SF Bay Mercury
Deadline: 4/4/07 Noon

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Defending Our Waters—from the High Sierra to the Golden Gate

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April 4, 2007

Chair Doduc and Board Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Sent via electronic mail to commentletters@waterboards.ca.gov

RE: Proposed Amendments to the San Francisco Bay Region Water Quality Control Plan to established a TMDL for mercury in the San Francisco Bay

Dear Chair Doduc and Board Members:

We are writing on behalf of Baykeeper, Natural Resources Defense Council, and Clean Water Action to comment on the proposed amendments to the San Francisco Bay Region's Water Quality Control Plan ("Basin Plan Amendment" or "BPA") to establish a Total Maximum Daily Load ("TMDL") for mercury. We appreciate the Regional and State Board staff's hard work to improve this BPA in response to State Board Resolution No. 2005-0060 (September 7, 2005) ("Remand Order"). Although this iteration of the BPA is substantially improved over that proposed in 2005, a few key changes are still necessary.

We remain deeply concerned that the BPA could be interpreted to authorize NPDES permits that do not include individual water quality-based effluent limits that are directly enforceable by the Regional Board, EPA, and third parties. Such a permit contravenes the requirements of the Clean Water Act and state law and could improperly allow near-term increases in mercury loads. We urge the State Board to directly amend the BPA, pursuant to Water Code § 13245, to make clear that permits must include water quality-based effluent limits that are enforceable via all available legal means. This simple change will avoid later unnecessary controversy over the meaning of the BPA and its implementation. This and our other suggestions are addressed in greater detail below.

Pollution hotline: 1-800 KEEP BAY
www.baykeeper.org

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A. The BPA must require that NPDES permits contain effluent limits enforceable against individual dischargers regardless of group performance.

In 2005, this Board explicitly remanded the original BPA in part because it relied on group wasteload allocations. The Remand Order directed the Regional Board to "revise the TMDL to establish *individual* wasteload allocations, after reconsidering the appropriateness of the policy assumptions used ...to derive the original wasteload allocations." Remand Order, Resolved 3 (emphasis added). This Board necessarily intended that such individual wasteload allocations be translated into enforceable, individual water quality-based effluent limits, or permit limitations, as otherwise the individual wasteload allocations would be largely meaningless. Unfortunately, the BPA could be read to violate this aspect of the Board's remand order and, in the process, allow an increase in mercury discharges, at least in the near term.

Although the revised BPA appears to assign individual wasteload allocations (Tables 4-x & 4-y), the BPA also continues to establish group, or "aggregate," wasteload allocations. BPA at 18. Unfortunately, the text of the BPA strongly suggests that the Regional Board does not intend to initiate traditional enforcement action authorized by law unless the aggregate allocations are violated. For example, the BPA states, with respect to municipal dischargers:

> The individual municipal wastewater wasteload allocations shown in Table 4-x shall be implemented via individual mass limits and an aggregate mass limit that is the sum of the individual allocations. . . . If any aggregate mass limit is exceeded, the Water Board will pursue enforcement actions against those individual dischargers whose mass discharges exceed their individual mass limits.

BPA at 18; *see also id.* at 21 (stating "[t]he Water Board will pursue enforcement action against [industrial] dischargers that do not respond to exceedances of triggers or do not implement reasonable actions to correct and prevent trigger exceedances.").

The Clean Water Act and its implementing regulations require that all NPDES permits include individual water quality-based effluent limits calculated to achieve applicable individual wasteload allocations, and provide that such individual permit limits are enforceable by the State, U.S. EPA, and private citizens with standing. Specifically:

- The Clean Water Act prohibits the discharge of pollutants from a point source without a permit. 33 U.S.C. § 1311(a).
- All permits for the discharge of pollutants from a point source must contain effluent limitations sufficient to achieve applicable water quality standards. 40 C.F.R. § 122.44(b)(1), (d).
- Federal regulations define a wasteload allocation as "the portion of receiving water's loading capacity allocated to *one* of its existing or future point sources of pollution," thus requiring assignment of wasteloads to individual point sources. 40 C.F.R. §130.2(h) (emphasis added).

- When a TMDL has been developed and individual wasteload allocations adopted, permit effluent limitations must be based on and consistent with the applicable individual wasteload allocation. *Id.*; *see* 33 U.S.C. §1313(d)(4)(A). Wasteload allocations are intended to ensure compliance with water quality standards established pursuant to section 303 of the Clean Water Act. 40 C.F.R. § 130.2(h), 40 C.F.R. § 122.44(d).
- Individual water quality based effluent limits, whether or not based on wasteload allocations, are enforceable by EPA, *see* 33 U.SC. § 1319, private citizens with standing, *see* 33 U.S.C. § 1365,[1] and the State, *see* Cal. Water Code § 13385.

The BPA language cited above could be read as an attempt to bypass these legal authorities and requirements as it describes a permit scheme under which individual permit limits generally would not be enforced (and, at least in the view of some regulated parties, would not be enforceable) unless aggregate limits were violated.

During the Regional Board hearing on this matter, the U.S. EPA, like the environmental community, raised significant concerns with the BPA's discussion of this issue. Although the EPA does not have veto authority over the BPA's TMDL implementation plan, EPA will ultimately have veto authority over permits issued pursuant to that plan. Accordingly, EPA focused on how the implementation plan could lead to an unacceptable permitting scheme. As EPA stated during the hearing:

> However, the individual limits must be enforceable by third parties if and when this group limit is exceeded. [¶] Moreover, the permitting scheme described in the TMDL may be inadequate. . . . The Board should ensure that the watershed permit, when drafted, include[s] enforceable limits on individual NPDES discharges in addition to the water quality based effluent limits based on the individual waste load allocations. The point is to have enforceable limits at all times to prevent any one discharger from having localized adverse effects.

Hearing Transc. 24-25.

In response to such concerns, Regional Board legal counsel indicated that the BPA amendment would not limit enforcement of individual permit limits and that any concerns regarding enforcement could be worked out in the individual permit process. Hearing Trans. 43-44. If this is so, the objectionable language in the BPA is unnecessary and there should be no objection to action by the State Board to modify the BPA to make clear that the language specifying when the Regional Board will (and by implication, perhaps when it will not) act to enforce individual wasteload allocations and resulting permit limits does not constitute a restriction on enforceability of individual permit limits.

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[1] In providing for citizen enforcement, Congress explicitly recognized that government often lacks the means or will to enforce water quality laws. *See* S. Re. No. 414, 92d Cong., 1st Sess. 2-3 (1971). This is why Congress specifically authorized enforcement suits by any private person with standing.

Taking that action now will remove controversy from this BPA and avoid future conflict over permits implementing the TMDL.[2]

We are also concerned that failure to enforce individual wasteload allocations could permit a near-term increase in mercury discharges since, right now, all permittees must meet individually enforceable permit limits. It may be suggested that such an increase would be offset by later reductions in waste load allocations or by reductions in load from other sources. Even if that rationale were sufficient *after* those future decreases took effect, they will not take effect for many years, if they materialize at all. In the meantime, individual municipal and industrial dischargers could effectively increase their discharges by operating under a "bubble" or aggregate allocation. Such near-term increases in individual discharges would impair water quality and violate anti-backsliding principles.

Proposed solution: To address these concerns, we urge the State Board to exercise its legal authority to add the following sentence to the BPA:

> Notwithstanding the aggregate waste load allocations for mass loadings from wastewater dischargers, the NPDES permit for each wastewater discharger shall include an enforceable concentration-based limit, or other limit determined to comply with water quality standards, consistent with the individual wasteload allocations specified in this Basin Plan Amendment.

B. The BPA lacks sufficient information about the Regional Board's commitment to mine and toxic hotspot identification and cleanup.

We strongly agree with the State Board that a legacy mercury inventory should be completed for both Region 2 and Region 5, as required by the Remand Order. Remand Order, Resolved 7. To ensure that such an inventory is completed and used effectively, however, the BPA should be revised to clearly describe the Regional Board's plan to control legacy sources. More specifically, the BPA should (1) state the Regional Board's intent to identify all existing contaminated Bay margin sites as it has done with abandoned mine sites, (2) identify the timeframe in which inventory and prioritization of cleanups will be completed, and (3) identify potential funding for cleanups.

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[2] On March 16, 2007, the Regional Board issued a draft watershed permit that would set concentration-based effluent limits for each discharger that are enforceable regardless of group performance. While we are still reviewing this draft permit, we are preliminarily concerned that the individual effluent limits set forth in the draft permit may not be calculated to ensure consistency with individual wasteload allocations. We are also concerned that *this draft permit is still a draft*. Absent amendment to the BPA by the State Board, either this or future watershed permits may not ultimately adopt enforceable, individual water quality based effluent limits designed to achieve individual wasteload allocations.

This level of detail is necessary to ensure that the cleanups and actions coordinating activity between Regions 2 and 5 actually occur. Currently, the Regional Board's mine and toxic site cleanup programs are underfunded and understaffed, so no guarantee exists that these programs will either continue or be sufficient to control legacy sources as suggested by the BPA. BPA at 23. For example, the Basin Plan currently states that the Regional Board will require NPDES permits and WDRs for dischargers of stormwater from active or inactive mine sites, but it is our understanding that this has not been done. Including in the BPA expectations for the actions to be undertaken, such as identification of funding and the expected completion dates, will provide additional assurance that the cleanup of legacy sources is a priority for the Regional and State Boards.

Proposed solution: The State Board should include in the BPA additional information regarding the Regional Boards' plans for addressing legacy sources in Regions 2 and 5. We understand, however, that the Regional Board has not been able to dedicate the resources necessary to make its mines and toxic hotspots programs as effective as they need to be. Therefore, we also encourage the State Board to act swiftly on its resolution to dedicate funds to assist in the examination and evaluation of legacy sources as contemplated by Remand Order Resolved 14.

C. The BPA should require more information about and control of air sources.

Based on the Remand Order's Resolved 15 and the atmospheric deposition language currently in the BPA on page 21, we do not believe the BPA adequately addresses air sources. While we recognize the State Water Board's commitment to coordinating with the Air Board, we believe the Regional Board has an independent role in requiring information from dischargers regarding air sources of mercury. In August of last year, we recommended that the BPA impose requirements on stormwater agencies to enable them to better understand and control air sources, such as cement factories, crematoria, and refineries, within their watershed. No such revisions were made.

Proposed solution: The State Board should revise the BPA to require stormwater agencies to identify fixed sources of mercury-laden particulates within their watershed, and require stormwater permittees to address mercury polluting sites through their industrial inspection programs.

