April 7, 2010

Ms. Kathryn Hart, Chair
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670-6114

Re: Proposed Delta Methylmercury TMDL/Basin Plan Amendment

Dear Chairwoman Hart and Fellow Members of the Board,

On behalf of Clean Water Action (CWA) and our 60,000 California members, as well as San Francisco Baykeeper, we submit the following comments on the proposed methylmercury total maximum daily load (TMDL) for the Delta and the amendment of the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (referred to herein as the 'proposed BPA'.) We appreciate the hard work that Board Staff has put into developing this plan to address one of the most dangerous and widespread contaminants in the watershed, which we recognize as both complex and difficult. They are to be commended for their diligence.

While there are positive aspects of this plan, particularly the methylmercury emphasis, we do have concerns about the proposed BPA. Before we provide you with our specific comments, we are obligated to point out that <u>the proposed BPA does not represent a consensus of all stakeholders, especially those most impacted by methylmercury in the Delta and in Delta fish.</u>

While we recognize that the Board's decision to establish a pubic stakeholder process may have been well intentioned and that Staff did attempt to be inclusive in incorporating various viewpoints into their proposed BPA and staff reports, the result was in fact a discharger and government agency (some of whom are also dischargers) driven process. This was because:

- The very structure of the process excluded full participation by community based and other public interest groups. Such formalized stakeholder processes require a tremendous time commitment and expense to travel to meetings or even to participate by phone. Dividing the work of the stakeholder group into multiple workgroups served to further expand the time and resources necessary to fully participate, and allowed for discussions to be limited to smaller groups of people—meaning at best that those not able to join these discussions could only comment on documents produced by the smaller groups instead of being part of their development. The reality is that community groups are outnumbered by and cannot compete with dischargers and agencies that have dedicated personnel and even budgets for such processes. Meetings held exclusively in one part of the Delta which may be inaccessible to impacted community members, further limited their participation. Furthermore, technical or jargon filled discussions often serve to discourage community voices from asserting themselves, despite the fact that they have unique expertise about their particular regions of the watershed and the impacts of the decisions being made about

how to address the mercury contamination. An attempt to overcome these problems by holding phone meetings specifically with community groups, while again well intentioned, in fact isolated their concerns and comments, as opposed to integrating them into the larger discussions by the stakeholder group.

- Outreach to tribes, who bring both unique expertise and needs to this process, did not happen until late 2009, meaning that they were left out of the development of the current BPA draft. This is not merely an egregious oversight. We contend that since this TMDL is a requirement under the federal Clean Water Act and must be approved by US EPA, neglecting the role of impacted tribes until the eleventh hour means that the stakeholder process did not comply with Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments , November 2000, http://www.usace.army.mil/ CECW/TribalIssues/Documents/ eo_13175.pdf)

Given these limitations, we respectfully ask the Board to recognize that the proposed BPA is not the result of a fair, truly inclusive process that built true consensus on key areas of concern related to this methylmercury plan. We look to you for fair consideration of the comments we make in this letter, and those submitted by other public interest and impacted groups and individuals, weighing them equally with recommendations that came out of the limited stakeholder process and are reflected in this TMDL. Further, we strongly urge the Board to delete language in the proposed resolution to adopt this Delta Mercury Control Program describing the stakeholder process (bullet 28, page 5). It is misleading in that it appears that participation and influence by all stakeholders listed was equal.

The following is a list of our concerns with the proposed BPA in its current form, as well as our recommendations to address these issues:

1. *The goals of the TMDL, expressed by the fish tissue target, fall short of attaining the true beneficial uses of the Delta and will perpetuate the health threat to communities with high levels of subsistence fishing.*

CWA and Baykeeper have consistently opposed a fish tissue target that will limit safe consumption of Delta caught fish to one meal a week. As we stated in previous written comments to this Board, "The purpose of the TMDL is to remediate the Delta in order to regain and protect its beneficial uses. The Clean Water Act does not condone only protecting a portion of these beneficial uses or only part of the population that takes advantage of them. Instead, the goal is to protect all populations that depend on a clean safe environment." (April 21, 2008)

