



# CVCWA Central Valley Clean Water Association

Representing Over Sixty Wastewater Agencies

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March 31, 2010

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Central Valley Regional Water Quality Control Board  
11020 Sun Center Drive #200  
Rancho Cordova, CA 95670

**Re: Comments on February 2010 draft "Amendments to The Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Methylmercury and Total Mercury in the Sacramento-San Joaquin Delta Estuary" (hereafter "BPA")**

Dear Members of the Central Valley Regional Water Quality Control Board:

Thank you for providing this opportunity to review and comment on the subject BPA and associated documents. The BPA and staff reports were made available for public review and comment in February 2010. Comments provided in this letter focus on the Central Valley Clean Water Association (CVCWA) members' significant issues with the BPA. Additional comments are provided in the attachment to this letter.

CVCWA is a consortium of publicly-owned treatment works (POTWs) in the Central Valley. CVCWA's primary purpose is to exchange information and provide a unified voice on regulatory issues impacting POTWs throughout the Central Valley. CVCWA has been an active participant in the Methylmercury Stakeholder Group. Our members want to continue to participate in effective solutions to difficult problems such as mercury. It is our intention that our comments below serve to improve the BPA, particularly in recognition that we already serve the public's interest by removing mercury from municipal wastewater and represent a *de minimus* source of methylmercury to the Delta.

As described below, there are four key comments that we still wish to bring to the attention of the Central Valley Regional Water Quality Control Board (Central Valley Water Board):

- Clarify Exposure Reduction Program Objectives and Requirements
- Do Not Impede Progress in Developing an Offsets Policy
- Appropriately Designate Beneficial Uses
- Remove the Long-Term Fish Consumption Goal

Detailed text edits and additional comments are provided in **Attachment A**.

### **Clarify Exposure Reduction Program Objectives and Requirements**

Although CVCWA's members are not opposed to participating in exposure reduction efforts; the separately released, March 1, 2010 proposed Exposure Reduction Program raises several significant issues of concern. The text itself is unorganized and inconsistent, which is symptomatic of the lack of clarity in the mandate to require participation in an Exposure Reduction Program, leadership to organize participants, and funding to implement it. Due to the 218 process, funding is a significant legal issue for public agencies (especially smaller communities). Unfortunately, this element was added towards the end of the BPA process and CVCWA, other stakeholders, and the Central Valley Water Board staff have not had adequate time to collaborate on developing a program that is mutually satisfactory to all parties.

**Proposed Edits:** To address the BPA text itself, edits are provided in **Attachment B** as tracked changes. However, CVCWA also recommends relying on the Adaptive Management Approach for Implementing the Delta Methylmercury TMDL to the extent practicable to avoid misinterpretation of the BPA.

### **Do Not Impede Progress in Developing an Offsets Policy**

Page BPA-2 states that "Adoption of a Mercury Offset Program for dischargers who cannot meet their load and waste load allocations after implementing *all* reasonable load reduction strategies *and can demonstrate no disproportionate impacts on local communities as a result.*" [Italics added for emphasis.] An offset project, by definition, trades an impact at one location for a greater benefit elsewhere, resulting in a net improvement to the environment at a lower overall cost. The qualification highlighted in the draft language is inconsistent with Principle #7 developed by the Stakeholder Group: "The control program should create strategies, including incentives to encourage innovative actions, to address the accumulation of MeHg in fish tissue and to reduce MeHg exposure, including watershed approaches, offsets projects, and short and long-term actions that result in reducing inorganic Hg and MeHg. Innovative and creative solutions such as offsets should not substitute for *reasonable actions to address local impacts.*" [Italics added for emphasis and comparison to the BPA text above.] It also over-states the key offsets principles stated on page BPA-13. The offset program can address localized impacts by, for example, requiring a higher credit ratio for cross-tributary projects.

Furthermore, the Stakeholder Group identified in the Adaptive Management Plan two main goals for an offset policy: (1) to provide more flexibility than the current regulatory system provides, to improve the environment in a shorter timeframe, and to reduce exposure to fish consumers while meeting regulatory requirements (i.e., load and wasteload allocations) at a lower overall cost; and (2) to promote watershed-based initiatives that encourage earlier and larger load reductions to the Delta than would occur without offsets. Both goals would be impeded if the qualifier remains.