<u>This concern could be addressed by adding one sentence in the BPA stormwater section to require that municipal stormwater permitees 1) identify fixed sources of mercury-laden particulates within their watershed and 2) address mercury polluting facilities through their industrial inspection programs.</u>

D. The BPA and the Regional Board must require refineries to calculate the amount of mercury in crude oil processed by Bay Area refineries.

Based on very limited data, Regional Board staff currently estimate that approximately *1,700 kilograms* of mercury enters the Bay Area every year in crude oil but only *six (6) kilograms* per year can be accounted for through wastewater discharges and loading from auto fuels.[3] To better understand potential unidentified sources of mercury pollution, the proposed BPA requires Bay Area refineries to work with the Regional Board "to investigate the environmental fate of mercury in crude oil." BPA at 21. This provision was singled out in the Remand Order, which articulates the State Board's support for the requirement that refineries be required to investigate "the potential pathways by which crude oil could be discharged...and the annual mercury loads associated with [those] discharge pathways." Remand Order, Finding 6.

Our concern is and always has been that the BPA is inconsistent with the Remand Order because it fails to require refineries to provide information on the amount of crude oil that enters the Bay every year. While the Regional Board has an estimate, it is rudimentary and does not reflect empirical data on the concentration of mercury in oil actually processed by Bay area refineries. This estimate must be refined based on actual data in order for the Regional Board to identify all potentially significant sources of mercury. Without knowing what is coming in, the Regional Board has no assurance it knows what is going out and whether all pathways have been identified and adequately taken into account. It is analogous to trying to balance a checkbook without knowing the opening balance. As a matter of sound policy and science, the Regional Board should require that the refineries research and provide this basic information.

The Regional Board has recently taken commendable steps to obtain information about mercury in crude oil. In additional to working closely with EPA, Regional Board staff recently released a draft section 13267 request that would require the refineries to report on mercury concentrations in crude oil processed in Bay Area refineries. If issued without significant changes, these study requirements will significantly improve the Regional Board and the State's understanding of refineries' potentially substantial contribution to mercury pollution. We are concerned, however, that the *draft is still a draft* and that a new request could be withdrawn or weakened. Amending the BPA to require information about mercury in crude oil will help ensure that the very important studies required by the 13267 request are completed.

Proposed solution: To ensure that these studies are required of the refinery industry, we suggest the addition of the requirement to conduct a mass balance analysis to the BPA section regarding refinery wastewater discharges. Alternatively, the following question could simply be added to the list of existing questions posed on page 20 of the BPA:

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[3] This estimate is much higher than the 380 kg/ year initially estimated by the Regional Board and is greater than the BPA's estimate of total mercury loading for 2003. BPA at 9.

How much mercury do the individual refineries bring into the Bay Area every year in crude oil?

E. The State Board can and should make any necessary changes to the BPA.

As we all are too aware, this BPA has been in development for more than four years and has consumed considerable Water Board time and resources. Fortunately, California law gives the State Board authority to make the simple changes we are suggesting, thus avoiding further delay. The Porter-Cologne Water Quality Control Act requires State Board approval of all water quality control plan revisions and grants the State Board authority to remand the revisions to the Regional Board for further consideration and resubmission. Cal. Water Code § 13245. It further provides that, upon resubmission, the State Board may revise the plan itself, after proper noticing. *Id.* To minimize the need for more time and expedite implementation, we urge the State Board to make any revisions it finds necessary and appropriate.

The environmental community especially urges the State Board to use its authority under § 13245 to make the revision requested regarding enforceable limits for wastewater dischargers. This change will reflect the Regional Board's intent as expressed during the July 2006 Regional Board adoption hearing and it will address our most pressing concern about the legality of the BPA and future permits.

F. We support numerous revisions made to respond to the State Board's Remand Order.

We commend the Regional Board and its staff for addressing a number of important issues raised by the environmental community during this long process. In particular, the following changes to the BPA represent significant improvements and demonstrate staff's willingness to listen and respond to the environmental community's concerns:

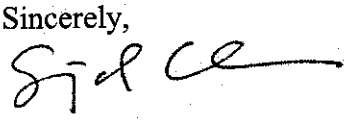
- Requiring methylmercury monitoring of all wastewater dischargers;
- Reducing wasteload allocations for wastewater;
- Removing the shield for stormwater dischargers;
- Strengthening risk reduction language to better protect our communities;
- Requiring NPDES permittees to undertake risk reduction efforts;
- Tightening BPA language on pollution prevention and the required good performance of industrial wastewater dischargers;
- Incorporating the San Francisco Bay Long-Term Management Strategy's restrictions for dredged spoils;
- Redrafting the 13267 letter for refineries to include the request for an accounting of the mercury in crude oil.

* * *

We strongly urge the State Board to make all of the changes requested, but especially to amend the Basin Plan Amendment provisions relating to the watershed permit. Revising the BPA to ensure that all permits for mercury contain enforceable water quality-based effluent limits for each discharger will codify the Regional Board's intent and ensure that the BPA and future permits comply with federal NPDES regulations.

We appreciate this opportunity to comment.

Sincerely,



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cc: Alexis Strauss, Environmental Protection Agency
Bruce Wolfe, San Francisco Regional Water Quality Control Board

Attachment: SF Bay Regional Board hearing transcript, excerpt of agenda item 7, August 9, 2006.

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

OAKLAND, CALIFORNIA

AUGUST 9, 2006

EXCERPT OF PROCEEDINGS -- ITEM 7:

PROPOSED AMENDMENT TO THE WATER QUALITY CONTROL PLAN (BASIN PLAN) FOR THE SAN FRANCISCO BAY REGION TO ESTABLISH NEW WATER QUALITY OBJECTIVES AND A REVISED TOTAL MAXIMUM DAILY LOAD AND IMPLEMENTATION PLAN FOR MERCURY IN SAN FRANCISCO BAY

LOCATION:

1515 CLAY STREET, SUITE 1400

OAKLAND, CALIFORNIA

Transcription By:
HOUSE OF SCRIBES
Stockton, California
(209) 478-8017

CHAIRMAN MULLER: We're going to get started into Item 7, Planning. And we do have at least eight cards at this moment.

MR. WOLFE: Right. Item 7 is consideration of proposed amendment to the Basin Plan that would establish new water quality objectives for mercury in the Bay, and that revised Total Maximum Daily Load, TMDL and Implementation Plan for Mercury in the Bay. So I'd like to ask Carrie Austin to make the Staff Presentation.

MR. MUMLEY: Quickly, before she starts, this is Tom Mumley, Head of the Planning and TMDL Division. I just want to clarify that in addition to copies of our presentation, we're giving you a copy of the State Board Remand Order. It was included as Appendix C to our Staff Report, but we noticed that it wasn't completely copied. And since it's key that you understand how we've been responsive to the order, we

thought it was important that you had it, especially in front of you for reference.

CHAIRMAN MULLER: Thank you, we appreciate that. Okay, Carrie, it’s all yours.

MS. AUSTIN: Well, good morning, Chairman Muller and Board Members. I’m Carrie Austin, and I’m an Engineer working on mercury. Mr. Mumley and I are making today’s presentation.

At this hearing today we are asking you to act by adopting the resolution for the proposed Basin Plan Amendment. In our presentation this morning we'll cover the following: new water quality objectives for mercury in San Francisco Bay, and revisions to the TMDL. Those are in the Basin Plan Amendment. We'll cover the key comments, changes that we’ve made in response to comments, the remand and our response to it. Dr. Mumley will then conclude our presentation.

First, a quick recap. In September 2004 you adopted the San Francisco Bay Mercury TMDL, which is a comprehensive approach to solve a complex problem. The State Board remanded this back for revisions in September 2005, and in November you agreed with our general approach in response to the remand. We then developed a package we have submitted to you and held the first formal hearing in June of this year.

The first of two main topics in the Proposed Basin Plan Amendment are new water quality objectives. EPA's prime concern in 2004 was with the water quality objectives. This is true not only for the San Francisco Bay Mercury TMDL, but for other mercury TMDLs as well. To resolve this concern we are now proposing new fish tissue mercury objectives for San Francisco Bay, and in the future we will establish new fish tissue mercury objectives with each mercury TMDL.

We are proposing new water quality objectives for San Francisco Bay, shown here in the two left boxes. We

recommend these objectives in fish tissue because it best represents the risk for mercury, and because mercury is directly measurable in fish. To protect human health, we recommend .2 parts per million mercury in large predator fish, and to protect wild life we recommend .03 parts per million mercury in prey fish.

The second main topic in the Proposed Basin Plan Amendment is revisions to the TMDL. The most significant change to the TMDL is the reduction in the allocations of waste water, which I'll describe in the context of all sources.

Mercury sources in current loads are shown in the maroon bars on this graph. As you can see from the tall bar on the left, by far the greatest mercury contribution comes from California's mining legacy. We calculated aggregate allocations for each source category, and then developed as required, individual waste load allocations for NPDES permits, which only apply to the urban runoff and waste water source

categories. Let’s take a close look at the waste water source category.

On the inset chart in the upper right, we show the dramatic reductions in mercury from waste water. The tall white bar is the estimated mercury load from municipal waste water in 1970 of 113 kilograms per year. Over the previous three decades, we estimate that municipal waste water has decreased its mercury load to the Bay by 85 percent down to the maroon bar, 17 kilograms per year. And because industrial waste water also improved its treatment systems in the 1970s and ‘80s, we estimate that industry, too, has greatly decreased its mercury loads to the Bay.

As we described in June, we propose about a 33 percent further reduction in the waste water load for municipal and industrial waste water combined, from 18 to 12 kilograms per year, in accordance with the remand requirement to achieve best treatment and pollution prevention for waste water.

We conclude from this information that our NPDES permits for waste water have worked, and that we need to this TMDL to address the other more significant mercury sources.

We received 11 comment letters. The U.S. EPA has voiced its support for the new water quality objectives and revisions to the TMDL, which resolves a key issue from 2004. The second issue we received comment on is that this TMDL is an unfair burden on waste water. We disagree. In keeping with the remand, we are requiring waste water to employ best treatment technology and pollution prevention.

Third, there’s a lot of interest in pollutant offsets, but development of this policy is in the State Board’s court. Fourth, we’re confident that our revised CEQA and regulatory analyses provide adequate and appropriate support for the proposed Basin Plan Amendment.

And fifth, the waste water enforceable limits issue was a remaining area of disagreement with stakeholders. This was not in the remand, but it came up at the June testimony hearing and in written comments. So we met with stakeholders to discuss it.

Some stakeholders have taken the position that our approach is bad policy because it isn't enforceable. We disagree. We have taken an innovative approach which differs from a more conventional single-limit approach. Let me explain.

Implementation of industrial and municipal waste water waste load allocations is a combination of numeric and narrative effluent limitations. This is consistent with but more stringent than what you adopted in 2004. Individual waste load allocations result in enforceable limits.

