package)

ATTACHMENT "2" – Information on each facility addressed or subject to via the MMP Initiative (OE to provide spreadsheets covering each facility)

Statewide Initiative on Mandatory Minimum Penalty Enforcement



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

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Arnold Schwarzenegger
Governor

ATTACHMENT 1

December 9, 2008

[REDACTED]

VIA CERTIFIED MAIL

[REDACTED]

No. [REDACTED] - OFFER TO PARTICIPATE IN EXPEDITED PAYMENT PROGRAM RELATING TO VIOLATIONS OF NPDES PERMIT

[REDACTED]

Dear Facility Contact:

This letter is to notify [REDACTED] (hereinafter "PERMITTEE" or "you") of alleged violations of the California Water Code identified in the State Water Resources Control Board's (State Water Board) water quality data system and to allow the PERMITTEE to participate in the Water Boards' Expedited Payment Program for Effluent or Reporting Violations (Expedited Payment Program) to address liability which may be assessed pursuant to Water Code sections 13385 and 13385.1.

NOTICE OF VIOLATION:

Based on information in the California Integrated Water Quality System (CIWQS) as of November 15, 2008, the State Water Board's Office of Enforcement alleges that the PERMITTEE has violated the effluent limitations, reporting violations, or Water Code provisions identified in the Notice of Violation (NOV) attached as Exhibit "A". The Permittee will have the opportunity to address the alleged violations as discussed below.

STATUTORY LIABILITY:

Subdivisions (h) and (i) of California Water Code section 13385 require the assessment of a MANDATORY MINIMUM PENALTY of \$3,000 for specified serious and chronic effluent limit violations. The PERMITTEE is subject to discretionary administrative civil liabilities of up to TEN THOUSAND DOLLARS (\$10,000) for each day in which the violation occurs, plus TEN DOLLARS (\$10) for each gallon discharged but not cleaned up in excess of 1,000 gallons. These mandatory minimum penalties and discretionary administrative civil liabilities may be assessed by a Regional Water Quality Control Board (Regional Water Board) or the State Water Board (collectively "the Water

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Boards"), beginning with the date that the violations first occurred⁹². The formal enforcement action which the Water Boards use to assess such liability is an administrative civil liability complaint although the Water Boards may instead refer such matters to the Attorney General's Office for prosecution. If referred to the Attorney General for prosecution, the Superior Court may assess up to TWENTY-FIVE THOUSAND DOLLARS (\$25,000) per violation. In addition, the Superior Court may assess up to TWENTY FIVE DOLLARS (\$25) per gallon discharged but not cleaned up in excess of 1,000 gallons.

OFFER TO PARTICIPATE IN EXPEDITED PAYMENT PROGRAM:

The PERMITTEE can avoid the issuance of a formal enforcement action and settle the alleged violations identified in the attached NOV by participating in the Water Boards' Expedited Payment Program. Details of the proposed settlement are described below and addressed in the enclosed documents.

To promote resolution of these violations, the State Water Board makes this Conditional Offer. The PERMITTEE may accept this offer, waive the PERMITTEE'S right to a hearing, and pay the mandatory minimum penalty as indicated on Exhibit A, for the violations described in the NOV. If the PERMITTEE elects to do so, subject to the conditions below, the State Water Board will accept that payment in settlement of any enforcement action that would otherwise arise out of the violations identified in the Notice of Violation. Accordingly, the State Water Board will forego issuance of a formal administrative complaint, will not refer the violations to the Attorney General, and will waive its right to seek additional discretionary civil liabilities for the violations identified in the Notice of Violation. Resolution of these violations by the State Water Board will preclude Regional Water Board action for these same violations.

The Expedited Payment Program does not address liability for any violation that is not specifically identified in the Notice of Violation.

PERMITTEE'S OPTIONS FOR RESPONSE TO OFFER:

If you accept this offer, please complete and return the enclosed "Acceptance of Conditional Resolution and Waiver of Right to Hearing, (proposed) Order" (Acceptance and Waiver) on or before thirty (30) days from the date of this letter. The Acceptance and Waiver will be held, pending a 30-day public notice period, and then will be

⁹² Please note that there are no statutes of limitation that apply to administrative proceedings to assess mandatory minimum penalties. See *City of Oakland v. Public Employees' Retirement System*, (2002) 95 Cal.App.4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, §405(2), p. 510.) The Permittee has not been substantially prejudiced by the passage of time between the date(s) that Permittee reported the violations identified on Exhibit A and the date of this letter. The Permittee was aware of the violations at the time it reported them to the Regional Board. Regional Board staff's limited enforcement resources and competing enforcement priorities provide a rational explanation for the delay. In fact, the delay has actually benefited the Permittee because it extended the time before payment of the mandatory minimum penalties is due. For these reasons, any delay is not unreasonable.

