



April 1, 2010

Ms. Katherine Hart, Chair
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670

Re: Proposed Mercury Total Daily
Maximum Load Regulations

Dear Ms. Hart:

Contra Costa County Flood Control and Water Conservation District (Flood Control District) manages approximately 70 miles of streams in Contra Costa County for the purposes of flood protection and habitat management. Portions of several streams listed in the proposed Amendments to the Water Quality Control Plan for the Sacramento and San Joaquin River Basins for the Control of Methylmercury and Total Mercury in the Sacramento – San Joaquin Delta Estuary (Basin Plan Amendments) are managed by the Flood Control District. As an owner and manager of stream channels, the Flood Control District offers the following comments on the proposed Basin Plan Amendments.

First the Flood Control District acknowledges that the Central Valley Regional Water Quality Control Board (Water Board) has implemented a process to include the issues from various stakeholders within the permit area. Discussions with colleagues involved in the process have indicated they have been collaborative and productive. The Flood Control District also acknowledges that we have not participated in this process. It is possible that some of the issues outlined in this letter have been discussed and resolved through the stakeholder process. On the other hand, it is also possible that the Flood Control District is providing a different perspective than presented in the stakeholder process.

Approaching Mercury and Methylmercury contamination from a wider, watershed approach.

The staff reports in support of the proposed Basin Plan Amendments indicate that the vast majority of historic and current mercury contamination has occurred from historic upstream sources. Yet the onus of clean-up efforts is being placed upon the downstream recipients of these toxic substances. This places a disproportionate responsibility upon Delta local agencies (cities, counties, and special districts within the legal boundary of the Delta) to clean-up pollutants generated by others over the past 150 years. The State and Regional Waterboards have been at the forefront of developing a watershed wide perspective in environmental management, yet the

proposed Basin Plan Amendments place near complete responsibility to study and develop control programs for these pollutants upon those jurisdictions within the legal definition of the Delta. This simply does not make sense from a watershed perspective.

Of greatest concern is the requirement for Delta local agencies to address mercury pollutants in upstream tributaries. The Delta local agencies have no legal authority to influence, let alone control pollutants generated in other jurisdictions upstream of our legal boundaries. Exactly how does a city, county, flood control or sanitary district implement control measures beyond their legal boundaries? For example, the Flood Control District's main mercury source within Marsh Creek lies on private property upstream of our facilities. We have no legal ability to address the pollution source without using eminent domain to acquire the property. If the Flood Control District were to acquire the property, we would assume full legal liability for the pollution source. This is something the Flood Control District simply cannot afford to do.

Requiring Delta local agencies to control pollution sources beyond their boundaries will lead to failure to successfully implement the proposed Basin Plan Amendments. The Basin Plan Amendments indicate that TMDL's for tributary watersheds will be developed in the future, but does not propose a schedule for their development or implementation.

The Flood Control District recommends the following changes to the proposed Basin Plan Amendments to address mercury contamination on a watershed wide basis.

- Expand the focus, study area, and requirements to include the entire watershed that feeds into the Sacramento – San Joaquin Delta in order to develop appropriate and implementable measures to address mercury and Methylmercury pollution within the Delta.
- Transfer oversight of the Total Daily Maximum Load (TMDL) and Basin Plan Amendment process to the State Water Resources Control Board, since the problems and solutions lie across multiple Regional Board areas.
- Work with the United States Environmental Protection Agency (US EPA) to utilize existing programs or develop new ones to provide funding to clean up and abate abandoned mercury mines in tributaries leading into the Delta.
- Grant "Good Samaritan" and liability protections to local agencies and non-government organizations who address abandoned mercury sources in upstream tributaries. Coordinate with US EPA to develop similar liability protection at the Federal level.

Lack of funding to implement the proposed Basin Plan Amendments

Another concern the Flood Control District has is that the proposed Basin Plan

Amendments lack funding mechanisms to implement the proposed regulations. The vast majority of the regulated agencies have extremely constrained abilities to raise the money needed to implement the proposed studies and control measures outlined in the proposed Basin Plan Amendments. Cities, Counties, and Flood Control Districts must adhere to the requirements passed in Propositions 13 (1978) and 218 (1996). It is essentially impossible to convince two-thirds of the electorate to raise fees or taxes to support activities that provide little perceived tangible benefits. Despite the benefits of reducing mercury and Methylmercury pollution in the Delta, most voters will not see this as an appropriate use of their local tax dollars. Consequently, Delta local agencies will be unable to implement the proposed Basin Plan Amendments without impacting other core services.

The Flood Control District recommends the following changes to the proposed Basin Plan Amendments to address adequate funding.

- Revise Chapter IV (Implementation), under "Recommended for Implementation by Other Agencies" #2 to replace "should" with "shall be required". Then this sentence would read: "the State of California shall be required to establish the means to fund a portion of the mercury control projects in the Delta and upstream watersheds" (BPA pg 15). Furthermore the required funding must adequately fund all of the required studies and control projects outlined within the proposed Basin Plan Amendments, including those slated to be conducted by local agencies. It is only through the adequate funding of the proposed Basin Plan Amendments that the Regional Board can hope to achieve the mercury and Methylmercury standards outlined in the TMDL.
- If adequate financial resources are not obtained prior to implementation of Phase I or II, then the State Board should develop a dedicated grant funding source for local agencies to use in order to implement the Basin Plan Amendments requirements for studies and control programs. One possible source would be to utilize the State Revolving Fund as programs where a percentage of the loan could be forgiven (similar to how American Recovery and Reinvestment Act money was distributed).