The waste water effluent limitations are threefold. One, individual numeric annual mass limits. Two,

individual numeric triggers. And three, narrative requirements. I'll explain those.

First, the individual numeric annual mass limits are enforceable if the aggregate allocation is exceeded. The individual mercury concentration in mass triggers by design call for immediate corrective action, which is a prime goal of any enforcement action. Even no response, or poor response to the trigger is enforceable. And third, narrative requirements, too, are enforceable.

Our proposed implementation plan calls for a suite of enforceable limitations that goes above and beyond a single enforceable limit. The key changes we made in response to Board Member comments where to, one, remove the urban runoff deemed in compliance language. You will recall from June that Baykeeper strongly opposed this language and some Board Members agreed. We do not believe it is a substantive change and therefore have deleted it.

However, the urban runoff agencies have expressed concern about this deletion but are willing to accept it if we affirm the following three points: fist, that municipal storm water permits will follow the Basin Plan and State Board Order 99-05 requiring an iterative approach to complying with the receiving water limits; two, federal regs require NPDES permits to be consistent with TMDLs that don’t require direct implementation of TMDLs; and third, municipal storm water permit compliance will continue to be determined based on whether the permit requirements are met. That concludes BASMA’s three points.

Secondly, in responding to Board Member comments, we clarified that regarding methylmercury, that waste water dischargers will conduct studies to better understand methylmercury fate and effects in the Bay. And under adaptive implementation Staff will take into account any new evidence regarding methylmercury which may justify a Methylmercury TMDL or allocations in the future.

As we worked to compile our responses to comments, we met with many interested parties to discuss their concerns and our rationale for our response. We are grateful to these stakeholders for the time and effort they have put into this process of review and discussion. In response to their written comments we added that waste water will implement corrective actions when a trigger is exceeded, and that the Board will pursue enforcement action against waste water dischargers that do not respond to exceedences, or do not implement timely actions.

So in summary, the changes we have made to the 2004 TMDL in response to the remand include waste water allocations now reflect best pollution prevention and treatment; NPDES permit holders are required to monitor methylmercury; the TMDL is consistent with the dredge disposal long-term management strategy. We've taken steps to ensure that legacy sources such as mines and other hot spots are being addressed, and progress

towards cleaning up these sites will be evaluated on a regular basis.

We've responded fully to the remand risk reduction requirement, but some stakeholders are asking that we go beyond the remand and require dischargers to mitigate health effects associated with mercury exposure. We assert that mitigation of health effects is a concept not clearly defined, which may be beyond our regulatory authority, and given the significance of legacy sources in the Bay, may best be done collaboratively as described in the TMDL.

Lastly, we revised the wildlife target and resolved the U.S. EPA concern with an outdated water quality objective. Now, I'll turn the podium over to Dr. Mumley.

MR. MUMLEY: Thank you, Carrie. And thank you, Members of the Board. And for the record, I'm Tom Mumley, head of the Planning and TMDL Division here at the Board.

I'd like to start my sort of concluding remarks on this item by just recognizing the hard work by our Staff, Carrie Austin, Dyan Whyte, Richard Looker, did a lot of work in the background. Janet Cox (phonetic) did a lot of the communication and information support for, and Yuri Won, our legal counsel, had a tremendous amount of input for us. So as a consequence of this team work, we feel we've been thoroughly responsive to the State Board's remand order.

And as a consequence of the remand order we have found opportunity to make improvements to the TMDL and Implementation Plan that you had previously adopted. But keep in mind, what we already presented to you when you adopted in 2004 was already designed to solve the mercury problem in San Francisco Bay. So in a sense we're saying it could be resolved a little bit better now that we've presented these changes to you.

The most notable improvements that we've made in response to the remand are the two new water quality

objectives. Establishing water quality objectives is not an easy exercise and we took on the challenge, and I feel very confident that we have protective numbers that will serve a long legacy for driving a solution to this mercury problem.

Now, the one issue that still is thorny was the issue concerning other approaches for implementing waste water, waste load allocations. And as you may recall, former Board Member Dr. Wolff suggested sort of an alternative at the Board meeting. So in response to his suggestion, we actually convened two meetings with various stakeholders to explore his suggestion and other options relative to the option, the approach that we had presented.

And as a consequence of that, those discussions and further analysis on our part, we still conclude that our approach is the best approach, and it results in the most comprehensive suite of water quality based effluent limitations, that are enforceable and as a

whole have a greater water quality benefit than the other options.

And just to consider, two main reasons why the other approaches weren't as preferred as ours. One has to do with just the time and resources necessary to construct them. It's not just a simple change to the package that we've presented to you to consider, other options that would have enforcement consequences, regulatory consequences -- we would have to do additional technical and regulatory analysis, and ultimately present that through a new public notice.

That easily could add three or four months to this process, for what we feel is essentially no benefit beyond what we've already -- will get from what we presented. Again, we think our comprehensive package will have the best benefit, because we go beyond just the conventional single limit approach, and we draw out the call for other things such as special studies in addressing the risk reduction.

And if we move more into the single command and control mode, we potentially compromise those additional components, either -- given that our time would be distracted from focusing attention on the studies, and on risk reduction, and focused on the limit versus we would have a harder time possibly justifying the scope of the studies in risk reduction, because they fit into the package as we presented to you. They may not fit as well with a revised package that's focused on -- the main focus is on the enforceability of the limit.

Just to, then, just to recap the benefits of our approach. Most, very importantly, it is about stewardship and it reflects and promotes discharger collaboration to work with us and other parties to solve the mercury problem, to address risk. And very importantly, work with other impairments; mercury's just one of many challenges that we have, and we -- the best solution is going to be comprehensive and deal with multiple pollutants through same solutions, rather than dealing with them one at a time.

But getting to -- we're anxious to get other solutions lined up, so they can be integrated with mercury. We also want to emphasize that the bigger approach that we promoted results in immediate individual accountability and corrective action. You know, that's really why you would want to have enforcement primarily in the first place; make sure there's a problem that's fixed. It's inherent to how the trigger process works, plus additionally, as Carried pointed out, additional enforcement action can happen as necessary.

But most importantly, our approach provides for adaptive implementation. If there are any issues, they can get resolved through implementing the TMDL, and if necessary revising the TMDL when new information is generated.

So, indeed, this implementation of the new water quality standards and the TMDL that we want to apply our attention, and we feel that they will be best served by applying our resources, implementing this

TMDL to solve the mercury problem, not by further revising it, certainly not at this time. The adaptive implementation scheme by design will lead to improvements and revisions when necessary. So to that end, we have prepared a resolution for your consideration that adopts the proposed Basin Plan Amendment that establishes the new water quality objectives and the revised TMDL and implementation plan for mercury in the Bay. And with that, we certainly could answer any questions that you have.

CHAIRMAN MULLER: Thank you, Rom. At this time -- no, but you'll be close by, I’m sure. Margaret, Clifford, did you have a comment at this time?

MR. WALDECK: Exhibit, John?

CHAIRMAN MULLER: Yes, Clifford.

MR. WALDECK: Before we move forward, I just want to make sure of a few things, as people comment coming up,

and they just talk about having dreams -- and I'm having a nightmare about our original 2004, whenever that meeting was in the first place. And I just want to make sure of a few things.

That, A, is U.S. EPA on board with the proposal? These don't really need answers now, I just want to set the stage. And also, I'm glad that you had two stakeholder meetings, and I did talk to Bruce about this beforehand, and I said, "You know, Bruce --" well, let me back up a second.

In most of our Board stuff, you know, we say, "Well, you know, 90, 95 percent there. That should be good enough because we'll expand it a lot more. You know, if we tried to get that 95, 100 percent agreement of what goes on there --" that said, you know, this is the type of thing where, you know, I do -- you know, I would consider taking the time to really flesh everything out that needs to be fleshed out. And I had commented to Bruce when I was talking to him a couple

days ago, I said that in the city council meetings, you know, a major house permit comes up, we want to make a few changes, a few minor changes to the house, we can do it. And it just comes back at the next meeting as a -- it comes back on the consent calendar. Could we do those types of changes or augmentations here?

And what Bruce kind of said to me, he said, “You know, it doesn't work the way city councils work here.” If we do make any changes to this, you know, there’s a whole re-noticing and more work there, and it could take a few months, too. And I just want to make sure I have that kind of context in place there.

So I just urge anybody who might want to make changes, that if we do it at the Board level here, you have to give us very clear instructions as to what you'd like, because we would have to consider it in the here and now.

MR. MUMLEY: I just would add that, yes, one of the -- there are devils in the details, but I think that’s where they're best resolved through getting into implementation, fleshing out the details and resolving them so that we can work out any issues in regards to permits.

Ultimately, EPA has to approve what permits we generate, so we’re pretty confident that they are in a position to support the objectives and the TMDL, and any permitting issues also obviously will have to be resolved, because they have approval authority. So we are very confident that we can work out the details of how the TMDL will be implemented and those permits in the matter that would satisfy them.

Similarly, a number or other issues that have been raised through this process can get addressed through implementation. That’s our assertion. Let’s work on implementation and if we find that there is a consequence that we haven’t resolved, envisioned, it

gives us cause to come back. Then it would be worth the time to go through the public process. If it’s not a consequence then we don’t have to spend the time fixing something that doesn't need to be fixed.

So by design, adaptive implementation works as long as we’re vigilant. And it’s certainly our intent to, we have to. And there’s going to be plenty of attention to implementation to this TMDL and all its components, so there’s no doubt that there will be sufficient opportunity to fix anything that needs fixing. And right now, we don’t see a need to fix anything, we feel a need to get on with implementing.

CHAIRMAN MULLER: At this time, would anyone else like to comment?

MR. ELIAHU: Yes. The way I see it, the changes we made are really very, very little. And the most changes come from waste water. We reduced that from 17, I guess, to 11; from 18 to 12. Very, very little. And I don't

think it makes any difference at all. For that time, we wasted about two years to come in here. That said, I appreciate the hard work from the Staff, and to have that moving, I think I will vote for it. And by the way, I did talk with Craig Johns (phonetic) on this.

CHAIRMAN MULLER: Okay. Any other announcements? Okay. We will move ahead with EPA first. Doug, please? And next will be Sejal. All right.

MR. EBERHARDT: Good morning, Mr. Chairman and Members of the Board. My name is Doug Eberhardt from the Clean Water Act's Standards and Permits Office for EPA Region 9 in San Francisco. And first of all, I would like to thank the Staff for their hard work, and in particular their work over this last year. We are very pleased with the changes that have been made since last September. We fully support the proposed standards actions and the proposed TMDLs, but we have some concerns that we believe can be worked out during the permitting process.