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counter-signed by the Executive Director and returned to you with an invoice for payment.

If you contest some but not all of the violations identified in the attached Notice of Violation, the PERMITTEE may elect to reserve the right to address the contested matters and resolve any uncontested violations through the payment of the mandatory minimum penalty for each uncontested violation. If the PERMITTEE chooses this option, please communicate with the staff contact identified below to discuss the mechanism for memorializing that election on or before the due date.

If the PERMITTEE chooses to contest any of the violations alleged in the Notice of Violation, please identify the specific violation and the basis for the challenge (factual error, affirmative defense, etc.) on or before the due date. The State Water Board staff will evaluate the contested violation and take one of two actions:

- 1) The State Water Board staff will determine that the violation is not supported, verify that determination with the Regional Water Board, expunge the alleged violation from the CIWQS data base once the Regional Water Board verifies the determination, take no further action against the PERMITTEE for the alleged violation, and notify the PERMITTEE of that determination;
- 2) The State Water Board staff, in consultation with the Regional Water Board staff, will determine that the alleged violation is meritorious, and will notify the PERMITTEE of that determination. The PERMITTEE will be given thirty (30) days from the date of receipt of the State Water Board staff determination, to submit a supplemental Expedited Payment for those violations. If the PERMITTEE chooses not to make a payment in response to the determination, the PERMITTEE should expect to be contacted regarding formal enforcement action that will be initiated with regard to the contested violations. In a formal enforcement action, the liability amount sought and/or imposed may exceed the liability amount set forth in this Conditional Offer. Moreover, the cost of enforcement is a factor which can be considered in assessing the liability amount.

CONDITIONS FOR STATE WATER BOARD ACCEPTANCE OF RESOLUTION:

Federal regulations require the State Water Board to publish and allow the public thirty (30) days to comment on any settlement of an enforcement action addressing NDPES permit violations (40 C.F.R. section 123.27(d)(2)(iii)). Upon receipt of the PERMITTEE's Acceptance and Waiver, the State Water Board staff will publish a notice the proposed resolution of the violations.

If no comments are received within the 30-day period, and unless there are new material facts that become available to the Water Boards, the Executive Director will

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- 4 -

December 9, 2008

execute the Acceptance and Waiver as a stipulated order assessing the uncontested mandatory minimum penalty amount pursuant to Water Code section 13385.

If, however, significant comments are received in opposition to the settlement, this Offer may be withdrawn. In that case, the PERMITTEE's waiver pursuant to the Acceptance and Waiver will also be treated as withdrawn. In that case, the unresolved violations will be addressed in a liability assessment proceeding. At the liability assessment hearing the PERMITTEE will be free to make arguments as to any of the alleged violations, and the PERMITTEE's agreement to accept this conditional offer will not in any way be binding or used as evidence against the PERMITTEE. The PERMITTEE will be provided with further information on the liability assessment proceeding.

In the event the Acceptance and Waiver is executed by the Executive Director, payment of the assessed amount shall be due and payable to the State Water Board as specified on the invoice that will accompany the PERMITTEE's receipt of the notice of the Executive Director's execution. The payment period is thirty (30) days. Failure to pay the penalty within the required time period may subject the PERMITTEE to further liability.

Should you have any questions about the Notice of Violation or the Conditional Offer, please contact Taryn Stokell at (916) 327-4743 regarding this matter.

Sincerely,



REED SATO
Director, Office of Enforcement

Encl. – Exhibit "A" - Notice of Violation
Acceptance of Conditional Resolution
and Waiver of Right to Hearing; (Proposed) Order

California Environmental Protection Agency

 Recycled Paper

Statewide Initiative on Mandatory Minimum Penalty Enforcement



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

Office of Enforcement

1001 I Street • Sacramento, California 95814 • (916) 341-5277
Mailing Address: P.O. Box 100 • Sacramento, California • 95812-0100
Fax (916) 341-5284 • <http://www.waterboards.ca.gov>



Arnold Schwarzenegger
Governor

[REDACTED]

ACCEPTANCE OF CONDITIONAL RESOLUTION AND WAIVER OF RIGHT TO HEARING; (proposed) ORDER

[REDACTED]

By signing below and returning this Acceptance of Conditional Resolution and Waiver of Right to Hearing (Acceptance and Waiver) to the Office of Enforcement of the State Water Resources Control Board (State Water Board), [REDACTED] (Permittee) hereby accepts the "Offer to Participate in Expedited Payment Program" and waives the right to a hearing before the Regional Water Board with jurisdiction over the facility to dispute the allegations of violations described in the Notice of Violation (NOV) which is attached hereto as Exhibit "A" and incorporated herein by reference.