While Staff does state that "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 (BPA, page 2)", the proposed BPA's objective remains at 32 grams/day (one meal a week) of trophic level 3 and 4 Delta fish, plus some commercial fish. This objective is not valid because it is based on averages taken over a large population and ignores the significance of variations of fish consumption within that population. In fact, it is the right of all people to fish in our waters to the degree that they see fit. By ignoring the rates of subsistence fishing taking place in many of the Delta's communities for cultural and/or economic reasons, as well as tribal traditions related to fishing, the proposed fish tissue target is discriminatory. Communities with the highest levels of fishing are often low income communities and/or communities of color. In a nutshell, the current fish tissue target does not comply with the intent of the Clean Water Act, and will not protect a significant portion of the Delta's human population.

In addition to asserting that the TMDL must establish goals that represent the true beneficial uses of the Delta, including subsistence fishing by a wide variety of communities, we continue to strongly disagree with Staff's contention that meeting a more stringent fish tissue target may not be achievable or

measurable. As we stated in our previous comments, measurement capabilities have, and will continue to improve over time. More importantly, because understanding of how to control methylmercury (the focus of this TMDL) is also expected to grow over time, we believe that reducing fish tissue levels to allow for subsistence fishing, is in fact achievable, as opposed to if we were relying on eradicating total mercury contamination in the watershed. We perceive the latter as much more unlikely to be successful given the scope of the contamination over the last century and a half.

Recommendations:
In order to ensure that the TMDL ultimately results in reestablishing the Delta's true beneficial use of fishing for all people, we recommend the following:

- Establish Staff's Alternative 5 as the fish tissue target of this TMDL[1] -- 128-160 g/day of Delta fish-- until further research on fishing practices in the Delta demonstrate that it should be lowered or increased. This target is in line with the US EPA's recommendation of a rate of 142.4 grams/day and would allow 4 to 5 meals a week of Delta fish. This is closer to actual fishing practices in many of the region's communities, and thus a far more appropriate fish tissue target for this TMDL.

- Include a subsistence fishing designation as a beneficial use for the Delta and the Native American Cultural (CUL) use, in recognition of the communities who rely on such practices to provide basic nutritional and cultural sustenance for their families. We recommend this over the COMM designation suggested by Staff for recreational fishing[2], as it best characterizes the true beneficial uses of the Delta and would protect both recreational and subsistence fishers.

2. Phase One does not include specific and measurable total mercury reduction requirements for all dischargers while methylmercury control studies are occurring and allows unnecessary delays in implementing methylmercury reductions strategies.

The proposed BPA establishes a phased approach with a 9-year study period for dischargers to research and develop methylmercury control programs. While we support the study period as a means of optimizing methylmercury reductions, we have consistently expressed concerns about delaying the clean-up process for almost another decade. These concerns have not been allayed given the vague language in the BPA about interim requirements to control total or inorganic mercury. For instance, the BPA states that "during Phase 1, all dischargers shall implement reasonable, feasible controls for inorganic (total) mercury" (BPA, page 3), though there is no definition of "reasonable" or "feasible" and implies that enforcement will be performance based and not on attainment of specific numeric reductions. Furthermore, the resolution to adopt the proposed BPA describes a more limited total mercury reduction requirement. It states that the proposed changes to the Basin Plan "require *specific point source dischargers* to implement inorganic mercury controls during the first phase of the control program" (Resolution No. R5-2010-XXXX, item #13, page 2, emphasis added), leaving out non-point, tributaries, and potentially some point sources all together. This not only delays efforts to reduce mercury levels in the Delta over the next decade but also threatens to delay implementation of reduction and mitigation measures pursuant to the San Francisco Bay mercury TMDL.

The proposed BPA also permits the Executive Officer undue discretion to extend the duration of mercury control studies beyond nine years in the event it is determined that dischargers are making significant progress (BPA, page 8). Significant progress is not defined. Furthermore, the proposed BPA

[1] See Staff Report
[2] http://www.waterboards.ca.gov/centralvalley/water_issues/basin_plans/sacsjr.pdf

actually incentivizes delays by stating that dischargers will not be required to implement methylmercury controls before the Board has reviewed the Phase 1 Mercury Control Program and developed upstream control programs for tributaries (BPA, page 3). This could delay implementation beyond the nine year study period, thus extending the threat of mercury exposure to both humans and wildlife.