First, with respect to the proposed water quality objectives, as noted previously we believe that the water quality objectives are fully protective of human health and wildlife. We fully support adoption of the human health and wildlife, fish tissue objectives and the recision of the water quality objective for San Francisco Bay.

The human health values are consistent with the recent SFEIC fish consumption study, and reflect appropriate fish consumption rates and patterns for the Bay. The wildlife values are consistent with the recent Fish and Wildlife Service analysis, and reflect protection of threatened and endangered species and fish-eating birds.

Now with regard to the TMDL. We support the more stringent revised individual waste water allocations for municipal dischargers, and we support the requirement for municipal/industrial dischargers to monitor for methylmercury. Now, federal regulations

require that NPDES permits include properly calculated enforceable water quality based effluent limits. It is within the state's enforcement discretion to adopt a tiered TMDL allocation approach, and to indicate its intention to exercise its enforcement discretion through a tiered definition of compliance.

Specifically, EPA supports in the context of trading, the basic scheme of individual water quality based effluent limits that are only enforceable if a group limit is exceeded. However, the individual limits must be enforceable by third parties if and when this group limit is exceeded.

Moreover, the permitting scheme described in the TMDL may be inadequate. Mercury is biocumulative, and additional constraints may be needed for individual NPDES dischargers to protect local water quality. The Board should ensure that the watershed permit, when drafted, include enforceable limits on individual NPDES dischargers in addition to the water quality based

effluent limits based on the individual waste load allocations. The point is to have enforceable limits at all times to prevent any one discharger from having localized adverse effects.

We believe these concerns can be worked out in the permitting process, but I wanted to alert you that we think important changes may be needed. We would appreciate the opportunity to work with your staff early in the permitting process. Thank you.

CHAIRMAN MULLER: Very good. Clifford?

MR. WALDECK: I don’t get it. I mean --

CHAIRMAN MULLER: Dyan, would you help us out?

MR. WALDECK: Well, I mean, I tried to follow and take notes and things like that, and I heard yes, we are behind this. But I didn’t know how to address the however, the buts and the ands. And so I can’t resolve

from what you say, is this something that a, can be taken care of in our adaptive implementation; 2, we can change a few shalls to shoulds, or shoulds to shalls here; or if we should take one more flesh-through. Because you are the man. You know, I mean, U.S. EPA is who we -- if there was one person that held a trump card, it’s U.S. EPA. So I don't know if you'd like to comment to this now, or if you want to comment, but I just wanted to get my arms around what you said.

MR. EBERHARDT: Well, to try and clarify, the TMDL sets out various waste load allocations, and we are supportive of the way those allocations are described. And the TMDL also then indicates that those will be translated into effluent limits in this, you know, group fashion and also in individual fashion, or individual are only enforceable if the group is exceeded. And we’re okay with that, as far as it goes.

And the other component that Dr. Mumley indicated was these triggers, which would indicate -- would be

applicable to individual facilities. And we have no objection to the triggers, but we do think that something needs to be in the permit for individual facilities that is immediately enforceable. Something in the way of limits that can be in addition to the triggers, or something -- a modification of the triggers to make them limits. I don't want to get into a big discussion about what that would be, but we think it needs to be something enforceable on an individual basis, even if the group limit’s not exceeded.

CHAIRMAN MULLER: But that’s in the permit writing, not in the TMDL --

MR. EBERHARDT: That’s in the permit writing, but it does not need to be in the TMDL.

CHAIRMAN MULLER: Okay, so, Clifford, you have to understand it’s kind of two separate things. It’s one, but it’s two separate, is that correct? Tom? To respond from Staff, Mr. Mumley.

MR. MUMLEY: We understand what Doug is saying. I mean, it’s getting into nuances of permits and they're basically endorsing the general implementation strategy. As I said, the details of the permit will need to be resolved as we craft the permit, and ultimately make sure that they conform with NPDES rules and regulations as such that EPA can adopt. So we feel quite confident that we can craft the permit in that way. And Yuri Won and I have already been discussing some straightforward means to field any concerns that have been expressed.

But we’re talking the permitting process, and we can actually initiate the permitting process once approval of this TMDL gets officially up the chain of command, that we can actually deliver to EPA a permit coincident with requesting their approval of this TMDL. There’s a significant time gap, as you know, in these approval processes. So we have plenty of time to work this out in the NPDES from things, as part of implementation of the TMDL.

MR. WALDECK: See, from a Board point of view here, let's just say for example, the term is 'triggers.' You know, if we don't hear from -- if you hear from all six of us that trigger implementation is very important to us, that moves a little bit higher up in the permitting process. And I'm just using trigger as an example, as opposed to us just listening to everything here and say, 'we vote Staff's recommendation.'

So that's why I wanted to make sure that we get Board input, because it kind of shows a little bit of prioritization, and there might be other things that we hear on the way there. So that was just kind of a framework that I wanted to set up there. And I think that by the time that we're done, we might ask EPA to come back and speak, or anybody else who might -- you know, because we do need to craft this in such a way that it's cohesive of what EPA wants to have. Thank you for your indulgence.

CHAIRMAN MULLER: Clifford, I respectfully might disagree with you. I don't know that I want to do everything that EPA wants to have. I mean, we have the authority to move forward with it, whether EPA likes it or not.

MR. WALDECK: Yeah, but they got the hammer to --

CHAIRMAN MULLER: Well, that’s just my opinion at the moment.

MR. WALDECK: Okay, yeah.

CHAIRMAN MULLER: We could debate it.

MR. WALDECK: I understand that.

CHAIRMAN MULLER: I understand that’s EPA’s opinion.

MR. WOLFE: And remember, the permit that -- the implementation of this would be for the waste water

allocation through permitting, and that is a public process. We need to bring public comment back to the Board. We will have that out for public comment. So that’s, that is the opportunity to make sure we get this resolved.

CHAIRMAN MULLER: We definitely want to have everybody involved in this process, as we have done, and we want to make sure that we don’t -- which I’d like to ask Yuri about, the remand. I think if you could stand by, then, Doug. We'll call on you in a moment. Just, we'll think about it -- it can’t be remand twice, is that correct?

MS. WON: Actually, it could.

CHAIRMAN MULLER: It could? Okay, I just wasn't sure.

MS. WON: But, however, if you looked at the draft resolution, it might not. The resolution request from the State Board that if it determines that further

changes are necessary, that it make the changes. And under the Water Code it may do that, but the only caveat is that the Water Board would have to have the hearing in this region.

CHAIRMAN MULLER: Okay, that’s a good start.

MS. DELUCA: I do have a question.

CHAIRMAN MULLER: Yes?

MS. DELUCA: These triggers, I take it what we’re trying to do is build in some elasticity, some flexibility so that all dischargers would not have the same triggers. And that would depend upon our knowledge of the discharges in, you know, perhaps greater detail than we have now, to be sure that we are --

MR. WOLFE: Well, to a certain degree we already have built in some recognition that many of the dischargers, especially those that have advanced treatment already,

do not need to have further reductions past the initial 20 percent. So there are two in the TMDL; there’s a table that shows that the expected reduction to 20 percent, which would by and large be done through aggressive pollution prevention. That’s essentially all across the board for all dischargers who have a discharge of mercury above a specified level.

And then there’s a smaller subset who would need to go further, to 40 percent, which recognizes that many dischargers already have advanced treatment, have already done significant reductions.

Now, we also recognize that those numbers are a bit soft, in that our initial determination of those allocations was based on a formula that addressed both flow and load. And that we recognize potentially during the first 10 years, we’re going to need to go back and revisit each of those specific dischargers and their individual situation, to make sure that they're

being aggressive, but also that the numbers we put in there are appropriate.

MS. DELUCA: So it would be more customizing, in a sense, or tailoring to individual dischargers in terms of their past performance and what you see now?

MR. WOLFE: Right.

MS. DELUCA: So that you can better control whatever level of containment that they are demonstrating.

MR. WOLFE: Yes. Right now, by and large it’s a blanket call to implement aggressive pollution prevention, look at your performance, maximize that and get a blanket 20 percent. Then we know it’s going to be more difficult to get further reduction, and we’re going to need to look much more specifically at individuals.

MS. DELUCA: Well, that’s my question, too. Will that not be more challenging to the Staff and more time-consuming to the Board?

MR. WOLFE: That’s one of our challenges of the adaptive implementation, is that we recognize we are going to need to, most likely within the initial 10 years of this TMDL, go back and do all that analysis. But that’s consistent with what we’ve said, that as we get new information with the scientific data, new information about methylmercury, new information about all the waste load allocations that we have, we'll try to make sure that the TMDL is responsive to that, and that we’re aggressively doing the work that really gets the most bang for the buck in terms of reduction in the Bay.

CHAIRMAN MULLER: Thank you for your patience, Sejal. We'll have Sejal, and then Amy, and then I believe it’s Michael. Okay, go ahead, please.

MS. CHOKSI: Thank you, and good morning Chairman, Members of the Board. Sejal Choksi with San Francisco Baykeeper. I'm having passed out just a very clear and concise summary of what we're asking for; and Clifford brought up -- Mr. Waldeck. This is probably, I hope exactly what you were asking for at the beginning of the meeting today, so I'm glad that worked out well.

Let me start by saying that I'm very disappointed that I have to be critical today, because I know that Staff and Baykeeper and the Board, I mean, everybody has been working really hard on this. And you know, I think this discussion that we're having right now, and the Board is having has been greatly needed. And I really hope that we can continue it today, so that we have a happy ending to this long, long story.

So on July 24th we thought we had worked out a good solution, a possible solution with Staff. But this solution was revoked last week. And so now we feel like we still have a proposal before you that violates the

law, fails to aggressively reduce mercury pollution in our lifetime, and does not comply with the State Board's September of 2005 remand order. And Mr. Waldeck, you know, in addition to EPA, the State Board also holds a trump card here.

Before I talk to you about how we can try to save this TMDL today, I want to bring to your attention an e-mail that was sent last week to Staff from EPA, that states that contrary to what Staff has been telling us, EPA does not fully support the permit that's being proposed here. And you just heard that from EPA's comment.

So I want to make sure that this e-mail has been entered into the record, and if it hasn't, I'd like to request that it is at this time.

MS. WON: Which e-mail are you referring to?

MS. CHOKSI: This e-mail from David Smith at EPA to a Mr. Tom Mumley on August 3rd, 2006. That will be part of the record? Okay, great.

Just to summarize this e-mail for you, if you haven't seen it, it says that Staff can't specify the Board's enforcement policy in NPDES permits. It also says that Staff can't stop third parties from enforcing the mercury limits in a permit, and Staff can't propose triggers to substitute for enforceable water quality based effluent limits in permits.