Finally, such a statement of priority consideration for local communities conflicts with the values expressed in the Water Code, which requires the Central Valley Water Board to regulate “to the attain the highest water quality, which is reasonable, *considering all demands being made and to be made on those waters* and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.” [Wat. Code, § 13000, emphasis added.] In adopting a Mercury Offset Program, the Central Valley Water Board must consider the principles expressed in section 13000, and must balance all demands of the water, including impacts to local communities. However, as currently expressed, impacts to local communities would be the only or primary consideration. We recommend that this language be revised to be consistent with the principles expressed in the Water Code.

**Proposed Edits:** Edit the text (also at pages ES-2 to ES-3) as follows “Adoption of a Mercury Offset Program for dischargers who cannot meet their load and waste load allocations ~~after implementing through implementation of all~~ reasonable load reduction strategies ~~and can demonstrate no disproportionate impacts on local communities as a result~~”.

### **Appropriately Designate Beneficial Uses**

The BPA proposes to add a new designated beneficial use designation for commercial and sportfishing (COMM) to the Sacramento-San Joaquin Delta and Yolo Bypass waterways listed in Appendix 43. The COMM beneficial use is defined in the Basin Plan to mean “[u]ses of water for commercial or recreational collection of fish, shellfish, other organisms including, but not limited to, uses involving organisms intended for human consumption or bait purposes.” According to the Draft Staff Report, the goal of the BPA is to lower mercury levels in fish to protect beneficial uses associated with fishing and wildlife. The draft staff report provides no other information or justification as to why the COMM is the appropriate beneficial use for which the BPA is needed to protect.

When designating new beneficial uses, the state must determine if the use is attainable. Uses are deemed attainable if they can be achieved by the imposition of effluent limitations on point source dischargers and the imposition of cost-effective and reasonable best management practices for non-point source control. [See 40 C.F.R. § 131.10(d).] Because of the uncertainty associated with meeting allocations designed to protect the beneficial use, the BPA requires the Central Valley Water Board to review the Delta Mercury Control Program after Phase 1 to determine if, among other things, the wasteload and load allocations are attainable. The review should also address attainment of existing and proposed beneficial uses.

Furthermore, the language proposed implies that COMM is an existing use, and not just a potential beneficial use. Existing uses are defined as “those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.” [40 C.F.R. § 131.3(e).] The Staff Report provides no evidence that COMM was actually attained in these water bodies on or after November 28, 1975. In light of this uncertainty, CVCWA finds it inappropriate to amend the Basin Plan to designate the COMM beneficial use to the Delta and Yolo Bypass waterways. CVCWA is especially concerned with the proposed amendment implying that COMM is an existing use, which is not the case.

Moreover, it is not necessary to amend the Basin Plan to include the COMM beneficial uses to these waterways to protect the fishing and wildlife uses identified in the BPA. The Basin Plan currently designates the Sacramento-San Joaquin Delta and the Yolo Bypass with recreation

(REC-1) and wildlife (WILD) as existing beneficial uses. Because the REC-1 use includes fishing, it is unnecessary to designate these waterways with COMM. Further, the COMM use is not intended to capture subsistence fishing. It is intended to protect the commercial and sportfishing industries, which includes the abundance of fish as well as food safety of the fish in question. Fishing in the Delta has always been considered a recreational use.

**Proposed Edit:** Delete the proposed BPA to designate the Delta and Yolo Bypass waterways with the COMM beneficial use. At the very least, the footnote must be revised to indicate that COMM is a *potential* use and not an *existing* use.

**Proposed Edit:** Add on page BPA-9, add the underlined: “(e) whether methylmercury allocations and beneficial uses can be attained”.

### **Remove the Long-Term Fish Consumption Goal**

Page BPA-2 includes this statement: “The long-term goal of the mercury program is to enable people to safely eat four to five meals per week (128-160 g/day) of Delta fish. The Delta objectives protect people eating one meal/week (32 g/day) of trophic levels 3 and 4 Delta fish plus some non-Delta (commercial market) fish. The fish tissue objectives will be re-evaluated during the Phase 1 Delta Mercury Control Program Review and later program reviews to determine whether a higher consumption rate can be reasonably attained as methylmercury reduction actions are developed and implemented.” The Central Valley Water Board should not be setting long-term goals in this BPA, especially if the current target is not being met and load reductions and results from the control studies have not been evaluated as to their feasibility and overall impacts to the Delta mercury loads.

**Proposed Edits:** The paragraph should be edited as follows: “~~The long term goal of the mercury program is to enable people to safely eat four to five meals per week (128-160 g/day) of Delta fish.~~ The Delta objectives protect people eating one meal/week (32 g/day) of trophic levels 3 and 4 Delta fish plus some non-Delta (commercial market) fish. The fish tissue objectives will be re-evaluated during the Phase 1 Delta Mercury Control Program Review and later program reviews to determine whether proposed objectives protective for a higher consumption rate can be reasonably attained as methylmercury reduction actions are developed and implemented.”