Nine years is more than an adequate amount of time to develop methylmercury control strategies and should at the very least be rigorously enforced. However, the BPA should also make it clear that the Executive Officer should also retain the authority to require appropriate best management practices for methylmercury and/or other methylmercury controls at any time during Phase 1 as appropriate. The adaptive management framework of the TMDL will ensure that as dischargers and the Board learn more about methylmercury control, during both Phase 1 and 2, new strategies can and should be implemented. It is likely that there will always be gaps in our understanding. This does not mean that efforts to address methylmercury based on current knowledge should not move forward.

Recommendations: Specific changes to the BPA should include:

- Clarification of the responsibilities of dischargers during Phase 1 to reduce total mercury loads by harmonizing the proposed adoption resolution with the actual BPA and assigning load allocations to all dischargers
- Deletion of language regarding the extension of mercury control studies beyond Phase 1
- Establishment of a process in the proposed BPA to enable dischargers whose studies demonstrate effective methylmercury controls to begin meeting their methylmercury allocations in advance of Phase 2, when appropriate, and publicly recognizing their achievements as an incentive for them to move forward in as expedient a manner as possible.

3. Progress of the methylmercury reduction programs described in this BPA is subject to minimal input by community interests, and continued disproportionate influence by dischargers.

In order to support an "an adaptive management approach", the proposed BPA includes the formation of a Stakeholder Group(s) to help review the Control Study Workplan(s) and results (BPA, page 7). While we support a public process, we are concerned that like the stakeholder process discussed above, this group will be largely made up of dischargers. This is inappropriate given that the group will be assessing the workplans that dischargers will be producing to meet their TMDL requirements. In other words, those being regulated will be able to influence decisions on how well they are meeting their regulatory responsibilities.

The BPA also includes the development of a Technical Advisory Committee (TAC) of "independent experts …to provide scientific and technical peer review of the Control Study Workplan(s) and results, advise the Board on scientific and technical issues, and provide recommendations for additional studies and implementation alternatives developed by the dischargers" (BPA, page 7). We support the development of the TAC and are pleased to see that community groups will be consulted for their recommendations. We note, however, that tribes are not mentioned as well. We are also concerned again with the potential influence the regulated community will have in regard to who will serve on the committee. Such influence puts the independent nature of the TAC in jeopardy and could thus undermine its purpose.

Recommendations:

- Add tribes to those recommending members of the TAC,
- Instead of establishing a separate stakeholder group, enhance true public input and participation by specifying that the TAC will include tribal and other community representation. Consequently we suggest deleting the language describing the Stakeholder Group(s) (BPA, page

7) and add the following sentence to the 2nd paragraph under "Technical Advisory Committee and Adaptive Management Approach (page 7).
"TAC membership will include representatives of tribal and other community and public interest groups who provide particular expertise on issues such as but not limited to their local watershed, local fishing practices, and the impacts of total and methylmercury on their communities. All TAC meetings and documents shall be public and transparent and allow for public comment."

- Delegate final approval of Control Study Workplans to the TAC, following public comment. Add language that "approval of Control Study Workplans shall not be delegated to the regulated community or representatives thereof". (BPA, page 7)

4. The proposed BPA lacks clear measurement and enforcement strategies, especially, though not exclusively in relation to non-point sources of mercury.

In a number of cases, it is unclear how the Board will determine that a discharger is in compliance with the proposed BPA's provisions or what the repercussions of non-compliance will or may be. This results in a lack of assurance that the plan will actually achieve the results it intends. For instance:

- The proposed BPA states that "Nonpoint sources shall be regulated through the authority contained in State laws and regulations, including State Water Board's Nonpoint Source Implementation and Enforcement Policy" (BPA, page 4). However, it does not apply the appropriate regulatory authority to various requirements in the BPA.
- It is unclear how implementation by non-point sources in the Delta and Yolo Bypass of "reasonable, feasible actions to reduce sediment in runoff" during Phase 1 will be measured or enforced (BPA, page 5). Nor does the proposed BPA contain definitions or examples of reasonable and feasible actions.
- Dischargers will be considered in compliance with reporting requirements related to their mercury control studies "upon timely submittal of workplans and revisions" (BPA, page 7). However, no mention is made of what the consequences of delayed submittal or non-compliance with the reporting requirements, in general, would or could be.
- It is unclear how Clean Water Act 401 Water Quality Certifications and other requirements related to dredging activity will be enforced. Will such certifications be revoked upon non-compliance?
- The BPA does not explain how the Board will enforce the requirement that "in conjunction with the Phase 1 Control Studies, nonpoint sources, irrigated agriculture, and managed wetlands shall develop and implement mercury and/or methylmercury monitoring, and submit monitoring reports" (BPA, page 17).

It is particularly not clear what role the Memorandums of Intent that have been promoted through the Stakeholder group process, will actually play in ensuring full cooperation and participation in developing and implementing Control Studies in Phase 1. They are not legally binding and are not therefore an enforcement tool for the Board.

Finally, it is not possible to comment on the appropriateness of the wastewater methylmercury allocations. Table B (BPA, page 20) provides a list of the load allocations assigned to each municipal and industrial wastewater facility, but does not indicate what the current load is. Consequently, it cannot be determined how much a reduction, if any, is being required. We presume this information is available, since Table C (BPA, page 21) indicates current combined loads from wastewater facilities in the various subareas of the watershed. Furthermore, it would be inappropriate to allow NPDES facilities to sum their load allocations if their allocations regionalize or consolidate (Table B Footnotes, BPA page 21) in

order to ensure that all communities where facilities are located enjoy reductions in local methylmercury discharges.

Recommendation: While we recognize that enforcement can take a variety of forms depending on circumstances, the BPA needs to provide the public with assurances that its requirements will be enforced to ensure that remediation activities will in fact move forward in a reasonable time period. We therefore recommend that the BPA:

- Includes at least general statements on how requirements listed throughout the document will be enforced, particularly in regard to non-point sources.
- Include current wastewater load allocations in Table B for specific dischargers and recalculate the required waste load allocations according to the fish tissue target we are recommending. We further recommend that Board staff recirculate the revised table for public review before final adoption. This will mean that the Board may have to adopt the BPA conditionally and revisit the wastewater allocations at a later date.
- Delete item (a) in Table B Footnotes

5. All sources of mercury loading must be addressed.

In some cases the BPA does not actively <u>require</u> mercury controls and reductions related to activities in the Delta and/or sources of mercury, and allows exceptions in studying some sources.

Recommendations: The proposed BPA needs to make clear the requirements for all dischargers and activities that impact mercury and methylmercury loading in the Delta:

- Revise "Dredging activities and activities that reuse dredge material in the Delta *should* minimize increases in methyl and total mercury discharges to Delta waterways" (BPA, page 11, emphasis added) to read "Dredging activities and activities that reuse dredge material in the Delta *shall* minimize increases in methyl and total mercury discharges to Delta waterways".
- Revise "By [two years from Effective Date] project proponents shall submit a study workplan(s) to evaluate methylmercury and mercury discharges from dredging and dredge material reuse, and to develop and *evaluate* management practices to minimize increases in methyl and total mercury discharges" (BPA, page 11, emphasis added) to read "By [two years from Effective Date] project proponents shall submit a study workplan(s) to evaluate methylmercury and mercury discharges from dredging and dredge material reuse, and to develop and *implement* management practices to minimize increases in methyl and total mercury discharges".

6. The impacts of new sources of mercury to the watershed are not adequately addressed in the proposed BPA

The proposed BPA states that "new or expanded methylmercury discharges that begin after [Effective Date] may necessitate adjustments to the allocations" (BPA, page 2). The BPA should clarify the process that would be required to adjust the allocations, which would be to adopt a new BPA following appropriate public review. Anything less would be tantamount to adopting load allocations and waste load allocations which are not really allocations at all, and would not fulfill the requirements of a TMDL.