So I know that this is all language about permits, but what we're doing here is -- Staff isn't asking you to adopt the TMDL that has policy in it regarding permits. So in order for you to not adopt bad permitting policy in this TMDL, you need to make a slight adjustment to the TMDL so that it actually reflects what should be in the permits, in the watershed permits.

So I’m going to provide about three directions that you can make to Staff today before adoption, to hopefully save this TMDL and avoid another long, messy fight on this issue and on future permits.

So, first, in order to comply with the law, the remand order and the EPA’s recommendation, I've requested you add enforceable waste water limits in the TMDL that are enforceable in the interim period while Staff determines what the actual load allocations should be. And these limits would serve as a backstop for egregious violations.

This was actually one of the proposals that was on the table on July 24th, that Baykeeper could have potentially been happy with. So you could easily request today that Staff insert current permit limits in the TMDL that act as a third set of limits to fix this problem before you adopt today.

Second, you should ask Staff to remove the enforcement restriction that says the Board will not enforce against individual dischargers, unless the group allocation is violated. Staff has told us that this language implemented in permits will also prevent third parties from enforcing those limits. And this kind of enforcement restriction violates federal standing law and the citizenship provision of the Clean Water Act. So it doesn't belong in the TMDL or in permits.

And third, I'd like to request that you direct your Staff to revise the 13-267 letter issued to refineries last year, to make it clear that you want a mass balance analysis, not just an air deposition study. And this is just common sense, to require this revision, and I know that none of you want to be perceived by the press or the public as helping the oil refineries hide the ball on mercury pollution.

So I don't have time to go into any other issues today, but I incorporate by reference the comments that are

made by my colleagues at Clean Water Action and NRDC. We have given your Staff ample notice about our concerns, so if this TMDL is adopted today as-is, you are basically forcing us to challenge this at the State Board. And I would hope that we might be able to get around that today, by focusing on these three changes that I've requested you make.

The first is inserting current permit limits as fully enforceable interim limits in the TMDL. The second is to remove the enforcement restriction that prohibits the Board and third parties from enforcing the limits. And third is to issue a 13-267 letter that is revised, that requires refineries to account for all the mercury in crude oil.

So I encourage you to keep discussing these options, and if you have any further questions, I'd be happy to answer them. Thank you.

CHAIRMAN MULLER: Thank you. Any questions at this time of Sejal? Next, please.

MS. BRUCE: I have --

CHAIRMAN MULLER: Yes? I'm sorry, Margaret.

MS. BRUCE: I have a question, actually, for Yuri. Is there anything about this TMDL that would prevent future permits from having specific enforceable limits?

MS. WON: I think there’s some confusion. All that this TMDL says is that the Board is going to pursue enforcement against those entities when the group limit is exceeded. That’s it. Everyone is kind of talking about permitting issues, and I understand EPA’s concerns that the limits, the water quality based effluent limits that ultimately do get into the permits, that we not craft them in such a manner that precludes EPA enforcement or third party enforcement. And we'll work with EPA to ensure that.

So I’m looking at, you know, what Sejal has handed out. And she says remove the enforcement restriction that prohibits the Board’s and third party enforcement actions. The TMDL doesn't have anything to this effect, so we don’t need to remove it. And with respect to enforceable limits, as Carrie described, the limits are enforceable. There’s the three suite of things, and (inaudible) enforcement.

MS. BRUCE: So if I understand you correctly, just to recap, the TMDL is a general framework. The individual permits upon which any enforcement actions are based, are separate from this, although they may derive some of their specific load allocations. And there is nothing about this TMDL that limits or restricts the Board’s, EPA’s or any other party’s ability to enforce against eventual permit specifics.

MS. WON: Yes, that’s correct.

MS. CHOKSI: I'd like to just respectfully disagree with Yuri, or at least the interpretation that third parties have of this language in the TMDL. There is a specific sentence or two in the TMDL that does make it sound like the Board is -- the Board's hands are tied, the Board is only going to have the option of using these reporting, sort of triggered mechanisms to have enforcement.

So maybe it's an interpretation of language. Maybe that's the confusion here. But there is definitely language in there that we believe sets up a framework that is --

MS. WON: Well, it would be helpful if you specified the language, so we could discuss it.

MS. CHOKSI: So I don't have it in front of me, Yuri. But I've actually specified this language for Staff at length, and I believe you've already seen it. So I can grab a copy of the TMDL and point it out, but --

CHAIRMAN MULLER: Well, we're not going to let you debate with the lawyer right here at the moment.

MS. CHOKSI: Sure.

CHAIRMAN MULLER: We can continue to hear the rest of the speakers, and then we'll try to figure out exactly what direction we want to take at the moment.

MS. WON: And if I could add something.

CHAIRMAN MULLER: Pull your mic up a little bit.

MS. WON: This is not something that's new, this is what the Board adopted in 2004. This was not an issue in the remand, as Sejal indicated -- that Staff has entertained it in the spirit of it and resolving issues. So this isn't new, and with respect to EPA's concerns, EPA doesn't have to -- or isn't required to approve the implementation component of the TMDL. All it does is approve the water quality objectives that

are being proposed, as well as the TMDL, the 706 allocation and how that is divvied up among various sources. The implementation part, EPA doesn't approve.

CHAIRMAN MULLER: Remind me after to just touch bases a little bit from a couple of years ago, that EPA did send us a letter of some type of support for -- is it a tiered approach that we did have? We don’t have it here, but I thought years ago we got something.

MR. WOLFE: Right. We did get something from EPA.

CHAIRMAN MULLER: I think that’s along the lines - because I thought they did support it.

MR. WOLFE: We got support for a two-tiered approach to allocations, and EPA did say that they viewed that they're in compliance with their permit as long as the group permit was met. Provided that the individual limits were enforceable when that group limit was exceeded. So that’s what we got from EPA.

CHAIRMAN MULLER: Was that in our packet, or did I miss that? Because I'm just trying to refresh our memory from years ago.

MR. WOLFE: That would have most likely been in the 2004 packet.

CHAIRMAN MULLER: Okay.

MR. MUMLEY: Excuse me. Let me -- we called attention to their June 2004 letter in our response to comments.

CHAIRMAN MULLER: Okay.

MR. MUMLEY: What we have in the 2004 letter is in the record, since it's what you considered in September 2004. It's still part of the administrative record for this action. But they did state in their comment letter --

CHAIRMAN MULLER: Well, why don't you research it a little bit? I just didn't want it to slip out of my little mind here, that we got away from the EPA's support. Support-lite, like pesticide-lite.

MR. MUMLEY: Consistent with what Yuri just said, EPA is supportive of the TMDL package, and says 'we look forward to working with you to see (inaudible) what the details of the permit are, to make sure that they not only conform with your TMDL, but conform with NPDES rules and regulations, but essentially should satisfy and conforms with CEQA. You can't adopt a permit that does not conform with NPDES rules and regulations, so the act of issuing the permit is indeed an opportunity to make sure that nothing that you have as part of the TMDL is in violation of the law.

CHAIRMAN MULLER: Well, I think at the end of the public testimony, again, I'd like Staff just to give us a brief summary on the comments. Because I am concerned about, as Sejal mentioned, that you know, that it

violates the law. She made that comment a couple of times, and I want to make sure we would never be working on that. So let’s go ahead with the comments, and I know you guys got a lot of scratching to go through.

MS. DELUCA: Question. Yes. I, too, have the same concern about restricting the enforcement capability of the Board. And I would like to see the language that is in question here. And the third point, Yuri, I would ask you to comment on is this issue regarding the possible revision of the 13-267 letter with respect to the oil refineries. I’m not quite sure what is being sought there, and how it plays into what we already have on the books.

MS. WON: The Board issued, we issued a 13-267 letter to refineries requesting -- I guess Tom could better explain what was requested of the refineries. But that was something that does not -- that doesn't have to be dealt with, or actually shouldn’t be dealt with through

the Basin Plan Amendment process, which this -- you know, this is what we're considering. I suggest if you have further concerns about how the Board, or about how Staff is dealing with the refineries, that at a future hearing or -- you can request that Staff bring it back to the Board on this issue, but not handle it here. Because this is really a basin planning exercise.

MS. DELUCA: So, again, you're suggesting that this would go to the mechanism of dealing with the permit itself. Is that what I'm hearing?

MS. WON: Well, it's not part of the permit.

CHAIRMAN MULLER: Well, we could actually specifically agendize 13-267, is that what you're saying?

MS. WON: Yeah.

MR. WOLFE: That is an option. Or I could accept direction from the Board. What we do have already --

and this is what the Board had adopted in 2004 -- was the statement that “Bay Area petroleum refineries shall be required to work collaboratively with the Water Board to investigate the environmental fate of mercury and crude oil, and report findings to the Water Board within five years of the effective date of the implementation plan. These requirements may be implemented through the Water Board’s authority under Section 13-267.”

So to a large degree in my mind, it’s already there, we have already started working with the refineries. We recognize that there’s a number of things based on the studies they're currently doing that we may want to get more information as we move forward. But that’s -- this is consistent with what’s in there, to address this within five years of the TMDL adoption.

MS. DELUCA: Well, what I’m hearing, of course, is the suggestion that there may be some hidden information here that we’re not receiving. And I think that for

that reason, it may be that at a future time we may want to re-examine what our requirements are in the 13-267, which might give us another opportunity to revise or re-issue the current rubrics --

MR. WOLFE: Right. Well, I'm certainly willing to commit in the coming months to prepare an information item for the Board, to say what we've done to date, where are we in the study process, what are the coming steps, how we envision this playing out over the next few years. So we could do that.

CHAIRMAN MULLER: Good. Thank you for your patience. Who's next, please?

MS. CHASTAIN: Good morning, Chairman and Members of the Board. I'm Amy Chastain, and I'll be reading these comments today on behalf of the California Coastkeeper Alliance.

California Coastkeeper Alliance believes that while significant changes have been made to this TMDL, more work is still necessary. First, we believe that the 20-year timeline for achieving necessary load reductions violates federal regulations, because the TMDL lacks sufficient justification for this time frame.

More importantly, the proposal before you does not still fully address a number of resolves that were contained in the State Board's Remand Order. First, Remand Result 3 requires revision of the TMDL to establish individual waste load allocations.

This proposal that's before you today purports to contain individual waste load allocations that, as we've been hearing, there appears to be some debate as to the enforceability of these individual allocations and whether they constitute enforceable water quality, or can be translated into enforceable water quality base effluent limits in the permits.

Second, Remand Result 7, which requests the watershed legacy mercury inventory and establishment of a priority list for addressing these sources. Staff has addressed this issue by including an additional sentence in the adaptive implementation section. We're not certain whether this is detailed enough to address the State Board's concerns, and would like to see it fleshed out.