The Permittee agrees that the NOV shall serve as a complaint pursuant to Article 2.5 of the Water Code and that no separate complaint is required for the State Water Board to assert jurisdiction over the alleged violations through its Executive Director. The Permittee agrees to pay the penalties authorized by California Water Code section 13385, as indicated on the attached invoice (Expedited Payment Amount) which shall be deemed payment in full of any civil liability pursuant to the Water Code sections 13385 and 13385.1 that otherwise might be assessed for the violations described in the NOV.

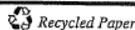
The Permittee understands that once the Acceptance and Waiver is executed by the Executive Director of the State Water Board, the full payment required by the deadline set forth below is a condition of this Acceptance and Waiver. The Permittee shall pay the Expedited Payment Amount by check payable to SWRCB. The payment shall be submitted to the State Water Board as specified on the enclosed invoice.

The Permittee understands that this Acceptance and Waiver does not address or resolve liability for any violation that is not specifically identified in the Notice of Violation.

Upon execution by the Permittee, the Acceptance and Waiver shall be returned to:

Expedited Payment Program
Office of Enforcement
State Water Resources Control Board
P.O. Box 100
Sacramento, California 95812-0100

California Environmental Protection Agency



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The Permittee understands that federal regulations set forth at title 40, Code of Federal Regulations, section 123.27(d)(2)(iii) require the State Water Board to publish notice of and provide at least 30 days for public comment on any proposed resolution of an enforcement action. Accordingly, this Acceptance and Waiver, prior to execution by the Executive Director of the State Water Board, will be published as required by law for public comment.

If no comments are received within the notice period which causes the Executive Director of the State Water Board to reconsider the Expedited Payment Amount, the Executive Director will execute the Acceptance and Waiver. Resolution of these violations by the State Water Board will preclude Regional Water Board action for these same violations.

The Permittee understands that if significant comments are received in opposition to the Expedited Payment Amount, the offer on behalf of the Water Board to resolve the violations set forth in the NOV may be withdrawn. In that circumstance, the Permittee will be advised of the withdrawal and an administrative civil liability complaint may be issued and the matter may be set for a hearing before the Regional Water Quality Control Board with jurisdiction over the violations or the State Water Board. For such a liability hearing, the Permittee understands that this Acceptance and Waiver executed by the Permittee will be treated as a settlement communication and will not be used as evidence in that hearing.

The Permittee understands that once the Acceptance and Waiver is executed by the Executive Director of the State Water Board, the full payment required by the deadline set forth below is a condition of this Acceptance and Waiver. The Permittee shall pay the Expedited Payment Amount in full. The payment shall be submitted to the State Water Board no later than the date indicated on an invoice which will accompany the Acceptance and Waiver after execution by the Executive Director.

I hereby affirm that I am duly authorized to act on behalf of and to bind the Permittee in the making and giving of this Acceptance and Waiver.

(Name of Permittee)

By: _____
(Signed Name)

(Date)

(Printed or typed name)

(Title)

IT IS SO ORDERED PURSUANT TO WATER CODE SECTION 13385

Date: _____

By: _____
DOROTHY R. RICE
EXECUTIVE DIRECTOR
State Water Resources Control Board

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Exhibit "A"

NOTICE OF VIOLATIONS (1 January 2000 – 15 November 2008) MANDATORY MINIMUM PENALTIES WITHOUT ENFORCEMENT

The following table lists this facility's alleged violations of subdivisions (h) and (i) of California Water Code section 13385, from January 1, 2000 through November 15, 2008, which have not received mandatory minimum penalty assessment by the Water Boards. Final calculation of MMP amounts owed, and descriptions of the abbreviations that appear in the table are also listed below. For additional information about the alleged violations listed in the table, please refer to the SWRCB Public Reports webpage http://www.waterboards.ca.gov/water_issues/programs/ciwqs/publicreports.shtml; choose the "MMP Report" link located under the "Enforcement Reports" category. Once in the Public Reports search page, enter the search criteria that correspond to your facility to access the list of violations.