Recommendation:

- Add specific language indicating that "the proposed BPA would be amended, with proper public review, if new or expanded methylmercury discharges beginning after [Effective Date] require adjusting the allocations established in this TMDL". (BPA, page 2)

7. The BPA inappropriately allows offsets during Phase One

CWA has consistently expressed concern over the assumption that dischargers may develop offsets programs to meet their load allocations because of the potential environmental justice implications of such schemes. As we noted in our comments to the Board dated November 13, 2006, "while offset programs are often touted as resulting in aggregate environmental benefits, they have also often resulted in disproportionate impacts on local, usually disadvantaged communities of color and can discourage dischargers from reaching optimum pollution reductions. Consequently…[offsets] should be seen as generally undesirable and a last resort."

The proposed BPA does state "on or before [9 years after Effective Date], the Regional Board will consider adoption of a mercury (inorganic and/or methyl) offsets program" (BPA, page 13). We are pleased to see some of our key principles reflected in the proposed BPA, specifically that offsets should only be available to "fulfill a discharger's responsibility to meet its (waste) load allocation after reasonable control measures and pollution prevention strategies have been implemented" and that they should not be allowed "in cases where local human or wildlife communities bear a disparate or disproportionate pollution burden as the result of the offset" (BPA, page 13). However, we have two specific concerns that should be addressed in the proposed BPA and in any potential policy that the Board establishes down the road, namely that since this is a methylmercury TMDL, offsets should focus on reducing methylmercury loads and that pilot offset projects should not occur during Phase 1 as stated in this draft.

We object to offsets in Phase 1 for the following reasons:

1. No offsets should be approved before the Board has establishes a policy with explicit parameters
2. Offsets are meant to assist dischargers who cannot meet their wasteload allocations to fulfill their mercury reduction obligations. Phase One is specifically meant to study how best to do just that. Consequently, it makes no sense to establish an offset program when it is not yet clear that a discharger will be in violation of their waste load allocations in Phase 2. As we stated above, Phase 1 should be focused on developing strategies to reduce methylmercury, and certainly, not on developing offsets.
3. Phase 1 does require dischargers to meet load allocations for total mercury. Such controls are well understood and should not require dischargers to offset their responsibilities to reduce or maintain current levels.

Another concern arises not out of the BPA language, but out of discussions of the Offsets Workgroup that comprised part of the Stakeholder process. While CWA was only able to participate in such discussions on a very limited basis, we were deeply concerned with proposals that pollution trading would be an acceptable strategy under an offsets program. We are absolutely opposed to pollution trading schemes that allow one discharger to trade credits with another. This serves only to move pollution around, discourage optimum pollution reductions, and can further contaminate local communities situated near or around the discharger who has obtained the extra credits.

Recommendations:

- Delete language that permits offsets during Phase 1
- Specify that if an offsets policy is developed and programs implemented, they must focus on reducing methylmercury loads
- Add to the list of key principles governing potential offsets (BPA 13) that no pollution trading schemes that allow one discharger to sell or trade credits to discharge total or methylmercury

into the watershed will be permitted in order to optimize mercury reductions and ensure that all communities are protected from disproportionate burdens of pollution as per Environmental Justice principles.

- Ensure that if an offsets policy is developed by the Board, it is done through a public process that is accessible to impacted communities and is approved by the State Board.

8. Exposure Reduction language recommendations

CWA and Baykeeper appreciate the efforts by Staff to include language to clarify responsibilities of dischargers to support and help facilitate the development of interim exposure reduction strategies to protect subsistence fishing populations over the time the TMDL is being implemented as directed by the State Water Quality Control Board in Resolution 2005-0060. This will be important in ensuring that such strategies can be identified, developed, and implemented as quickly as possible and to the maximum extent practicable. CWA joined other stakeholders working with impacted communities to develop recommendations to further strengthen the proposed BPA language. We refer the Board to a letter submitted to the Board on April 1, 2010 by CWA and these other stakeholders containing that language.

Again we wish to recognize the hard work Board Staff has put into this proposed BPA. We submit these comments and recommendations in the spirit of making this an effective and successful TMDL that will, over time, return the Delta to a state in which it will fulfill its true beneficial uses. Thank you for your consideration of our comments and for the opportunity to express them. We are available to clarify any of the points herein or provide more specific recommendations as necessary.

Sincerely,

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