Third, Remand Result 15, related to air deposition and mercury. California Coastkeeper Alliance believes more is needed to address the air deposition issue in the TMDL, especially with regard to crematoria and cement facilities.

Finally, the TMDL proposal does not appear to adequately address Remand Finding 8, which is related to what you were just discussing with the 13-267 letter. Remand Finding 8 states that the State Board's intent is that Bay Area refineries be required to investigate the environmental fate of mercury and crude

oil, including the potential pathways by which crude oil and mercury could be discharged to the Bay; and the annual mercury loads associated with these discharge pathways. As you've heard today, we would like to see that addressed, ideally soon, in the 13-267 letter.

Because of limited time, this list is not intended to be exhaustive. We would like to direct your attention to, however, and incorporate by reference six letters that Baykeeper and other NGOs have submitted previously on these and other issues. These letters are dated March 2nd, 2005; March 11th, 2005; June 5th, 2005; July 14th, 2005; February 21st, 2006 and June 5th, 2006.

These letters raise and discuss in detail various legal issues raised by this TMDL, and we hope that you and staff can study these comments thoroughly before making your final decision. Thank you.

CHAIRMAN MULLER: Clifford?

MR. WALDECK: Ms. Chastain, who is the Coastal Keeper --

MS. CHASTAIN: California Coastkeeper Alliance is a -- it’s a consortium of the majority, if not all of the Keeper groups around the coast of California. And Linda Sheehan is the Executive Director.

MR. WALDECK: And who do they --

MS. CHASTAIN: All of the Keeper groups are part of the National Waterkeeper Alliance. The Executive Director is Linda Sheehan, and I’d have to defer to Sejal for more of a history of the California Coastkeeper Alliance. I’m trying to recall when they were started, but they're very active in kind of coordinating advocacy. They’ve been very active in the once-through cooling issue and have appeared before you to comment on the Portrero Hill Power Plant issue.

MR. WALDECK: Okay. Thank you.

MS. CHASTAIN: Thank you.

CHAIRMAN MULLER: And then we will have the senior attorney for NRDC now, who will probably explain who they are, too.

MR. WEIL: Good morning, Members of the Board. I'm Michael Weil, I'm a Senior Attorney with NRDC, and I appreciate the opportunity to speak to you. We don't often appear before this Board. In fact, I think the last time we were here, my colleague, Dr. Gina Solomon, was here on this very issue, which we pursued up to the State Board through the remand.

So I appreciate being back here. I wish we had made a little bit more progress. I'm going to throw out my prepared remarks and address three issues that I've heard discussed today. Because I think that would be best helpful to the Board.

What we just heard is the interpretation of the TMDL's effect on enforcement and permits from counsel -- is not consistent with the interpretation we've heard from Staff in meetings with Staff.

If counsel's interpretation is in fact the correct interpretation, and at the very least the TMDL is ambiguous, then counsel's interpretation can be clarified today by making changes in the TMDL that put that specific issue in the TMDL. If that's what the TMDL means today, it can be clarified to make clear that nothing in the TMDL is precluding citizen enforcement, EPA enforcement or Board enforcement of permit limits, including individual permit limits.

Second, you've heard that EPA clearly has some concerns with the permitting scheme envisioned by the implementation plan. Now, EPA is saying we can address that in the permitting, at the permitting stage. And the reason for that is because EPA does not itself

approve the implementation plan in the TMDL, it approves the water quality aspects of the TMDL.

But what you're hearing is that EPA has a concern here, and it knows it’s going to come up and it’s got to be addressed. And EPA’s saying, “Well, we'll solve it when we have our veto power on permits.” But the problem exists today, and by adopting the TMDL implementation plan as written, you are adopting the problem today. The work to address that problem has to be done. It could possibly be done during the permitting scheme, although I’m doubtful, or during the permitting phase, but I’m doubtful.

But if the work has to be done, it might as well be done now. And the principal reason we heard from Staff for not addressing the problem now is that it will take time and energy. Well, that time and energy has to be invested in any event.

The scheme for enforcement, as we understand it, as was described to us by Staff in several meetings, was that they would have a group waste load allocation and individual waste load allocation. But the individual waste load allocations would be the only individually-enforceable limit. But the individual waste load allocations would not be enforceable unless the group waste load allocation is violated.

That’s like having a speed limit, and then telling everybody you can all break the speed limit as long as we don’t have a massive car crash. If we have a massive car crash, then we can go after each one of you for violating the speed limit. It’s bad policy. It’s also inconsistent with decades of implementation of the Clean Water Act, which you have individually-enforceable permit limits.

Now, this isn't to say that the Board cannot exercise its discretion to decide how to prioritize its enforcement actions, it can. But that’s a different

matter than writing it in the Basin Plan, at least as we've been previously informed. A proposal that would preclude citizen enforcement, EPA enforcement and traditional Board enforcement of individual waste load allocations and their water quality based effluent limits that are calculated from those individual waste load allocations.

As we understand it, the only 'enforcement scheme' that would be available is you require the discharger to do a report, and do some studies and maybe implement something, and it's a long and tedious process. The Clean Water Act has a clear enforcement scheme written into it, and it says that effluent limits have to be enforceable through this means.

It includes exercising your discretion to require studies and that sort of thing, but it also requires the threat of -- the deterrent threat of penalties, injunctive relief and what-not that are the incentives

for people to comply in the first place, so that they all don’t take a free bite at the apple.

Now, this issue is not only going to be an issue here, but it could be a precedent. And what we’re seeing is a fundamental change, a proposal to fundamentally change the way Clean Water Act permit limitations are implemented.

One thing that’s interesting is Staff’s proposal not even to require that the dischargers meet current performance standards. We have suggested, as Sejal mentioned, that something -- that there be an enforceable limit in the permits, and this be clarified in the TMDL, which would require the dischargers to meet current performance limits. And Staff told us it would take too much time to calculate the current performance limits.

We respectfully submit there’s been a few years of work on this already, and I don't think it would take too

much time. But that said, if the problem is that they don't want to require or allow enforcement of current performance, it suggests that the TMDL is being used as an excuse for backsliding. We're going to have a TMDL, and excuse people from current performance. That, I respectfully submit, would be unfortunate.

The reason NRDC is here is not only because of the significance of this precedent for the Clean Water Act, but because of the significance of the mercury problem. My colleague, Dr. Gina Solomon -- who also holds an appointment at UCSF where she's Co-Director of the Children's Environmental Health Specialty Unity -- spoke on this issue, I believe, a couple years ago.

Mercury is an acute neurotoxin and developmental reproductive toxin. According to EPA's own data, about 600,000 women of childbearing age in the United States have mercury levels that are above EPA's safe level. The Bay Area is acutely affected by this. We have large subsistence fishing communities, we have fish that are

high in mercury for a variety of reasons, and we have very high rates of fish consumption.

The question to ask yourselves is whether we do everything in our power to address that problem, and I think the Board has a public responsibility and duty to do that. The other question is do you want to see this all over again? We've been here before, we raised our concerns. Counsel said this was not an issue on remand; that is not entirely correct.

The Remand Order said that there has to be individual waste load allocations. And traditionally, water quality based effluent limits are based on individual waste load allocations, and the Clean Water Act makes water quality based effluent limits enforceable. The issue was up here before. Whether Staff paid attention to it or not, I'm not sure. They're clearly paying attention to it now, and we appreciate that.

We respectfully submit that there is a way to address this problem that prevents further controversy, it's within our grasp. And you might start by making the clarification that counsel gave, and by requiring that the implementation plan provide for enforceable permit limits that at least mandate current performance. Thank you, I appreciate your time.

CHAIRMAN MULLER: Thank you. Clifford?

MR. WALDECK: I have a question for Bruce. I'm very much a home team person, so all ties go to the home team; whether it comes to the science or to the law. So I am not -- I understand what Mr. Weil is saying in his concerns. I don't -- I am not in a position as a Board Member to figure out who's -- you know, who knows the Clean Water Act better and everything. And I still didn't get a sense for what Mr. Weil was saying.

Is this something that we can address now with some wordsmithing? Or is this something that, you know, the

Framm Oil Filter -- you know, ‘you gotta change your oil filter. You can pay me now or pay me later.’ But how do you interpret this, Bruce?

MR. WOLFE: Well, I must say, I’m hearing a new proposal today from Baykeeper and NRDC. We had received last week a proposal from Baykeeper that we go back and refigure what might be interim limits, and that’s what we said, it would take significant time and three or four months to do. Today they're saying accept the existing interim limits as enforceable, and I don't think anyone has any problem with doing that, including -- I won't speak, put words in BACWA’s mouth, if they want to comment on that.

I guess the challenge is then how we include that. Because while there’s been a comment about backsliding, I think we would take the approach that, if anything, the individual waste load allocations in our approach is very counter to backsliding. It’s much more aggressive. But that if it’s acceptable to NRDC and

Baykeeper to include the current what we called interim limits pending adoption of the TMDL, and individual waste load allocations -- and if that gives them then the surety that there is something enforceable in there, I think that’s something we may be able to do.

CHAIRMAN MULLER: Okay. Shalom?

MR. ELIAHU: Just one question. The bulk of mercury in the Bay is in these two -- bed erosion and Central Valley waste. That’s about 50 percent, that’s the bulk. How do we control that? How do we enforce it?

MR. WOLFE: Well, and that’s the issue, is that here we are spending so much time on where we have identified responsible parties that obviously we can enforce if somebody exceeds by a nanogram, and we’re not necessarily addressing the multiple kilograms that are essentially causing the bulk of the issue. And so that’s been the fundamental concern for us.

Nonetheless, we're trying to be responsive to the remand and trying to resolve all parties' concerns.

MR. ELIAHU: Well, we're wasting our time on the two percent, less than two percent.

MR. WOLFE: I wouldn't disagree with that.

CHAIRMAN MULLER: There might be other people that would disagree with you, Mr. Shalom. Mr. Kelley, and then I believe it's Vanderwoerker (phonetic). Help me out, Amy. Thank you on that one, I think you're new here.

MR. KELLY: Thank you, Chairman Muller. Thank you for the Board to have the opportunity to address you. First, let me say this is a -- we've had a long tradition in the clean water agencies working with the Regional Board to address water quality issues without threat of compliance.

Now, I go back in time -- it was over 20 years ago that my friend and colleague, Pang Lu (phonetic), called and said “Jim, would you come over and look at how we can implement a pollution prevention program” well in advance of requirements of pollution prevention. Well, over the period of about two years we developed a pollution prevention program which I believe is one of the best programs that’s in the nation.

The second thing we went forward with was a local effects monitoring program. This is where we hung a bag of bivalves, mussels or oysters, in our effluent right where it hit the Bay water. And these were filter feeders that concentrate the solids. We did that for about five years until we saw there was no effect. There was no regulatory mandate for that.