Violation ID	Occurred Date	Type	MMP Type	Violation Description
[REDACTED]	1/3/2005	CAT2	SIG	1Q05 effluent violation (01/03/05) Outfall 004 BEHP monthly avg 39/5.9 ug/L
[REDACTED]	1/3/2005	CAT2	SIG	1Q05 effluent violation Discharge #6 (1/03/05): Copper daily max (33/19 ug/L).
[REDACTED]	1/3/2005	CAT2	SIG	1Q05 effluent violation Discharge #5 (01/03/05): Copper daily max (77/19 ug/L).
[REDACTED]	1/3/2005	CAT2	SIG	1Q05 effluent violation (01/03/05): Outfall 004 BEHP daily maximum 39/11.8 ug/L
[REDACTED]	2/22/2005	CAT1	CHRON	1Q05 effluent violation Discharge #5 (2/22/05): BOD monthly average (22 / 20 mg/L).
[REDACTED]	2/25/2005	CAT2	SIG	1Q05 effluent violation (02/25/05) BEHP monthly avg 8.1/5.9 ug/L
[REDACTED]	2/25/2005	CAT2	SIG	1Q05 effluent violation Discharge #6 (2/25/05): Copper daily max (33/19 ug/L).
[REDACTED]	2/25/2005	CAT2	SIG	1Q05 effluent violation Discharge #5 (2/25/05): Copper daily max (48/19 ug/L).

Mandatory Minimum Penalty Amount Owed for Effluent Violations

(7 Serious Violations + 1 Chronic Violation) × \$3,000 = \$24,000 to the Cleanup & Abatement Account

Mandatory Minimum Penalty Amount Owed for Reporting Violations

(0 Late Reporting Violations + 0 Deficient Reporting Violations) × \$3,000 = \$0,000 to the Waste Discharge Permit Fund

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Definition of Acronyms & Abbreviations

CIWQS	California Integrated Water Quality System database used by the Water Boards to manage violation and enforcement activities.
Violation ID	Identification number assigned to a violation in CIWQS.
Occurrence Date	Date that a violation actually occurred. For continuing violations, such as a monthly average, the last day of the reporting period is used. If the occurrence date is unknown, the date is entered as the day it was first discovered by staff, the Discharger, or a third party. For deficient or late reports, the occurrence date is the day after the report was due.
Type	Classification of a violation. Two types of violations relate to MMPs: 1) Late Reporting Violations (LREP, DREP) 2) Effluent Violations (ATOX, CTOX, CAT1, CAT2, OEV)
LREP	Late reporting violation. Every 30 days a report is late counts as one late reporting violation.
DREP	Deficient reporting violation. This will only result in an MMP if the report is so deficient as to make determination of compliance impossible for that reporting period.
ATOX	Violation of an acute toxicity effluent limitation.
CTOX	Violation of a chronic toxicity effluent limitation.
CAT1	Violation of an effluent limitation for a Group I pollutant by more than 40%.
CAT2	Violation of an effluent limitation for a Group II pollutant by more than 20%.
OEV	Violation of any constituent-specific effluent limitation not included in Group I or Group II.
MMP Type	Classification of the type of MMP violation.
CHRON	Chronic violation as defined by California Water Code section 13385 (i). To be counted as a chronic violation, there must be 3 preceding violations within a 180 day period. The fourth non-serious violation that occurs within the 180 period is an MMP violation.
SIG	Serious violation as defined by California Water Code section 13385 (h). Waste discharge exceeds the effluent limitation for a Group I pollutant by 40% or more (CAT1), or a Group II pollutant by 20% or more (CAT2). Also defined by California Water Code section 13385.1 as a failure to file a discharge monitoring report pursuant to Section 13383 for each period of 30 days following the deadline for submitting the report, if the report is designed to ensure compliance with limitations contained in waste discharge requirements that contain effluent limitations.
Violation Description	Narrative description of the violation.
M	Effluent exceeds limit for monthly reporting period.
Q	Effluent exceeds limit for quarterly reporting period.
S	Effluent exceeds limit for semi-annual reporting period.
A	Effluent exceeds limit for annual reporting period.
IM	Effluent exceeds instantaneous maximum limitation.
DM	Effluent exceeds daily maximum limitation.
AW	Effluent exceeds average weekly limitation.
AM	Effluent exceeds average monthly limitation.