Responsibilities associated with the Exposure Reduction Program

The proposed Exposure Reduction Program, designed to reduce the amount of Methylmercury ingested by people consuming mercury-tainted fish from the Delta, places an unacceptable burden upon Delta local agencies. The program not only requires Delta local agencies to conduct a community outreach campaign to target human populations and achieve measurable reductions in the consumption of mercury tainted fish, but it also requires local agencies "to mitigate health impacts due to intake of mercury in Delta fish." It is our understanding that the "mitigation of health impact"

language may be changed based upon discussions at the February 24, 2010 stakeholders meeting. If this is the case, then these changes need to be codified prior to approval of the proposed Basin Plan Amendments.

If the requirement to mitigate health impacts from consuming mercury tainted fish remains within the proposed Basin Plan Amendments, then local agencies will be placed in an untenable liability risk that could potentially bankrupt them. It is not the responsibility of a city, county, or special district to restrict fish consumption; nor should these agencies be held liable for the health impacts incurred by those who choose to consume tainted fish. Mercury contamination in the Delta is a watershed wide issue. Delta local agencies cannot be held responsible for the health outcome of people's food consumption habits.

Although local agencies can address mercury contamination of waterways and aquatic ecosystems on those streams they manage, they cannot change dietary habits. The implementation of the Exposure Reduction Program will require specialized capabilities best implemented by public health agencies. Since the threat of mercury contamination in fish is essentially a state-wide issue and many of the proposed waterways to be included in the proposed Basin Plan Amendments are managed by the State, the Flood Control District believes it is most appropriate for the State to implement the Exposure Reduction Program through the CA Dept. of Public Health (CDPH). CDPH is the most appropriate agency to lead this effort and can better coordinate with County public health departments than cities or special districts can.

The Flood Control District recommends the following changes to the proposed Basin Plan Amendments regarding the Exposure Reduction Program.

- Incorporate the changes negotiated in the February 24, 2010 stakeholders meeting to eliminate the local agency requirement to mitigate the health impacts due to intake of mercury contaminated fish.
- Designate the CDPH as the lead agency to implement the Exposure Reduction Program and ensure adequate funding for this program is guaranteed for the duration of the TMDL requirements.

Extension of proposed Basin Plan Amendments to other Regional Board and state agency requirements

The Flood Control District has concerns that requirements for studies of baseline conditions and development of control measures may be implemented through regulatory mechanism on projects that have little or no nexus to mercury contamination. In particular, the Regional Board's water quality certifications and/or waste discharge requirements, or CA Dept of Fish and Game's Streambed Alteration

Agreements and/or Section 2080.1 endangered species consistency determination appear to be susceptible to imbedding mercury study or control program requirements. The Flood Control District agrees that projects that create or exacerbate mercury contamination should be required to address mercury issues in the regulatory permit process. But the Flood Control District is opposed to regulatory mechanisms being used to require studies or control programs where little or no nexus is required.

The Flood Control District recommends the following changes to the proposed Basin Plan Amendments regarding the use of regulatory mechanisms to further mercury TMDL goals and requirements:

- Modify the proposed Basin Plan Amendments to clearly state that regulatory mechanisms can only be used to require studies or control plans where there is a clear and proportionate nexus between the proposed activity and the potential impact upon mercury within the Delta.

Mitigation for impacts to wetlands from required mercury control programs

The proposed Basin Plan Amendments will have potentially significant impacts upon streams and wetlands, as discussed in the CEQA Environmental Checklist and Discussion (CEQA Checklist). Required implementation of control programs to treat Methylmercury will involve the temporary and often permanent removal of wetland resources. The CEQA Checklist also indicates that impacts to wetland resources will require pre-planning studies, construction monitoring, and compensatory mitigation. Yet the Regional Board assumes that Delta local agencies will incur the burden of complying with project specific planning, implementation, and mitigation associated with implementation of the proposed Basin Plan Amendments. These projects will be conducted solely because of the requirements of the proposed Basin Plan Amendments. It is unacceptable for the Regional Board to pass along the responsibility to mitigate projects for which the Delta local agencies have no choice but to comply. The discretionary actions that require mitigation lies with the Regional Board's decision to amend the Basin Plan, not the Delta local agencies, who must comply with newly mandated requirements.

The Flood Control District recommends the following changes to the proposed Basin Plan Amendments regarding compliance with the CEQA analysis.

- The Basin Plan Amendments CEQA document needs to more fully examine impacts of the amendments upon wetland resources. Specifically the CEQA document must estimate the amount of wetland acreage, function, and value that will be impacted by the proposed Basin Plan Amendments and determine potential avenues to mitigate the temporal and permanent losses associated with

- proposed control programs.
- The Regional Board should consider developing an exception to the Basin Plan requirements to compensate for unavoidable losses of wetland resources when implementing control programs. Or consider lowering the mitigation ratio from 3:1 (as outlined in the CEQA checklist) to 1:1.
 - The Regional Board should develop a wetland mitigation bank to allow Delta local agencies who incur unavoidable wetland impacts to use either free of charge or at cost to meet compensatory mitigation requirements.

The Flood Control District thanks the Regional Board for this opportunity to comment upon the proposed Basin Plan Amendment to Control Methylmercury and Total Mercury in the Sacramento-San Joaquin Delta Estuary. If you have any questions regarding this letter, please contact Cece Sellgren, Environmental Planner, at 925-313-2296 or by e-mail at csell@pw.cccounty.us.

Sincerely,



R. Mitch Avalon
Deputy Chief Engineer

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