MR. ELIAHU: (inaudible).

MR. KELLEY: Well, we didn’t need them because they were ground up and tested. The oysters that were by my

plant did die once. That was because it was a very wet year, and they got too -- the water became too fresh. Other than that, they were pretty healthy.

My district, with the support of the Regional Board, did a residential metals study. That's because we were learning we couldn't get that much reduction metal from our industry, so we had to look elsewhere. Where is it coming from, residential metals. We got a grant from the EPA, which required your Regional Board support to do. Later, the Regional Monitoring Program went forward. Yes, it was a 13-267 letter. But once we saw what Steve Richie had in mind, we went forward. That is a model for the entire nation.

More recently, we've worked with the Regional Board Staff on the sanitary sewer overflow effort. Right now, the electronic reporting program you have is a model, it's the envy of the state. They hope they can come close to what you have. And the Clean Estuary Partnership has been going for five years, and I think

there’s been over $5 million spent trying to advance the TMDLs. Again, this was in front of a regulatory mandate.

My own district has spent millions of dollars on its household hazardous waste facility. That’s coupled with our pollution prevention, so you don’t tell them don’t put in my sewer, you give them a place to put it. This again is in front of regulatory mandate.

So I just wanted to say that clean water agencies have looked to advance water quality, we haven't needed a third-party lawsuit to make this happen. We thought this was a good opportunity for a different approach, to go from 17 to 14 to 11. Now, 17’s about the right number, if you look at the current performance based upon EPA Technical Support’s document.

So I’d like to address triggers versus limit. There’s a difference for a trigger vs. limit. A trigger is normally a lower number than a limit. Why? You want

to not violate the limit, and that was the way this was set up. In the -- while in the vein of dueling analogies, I would not look at this as a speed limit. I'd look at it as a fleet average. A fleet average means you want this fleet of this size of cars to have an average of 21 miles a gallon, or something like that. That's really what the group waste load allocation is, it's a fleet average.

And I agree with your Executive Officer. I don't view this as a backsliding, I view it as an opportunity for those that aren't in compliance to improve. So the -- speaking directly to what I understood the proposal to be, continuation of our current limit, that is something that I as Manager of Operations for Central Sand would support.

I would accept that, I think it's a reasonable crutch, if that's what's being proposed. I can't speak for my colleagues in BACWA, but I think that if that gets us around where we are right now, I would endorse that.

That's just some of my comments. Thank you very much for the opportunity.

CHAIRMAN MULLER: Thank you, Mr. Kelley. Amy, please and then Kevin.

MS. VAN DERWOERKER: Good morning, my name is Amy Van Derwoerker (phonetic), I'm with the Environmental Justice Coalition for water. We're a statewide coalition of over 50 community-based organizations and nonprofits working on community water issues in California. And we represent low-income communities and communities of color, many of whom are here in the San Francisco Bay Area.

So, as you said, I'm a little bit new here, but I can definitely see there's been a lot of back and forth on this TMDL, as you know better than anyone at the Board. I congratulate you on addressing many of the critical issues that have been raised by many of my colleagues at Baykeeper and Clean Water Action.

But I'm here today to say there's a few more critical steps that need to be taken before you can accept this TMDL and state in good faith that you have done your utmost to protect the health and quality of life of communities throughout the Bay. Because at the heart of all this wrangling and all this back and forth, the people -- the heart of this is the people that I work with, people who fish on a daily basis from piers at Point Pinole, or people who spend their evenings in the Berkeley Marina and on the docks at Bayview/Hunter's Point.

These are people who fish for their families, fish for their lunch. Risk reduction and mitigation is critical for the health and quality of life of environmental justice communities, low-income communities and communities of color. You've taken the first step as a Board to address this issue, and that's fabulous. But just acknowledging the need for risk reduction and mitigation is not enough.

Just because mitigation is not a clearly-defined concept, it does not mean that communities should have to continue to pay for pollution, legacy pollution, current discharges with their health and quality of life. These are communities that need protection now. And while we spend the next decades cleaning up the Bay -- we know that's how long it's going to take -- they still have immediate critical, daily health issues.

You as a Board have a chance to take leadership on this issue, to show the State of California that you protect all the beneficial uses of California's water, including subsistence fishing. And you can take a -- this is really an amazing opportunity to take a groundbreaking step for environmental justice by inserting risk reduction language into all the specific discharger categories.

And this issue of individual dischargers and specific discharger categories, as you can see, has come up a lot. Unfortunately, the people that I work with, these

communities throughout the San Francisco Bay, they're not just impacted by total amounts of pollution in the Bay, they're not just impacted by the legacies of mercury pollution. They're impacted by specific dischargers, by the refineries next door to them, by the waste water treatment plants that often border low-income neighborhoods. Individual dischargers need to have enforceable permits and requirements.

So I'm definitely urging you to insert enforceable waste water allocations for each of the individual dischargers. Just because you're leaving the door open for other agencies to regulate, that's not enough. Just because EPA does not have to approve an implementation plan does not mean that you as an agency responsible for monitoring industries around the Bay should allow individual dischargers to continue to hide behind a total allocation.

So I just want to conclude by making an observation about this, you know, this very controversial process.

From the perspective of the communities throughout the San Francisco Bay, the communities I work with, this has dragged on not because it’s so controversial or there’s so many different opinions. But it’s really dragged on because it seems like, it appears to these communities that there is a lack of willingness to step up and protect the health and quality of life of communities, by actively reducing and requiring waste load allocations and risk reduction in the mercury TMDL.

It’s perceived that it’s been dragging on because there’s a hesitancy to step up and do what is necessary. And yes, it’s hard, and yes, it takes a lot of time and energy. But that’s not a good enough reason for the communities that I work with. That’s not a good enough reason to allow these communities to continue to pay with their health and quality of life.

So if you want to send a message to the public, the larger public, that you are willing to address

environmental justice issues, to live up to your mandate to protect the beneficial uses of California's water, then you should definitely take the suggestions of my colleagues at Clean Water Act and Baykeeper, and the suggestions that I've said today, which would, again, be the things about individual waste water allocations that are enforceable and risk reduction language in all our specific discharger companies. Thank you.

CHAIRMAN MULLER: Thank you. Questions? Margaret had a question for you, Amy, please.

MS. BRUCE: Excuse me, Amy?

CHAIRMAN MULLER: Amy?

MS. VAN DERWOERKER: Oh, I'm sorry. Yes.

MS. BRUCE: I want to be very sensitive to the folks that you work with, and I'm curious. In the eyes of

the subsistence fisher person going to the pier and fishing for lunch or dinner, what does risk reduction of health effects look like to that person? How would they perceive our organization being of service to their community and to them?

MS. VAN DERWOERKER: I think that's a really important question, and it's a really difficult question. It's one that we as a nonprofit agency struggle with as well. But, certainly making clear that there are specific steps being taken to reduce emissions, reduce how much of the pollution is getting into the Bay, I think would be one thing.

And then, really, I think the most important thing is working in a collaborative process with impacted communities, and really doing a lot of outreach and concentrated effort to include their voices. And I know it's hard because there's a lot of technical things, but it's really the voice of those people that really need to be included.

And I think you will find that while it seems like a huge thing, once people have that space to talk about the issues and make clear -- and feel like they're being heard, you'll find that the solutions are not that hard to get to. Really, a lot of it is about creating a space to make sure that those voices are being heard in this process.

MS. BRUCE: So your point is good communication, effective outreach and inclusion.

MS. VAN DERWOERKER: Yes. And taking the actual steps. I mean, I don’t want to make it sound like that’s just it, because you do actually have to go ahead and take the steps to say to people, “We did this.” You know, we don’t have just a general load allocation for how much mercury’s allowed in the Bay. We’re actually saying to the Chevron refinery -- which is right next, which is the backdrop to where you fish -- they have an individual, there are regulations on how much they can discharge.

Being able to show to people -- I mean, so often communities say these things and then it gets just glossed over in these large general-speaking requirements. Being able to say specifically, ‘this is what we’re doing’ would go a long way.

MS. BRUCE: Okay. Thank you.

CHAIRMAN MULLER: Amy, I’d just like to make a quick comment, too. I think you should tell your community, or visit with them, that if you're thinking that the past 10 years that I've sat here was a waste of my time and I've not done anything to improve the environment, you're totally wrong. Excuse me.

MS. VAN DERWOERKER: No, I --

CHAIRMAN MULLER: I just have to say that. I'm sorry.

MS. VAN DERWOERKER: No, I really --

CHAIRMAN MULLER: I think our mission is to improve the environment of the Bay, and we've done our very best. And we're going to continue to do more, so I want you to tell your community that. Thank you.

MR. WOLFE: And just to comment on that. Margaret, I'm glad you brought up that question. Because, as Amy said, there's a number of things that should be done, but it's difficult to specify just how you do that. And in fact, the Clean Estuary Partnership has hired Dr. Kyle (phonetic) from UC Davis to do just that, to go ahead and go out to the community to determine what the needs are, and to determine how we do that.

So this is already moving forward. So there's progress being made, and the Clean Estuary Partnership, as you may recall, is a partnership right now amongst the Board, the BACWA from waste water, BASMA from storm water, our next speaker WSPA (phonetic) participates. A number of parties participate, including the environmental groups as part of that.

So that is ongoing, I think the request to include wording that would specify the risk reduction gets a little bit somewhat to the point Shalom just made, is that here we have identified parties. And in fact, the language in the Basin Plan Amendment says “Develop and implement effective programs to reduce mercury-related risks to human and wildlife, and quantify risk reductions resulting from these activities.”

That’s already stated in the municipal and industrial waste water. To state that in the bedload or Central Valley waste load doesn't do much, because we don’t have anybody to ask to participate to do that. The people who can participate are participating already in the Clean Estuary Partnership.

MS. BRUCE: I think I want to speak, though, to Amy’s concern that there isn't enough information getting out into the community at large, about all of the existing endeavors to identify, to mitigate, to collaborate on efforts to further reduce. And it’s one more way to

get the work of the Board Staff and everyone else involved in these collaborative efforts out there in the community. So I would encourage that you toot your horn a little.

MR. WOLFE: Right, right. No, I think we fully agree, in that it's not just tooting the horn, I think everybody wants to see something happen on the ground that can really be effective. Because just having signs out that state 'Don't eat the fish,' is not enough when subsistence fishermen need to eat the fish. So we need to look at ways we can address that, and that's recognized by all the parties.

MS. BRUCE: Okay. Thank you.