We appreciate this opportunity to provide input into the Basin Planning process and look forward to working with you and your staff to resolve our remaining concerns.

Sincerely,



Debbie Webster  
Executive Officer

cc: Charlie Hoppin, Chair, SWRCB  
Alexis Strauss, US EPA Region IX  
Pamela Creedon, Executive Officer, CVRWQCB

## ***Attachment A. Additional Comments***

This attachment contains additional comments on and proposed edits to provide clarity in the BPA.

### **Compliance Schedule Provisions for NPDES Permit Holder**

The BPA correctly provides the Central Valley Water Board with authority to include compliance schedules in NPDES permits for compliance with water quality-based effluent limitations based on the waste load allocations. However, the language as currently proposed is unclear as to the length of compliance schedules that may be adopted by the Central Valley Water Board.

Furthermore, CVCWA members continue to contend that Phase 2 should span 15 years, to the year 2035, which is equivalent to three five-year NPDES permit cycles, as originally contemplated when the BPA was introduced in 2004. Otherwise, this limits compliance to 10 years or less to achieve Phase 2 WLAs, which may not be enough time to design, build, and implement treatment systems for some dischargers.

**Proposed Edit:** Revise the compliance schedule language at BPA 3 as follows: “Beginning in Phase 2, the Regional Water Board shall, as necessary, include schedules of compliance in NPDES permits for compliance with water quality-based effluent limits based on the waste load allocations. The schedules of compliance shall be as short as possible, but shall not exceed the final compliance date of 2035, unless the final compliance date is extended by the Regional Water Board, and approved by U.S. EPA. If the final compliance date is extended beyond 2035, the Regional Water Board shall have the authority to extend schedules of compliance as necessary in accordance with the extended compliance date. The compliance schedules...”

### **Focus on a Holistic Approach**

The Central Valley Water Board should focus on a holistic approach when evaluating the results of Phase 1 control studies and other activities. The Delta is an ever-evolving place in many respects. Many structural, ecological, and regulatory changes are being contemplated by a variety of agencies. The decisions to make or not make such changes may consider their effects on methylmercury production and transport.

**Proposed Edit:** Add text to the BPA indicating that the Central Valley Water Board will perform a complete linkage analysis as part of the Phase 1 review, linking mercury source loads in the Delta and its watershed to mercury concentrations in Delta fish.

### **USEPA Approval Process**

The BPA indicates that USEPA will approve the Delta Mercury Control Program. Although USEPA must approve some parts of the BPA, USEPA does not have authority to approve all parts of the Delta Mercury Control Program. Because of their limited authority, we recommend that the language be amended as follows to clarify USEPA’s approval authority.

**Proposed Edits:** Revise the text on page BPA-1 as follows: “This control program was adopted by the Regional Water Quality Control Board on [date], ~~and approved by the U.S. Environmental Protection Agency~~ approved the water quality standards portions of the Delta

Mercury Control Program, including compliance schedule provisions for NPDES permit holders on [date]. The Effective Date of the Delta Mercury Control Program shall be [Effective Date], the date of U.S. EPA approval.”

### **Interim Limits for NPDES Wastewater Dischargers**

Only POTWs are given interim wasteload allocations, given on page BPA-4: “During Phase 1, all facilities listed in Table B shall limit their discharges of inorganic (total) mercury to facility performance-based levels. The interim inorganic (total) mercury effluent mass limit is to be derived using current, representative data and shall not exceed the 99.9<sup>th</sup> percentile of a 12-month running average effluent inorganic (total) mercury load (lbs/year). The limit shall be assigned in permits as an annual load based on a calendar year. At the end of Phase 1, the interim inorganic (total) mercury mass limit will be re-evaluated and modified as appropriate.”

Even in cases where considerable data have been gathered for estimating mercury loads, site-specific fluctuations beyond the facility’s control could occur. In particular, recycling more wastewater in the future will lead to greater seasonal and inter-annual fluctuations in wastewater discharges to the Delta. While *overall* discharge volumes and mercury loads will be reduced, recycling will be limited at times by seasonal weather patterns or available water users. For example, if a seasonal discharger calculates its interim inorganic mercury load based on dry years’ data and then discharges more in wet years, it will exceed its limit because of its early recycling efforts.

**Proposed Edits:** Revise the text on page BPA-4 as follows: “...The interim inorganic (total) mercury effluent mass limit is to be derived using current, representative data and shall not exceed the 99.9<sup>th</sup> percentile of a 12-month running ~~average~~ effluent inorganic (total) mercury load~~s~~ (lbs/year). For intermittent dischargers, the interim inorganic (total) mercury effluent mass limit shall consider site-specific discharge conditions. The limit shall be assigned in permits as an annual load based on a calendar year...”

### **Control Study Deadline**

A small change was made from the BPA language developed by the Stakeholder Group to the proposed BPA language, which changed or limited the intention of the language. The change made to the BPA implies that only the final deadline of a Control Study can be extended by the Executive officer. However, other interim deadlines in the sections should be eligible for extensions, if warranted. CVCWA recommends the language be returned to that discussed in the Stakeholder Group to allow flexibility with all deadlines on the Phase 1 Control Study.

**Proposed Edits:** On page BPA 8 make the following minor edit: “If the Executive Officer determines that dischargers are making significant progress towards developing, implementing and/or completing the Phase 1 Control Studies but that more time is needed to finish the studies, the Executive Officer may consider extending ~~the studies’~~ a study’s deadlines.”

### **Comments Specific to the Staff Report for Public Review**

Based on a review of the Staff Report, specific comments and edits are provided below. Additional edits may be necessary to be consistent with edits to the BPA based on comments above.

On page 50 under heading Population growth, the last sentence reads "Even so, the relative bioavailability of mercury in point source discharges and atmospheric deposition remains unknown; it is conceivable that discharges from these sources could be more bioavailable than other nonpoint sources and therefore could have a disproportionate effect on ambient methylmercury if such sources were to increase." There is no scientific conclusion regarding the relative bioavailability of mercury from point sources versus other nonpoint sources. SRCSD's bioavailability study found that its point source discharge was no more bioavailable than ambient methylmercury.

**Proposed Edits:** Edit the sentence as follows: "Even so, the relative bioavailability of mercury in ~~point source discharges and atmospheric deposition~~ local methylmercury sources remains unknown; it is conceivable that discharges from ~~these~~ some sources could be more bioavailable than others, which ~~nonpoint sources~~ and therefore could have a disproportionate effect on ambient methylmercury if such sources were to increase."

Additional minor editorial corrections:

- The Yolo-Bypass (North & South) subareas are sometimes referred to as two distinct subareas, but are being regulated as one subarea. The BPA documents should be more consistent in this naming convention.
- P.iv: Figure 1 presents a methylmercury budget for the Delta with arrows in and out of the Delta box. Open water is considered as a source (sediment flux), but not as a sink (photodegradation and particle settling). Consequently, if water managers increase methylmercury losses in open water they would not be addressing their load allocations. Open water loads should be considered for their net effect.
- P.26: The references to reductions in fish mercury concentration are all associated with water bodies contaminated by significant industrial sources that were removed. Yet even in those cases, mercury levels remain above fish contamination goals. That residual effect should be noted and considered when extrapolating those results to potential benefits of control actions in the Delta.
- P.96 and elsewhere: The report references Bosworth et al. (2008). That report should be finalized and made public if it is to be part of the public record.
- P.172: The 4th of 5 bullet points should refer to a concentration of 0.05 ng/l rather than 0.5 ng/l.
- P.199: The second paragraph refers to a report by TetraTech (2008). The report does not indicate that potential reductions to meet allocations may be possible. The focus was on tributary sources of total mercury. The analysis prioritized projects without quantifying net reductions associated with such projects.

## ***Attachment B. Proposed Edits to Exposure Reduction Program Language***

The language proposed in the March 1, 2010 separate release is shown in its entirety. CVCWA's recommended edits are shown as underline-strikeout changes. Comments are shown in italics.

### Draft Delta Methylmercury Control Program Basin Plan Amendments, 1 March 2010 Exposure Reduction Program Section

The following is draft text for the Exposure Reduction Program section of the Basin Plan amendment. This text reflects discussions at the December 2009 and January 2010 Delta Methylmercury Stakeholder Group meetings, a workgroup meeting on 10 February 2010, a stakeholder meeting on 24 February 2010, and written comments. The following text replaces BPA text contained within the February 2010 staff report. For the full text of the proposed Basin Plan amendment, see the Central Valley Water Board's website:  
[http://www.waterboards.ca.gov/centralvalley/water\\_issues/tmdl/central\\_valley\\_projects/delta\\_hg/april\\_2010\\_hg\\_tmdl\\_hearing/apr2010\\_propbpa\\_exec\\_summ.pdf](http://www.waterboards.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/delta_hg/april_2010_hg_tmdl_hearing/apr2010_propbpa_exec_summ.pdf)

#### Exposure Reduction Program

While methylmercury and mercury source reductions **necessary to meet fish tissues objectives** are occurring, the Regional Water Board recognizes that activities need to be undertaken **with-to encourage** people who eat Delta fish to reduce their methylmercury exposure and **its** potential health risks. The Exposure Reduction Program is not intended to replace timely reduction of mercury and methylmercury **in-loads to** Delta waters.

The **Regional Central-Valley**-Water Board will investigate **waysactivities**, consistent with its regulatory authority, to address public health impacts of mercury in Delta fish, **including. The objective of such activities that would be to reduce actual-and-potential** exposure of and **mitigate consider** health impacts to **those people and communities** most likely to be affected by mercury in Delta-caught fish, such as subsistence fishers and their families. **→ Consider deleting this paragraph. The next paragraph says what Board staff will do, and the subsequent text states the objective and strategy.**

By [one year after Effective Date], **Regional Water** Board staff shall work with dischargers, State and local public health agencies (**California Department of Public Health, the California Office of Environmental Health Hazard Assessment, and local county public health and/or environmental health departments**), and **other** stakeholders, including community-based organizations and Delta fish consumers, to complete an Exposure Reduction Strategy. The purposes of the **S**strategy will be to recommend to the Executive Officer **which-how** dischargers will be responsible for participating in an Exposure Reduction Program, **to set performance measures, and to propose a collaborative** process for developing, funding and implementing the program **in a collaborative manner. At a minimum, point source dischargers and the state and federal agency**ll dischargers shall be responsible for conducting the Exposure Reduction Program **at a level proportional to each source's contribution to the impairment.** In the absence of participation **recommendations provided through the Exposure Reduction Strategy**in the Exposure Reduction Program, **methylmercury** dischargers shall be individually responsible for **implementing the Exposure Reduction Program requirements.**

The objectives **s** of the Exposure Reduction Program **are-is to:**

~~r~~ reduce ~~actual and potential~~ mercury exposure of Delta fish consumers most likely affected by mercury.

The Exposure Reduction Strategy should include elements that:

- ~~d~~Develop and implement ~~successful~~ community-driven ~~and regional~~ activities to reduce mercury exposure;
- ~~r~~Raise awareness of fish contamination issues among people and communities most likely affected by mercury in Delta-caught fish such as subsistence fishers and their families;
- ~~i~~Integrate community-based organizations that serve Delta fish consumers, Delta fish consumers, and public health agencies in the design and implementation of an exposure reduction program; and
- ~~i~~Identify resources, ~~as needed~~, for ~~public health agencies, dischargers, and~~ community-based organizations to participate in the Program.
- Utilize existing programs and materials or activities in place to reduce mercury.
- Develop measures of success that are agreed to by public health agencies and public and private stakeholders and that are found to be in the best interest of the public trust. Measures of success may include both scientific monitoring and public perception, which is measured through public surveys.

The dischargers, ~~either~~ individually or collectively, ~~or based on the Exposure Reduction Strategy~~, shall submit an exposure reduction workplan for Executive Officer approval by ~~-[two years after Effective Date].~~ The workplan shall address the Exposure Reduction ~~Program objectives and dischargers' coordination with other stakeholders~~Strategy. ~~→ The next deleted statement is redundant with the Strategy, and precludes what that Strategy would propose.~~Dischargers shall integrate or, at a minimum, provide good-faith opportunities for integration of community-based organizations and consumers of Delta fish into planning, decision making, and implementation of exposure reduction activities.

The dischargers shall implement the workplan by [four years after Effective Date]. Every three years after workplan implementation begins, the dischargers, individually or collectively, shall provide a progress report to the Executive Officer.

~~The California Department of Public Health, the California Office of Environmental Health Hazard Assessment, and the local county public health and/or environmental health departments should collaborate with dischargers and community members to develop and implement exposure reduction programs and provide guidance to dischargers and others that are conducting such activities. The California Department of Public Health and/or other appropriate agency should seek funds to contribute to the Exposure Reduction Program and to continue it beyond 2030, if needed, until fish tissue objectives are attained.~~

The State Water Board should develop a statewide policy that defines the authority and provides guidance for exposure reduction programs, including guidance on addressing public health impacts of mercury, activities that reduce actual and potential exposure ~~to mercury~~ef, and mitigating health impacts to those people and communities most likely to be affected by mercury exposure from consuming Delta fish.