MS. DELUCA: I completely agree with Mrs. Bruce's concern, and with what's been expressed here. But part of the problem, of course, is that we have this inter-agency approach. We have so many players. For example, the Department of Toxic Substance Control --

because we're looking at a huge mandate for public education here, that no one agency singularly is willing to take on as their specific burden. And I would like to see more action on a collaborative effort with agencies that are perhaps more specifically designed to deal with toxic substance control such as the DTSC.

I don't see that specifically, although I'm very concerned and sensitive to human health concerns, as my record will indicate. I think that we don't hear enough about what they're doing to control some of these problems that are affecting people of color, and minority groups who do use the Bay as a sustenance source.

CHAIRMAN MULLER: After Kevin will be Andrea.

MR. BUCHANAN: Good morning, Chairman Muller and Members of the Board. My name is Kevin Buchanan, I'm with the

Western States Petroleum Association. We reside at 1450 L Street in Sacramento.

Just to get right to the point. This TMDL's been delayed for two years, and in our opinion, without any real substantive justifiable arguments for doing so. The waste load allocations are protective, the science is sound in this TMDL, it's legally defensible, and we believe you should adopt it today and move forward with getting the reductions that the TMDL has incorporated.

I did want to touch on one issue that was brought up previously about current limits in the TMDL. Your Staff is aware of this, but you guys may not be aware of this, is that when NPDES permits are renewed, where there's a limit being considered for a TMDL pollutant, the Staff evaluate what is more stringent -- either the current performance of the facility that's discharging that pollutant or the previous permit limit. And whatever is more stringent gets rolled into the permit

renewal as the TMDLs are being adopted and moving forward.

Nobody has objected to that, and we -- you know, by that practice we are doing essentially what some of the non-governmental organizations are asking that you incorporate into the TMDL. Which brings me to my next point.

And that is, we seem to go down this path that whenever there is an opportunity for the TMDL or Basin Plan Amendment to come to the Board, we're seeing that the non-governmental organizations continue to ask for more and more and more. We've seen this pattern for years, and we thought it would be helpful to point out to the Board that it doesn't seem like we'll ever get there with them. And I think this is just another example of wanting to incorporate something that is really NPDES permit-related into a TMDL that's about incorporating waste load allocations or reductions to bring the Bay back into attainment.

We don’t agree that the TMDL is totally perfect, which I think most people that’s coming before you today may say so. But we think in the best interest of moving forward, you should adopt this TMDL the way it is. It’s protective and legally and scientifically sound.

A lot of the objections that we’ve heard from the non-governmental organizations about this TMDL is not legally defensible -- we asked NRDC directly what part of the Clean Water Act these group waste load allocations violate, and they told us there isn't one. That it just goes contrary to the traditional approach of NPDES permitting.

Well, I think we’re in the day and age where novel approaches to achieve water quality standards is a good thing to embrace, and I think this TMDL incorporates that.

Two more issues and I’ll finish up. I did want to highlight, there is an issue about the 13-267 that the

refineries have been issued for mercury within the TMDL. We're fully complying with that. In fact, we're going above and beyond that. We're holding discussions with your Staff about other waste streams that are leaving the refineries that could be contributing, or could make their way to the Bay.

We're going to be having an update to your Staff in October, giving them a status update of the air deposition study that we're doing, that we're funding ourselves, and something that really was a cooperative effort with Staff. The 13-267 just kind of memorializes it so that we would go forward with a structured framework for doing so. But we came forward to Staff and we felt we should do this, and so that's why we did. We're the only discharger group, also, doing that.

The last thing is, in addition to we think you should adopt this TMDL today and have it go forward, is it wasn't clear to us in the EPA testimony if they

actually support your adoption of the TMDL today or not. I heard that they support several provisions of it, but I'd like the Board to ask EPA to state clearly do they recommend you adopt this TMDL or not. With that, I'll conclude and take any questions that you may have.

CHAIRMAN MULLER: Thank you, and I think that's what Clifford started the morning with.

MS. VENTURA: Hi, I'm Andrea Ventura with Clean Water Action. Clean Water Action is the national statewide organization. And I just want to say I'm not a lawyer, I cannot respond with a legal argument here. But we were founded specifically to help write and pass the Clean Water Act. So it is near and dear to our hearts, and as far as which part of the Clean Water Act that NRDC had referred to, I think you should ask them. Because I don't remember them saying that there wasn't one.

I am also going to throw away my prepared statement, which always makes me nervous because I'm better if I can read it. So bear with me. But I do want to respond to just a few things that were said today, and to clarify something about the risk reduction, by the way.

But first, the delay, we're all frustrated by the delay on this TMDL. It's hard work putting together a TMDL, I know that Staff works hard on it, you consider it very seriously. The delay is because there were flaws in this plan. We're trying to get it right. And that that is a very important thing about the future of it, is that we have to get it right before can pass it on, or else we're going to end up with a worse problem than we have with the delay.

As far as the NGOs asking for more and more and more, I would challenge that comment by saying if you look at comments that you have received since the draft TMDL was first put out by my organization, Clean Water Act,

as well as my colleagues at Baykeeper and NRDC, I think you'll find we have been very consistent with the things that we have pointed on and contested about the plan. So I would disagree with that.

I also will not go into detail -- my colleagues at Baykeeper and NRDC were very eloquent about the waste load allocations. We also concur that they should be both individual and enforceable. We feel strongly about that, because first we think that individual waste load allocations optimizes and ensures that we do as much as possible to reduce, to staunch the flow of mercury coming into the Bay. But also because we are concerned with the environmental justice impacts.

Not all dischargers are discharging into deep water. There are potential local impacts, and if a specific discharger does not meet their allocations, then we may see environmental justice problems. So we feel very strongly on that issue.

I just want to make two major points, however, and that is in regard to the question about risk reduction. I was delighted it came up as a question, because it does need clarification. If you look at the State Board language -- and we are grateful to Staff for putting that into the TMDL -- it specifically says that we go beyond education.

To be honest with you, there is a lot of information out there about fish in the Bay being a little bit questionable to eat, at least on a regular basis, okay? People do know that. We're talking, of course, about subsistence fishers, however, that don't have a choice, necessarily, right? We all understand that.

And so what this is actually calling for -- and this is where I think you've really taken the lead -- this is new, this is groundbreaking -- is saying, "Okay, it's going to take decades, no matter what we do in this TMDL. It's going to take decades to address the mercury, to address the other contaminants in the Bay."

What do we do to help those communities that are dependent on that fish, okay?

And there isn't an easy answer. I don't think anybody can just, you know, wave a magic wand and answer the question for you. The thing is -- and this is the key -- is we have to go to the communities and find out how do we mitigate the problem. If people are being exposed, what do we do about that, and how do we offer people an alternative to eating fish all the time that may be problematic.

And one of the things that Clean Water did in conjunction with Baykeeper and the Environmental Justice Coalition For Water -- of which we are a member, by the way -- is we actually got a few community members in a room and just started brainstorming, putting things up on a board. Some of these were more viable than others, okay, but they were ideas.

These were not things that the Regional Board would go out and do. We're not saying to you, 'you're going to go out and do health monitoring,' or 'invest in local backyard fish-farming,' or something like that. We're not saying that. What we're saying is that the Regional Board -- and we believe the dischargers need to facilitate that process, so that those things can happen to protect our communities. And what those ideas are will have to come through a collaborative process.

Now, as Mr. Wolfe said, there was a -- there is a process going forward, but really was instigated by BACWA. And we appreciate them stepping up to the plate, but we would remind you that BACWA represents municipalities that while we do see them as a discharger and we want them to be held accountable for their discharge, they did not create the pollution problem. The people who are missing at that table are the refineries and the other industrial polluters, who are not being publicly supported.

So what we would like to see -- and I think this is what Ms. Van Derwoerker was trying to get at -- is we would like to see the language from the State Board resolution put into the various discharger categories in the TMDL so that in the permits there is some sort of participation by all dischargers, whether it’s financial, whether it’s through expertise or facilitation. Whatever that works out to be, support this, because it’s going to have to go forward over the next few decades. And that’s really key. There is nothing legally prohibiting that from being in a permit.

I hope that clarifies -- and if you ever have any more questions, you know, I've been working on this issue and I’m happy to talk to you about that.

I just want to bring up one last thing, and then I’ll conclude because I know time is short. You know, you can hear my point of view, you can hear other NGOs, you can hear WSPA and BACWA and Staff’s point of view. But

what we really have to consider is the public will. And two letters have come, one to you that I hope you read this weekend, because it came via e-mail. If not, I have hard copies. That was signed by a little over 120 residents from around the Bay Area, okay. No?

MR. WOLFE: This is what, Andrea, I sent you an e-mail on this, saying that since the public comment period’s closed, we can’t accept this into the record. But you're certainly free to read it into the record.

MS. VENTURA: Okay. Well, I won't read the whole letter. But what it basically says is that these members of the public -- you know, they're not NGOs like myself or anything like that -- are saying they want the individual waste load allocations. They want the information from the refineries about what’s coming into the Bay Area in the form of the crude oil as far as mercury. That they want the waste load allocations enforceable, and they want risk reduction.

This, a similar letter was sent to the State Board last year -- I believe it was in August -- that had 1200 signatures of people from around the Bay. Different economic status, different education, different communities. What the public is clearly saying is they want discharges into the Bay reduced, they want to staunch the flow of mercury coming into the Bay, they want the mines cleaned up, and they want risk reduction. And I think we need to remember that they're that greater group out there that we all have to respond to, and I just want to -- you know, I know you take that seriously, and I just wanted to offer you some sort of testament that that’s where the public’s will has been coming down. That’s been our experience in outreach.

CHAIRMAN MULLER: Well, as I said to Amy, hopefully that’s been our will, too. It just doesn't happen that easily, but we’re trying.

MS. VENTURA: It’s good to see it in writing, so that’s why we presented that to you.

CHAIRMAN MULLER: Thank you. Margaret, question?

MS. BRUCE: Is your organization, or any other of the many water quality NGOs, working in the Central Valley on the abandoned mines issue?

MS. VENTURA: Yes. We are working on the Central Valley and a number of water issues -- abandoned mines, pesticide use, the whole nine yards. But specifically to the legacy mercury loading.

MS. BRUCE: From the Central Valley, from abandoned mines.

MS. VENTURA: Mm-hmm [affirmative].

MS. BRUCE: What is your level of effort there, and what are you working on there?

MS. VENTURA: I personally have not had as much effort as I would like. We are basically a two-person program staff, okay, and you understand the difficulties of that. So we have been more interested in working through the TMDL process on that, than we can on a community level.

We are working on water quality issues with communities there, and that certainly will have an impact. Right now, our focus, frankly, has been on agricultural issues. But I know that there are other organizations, including Deltakeeper, that have been very involved in that.

MS. BRUCE: Thank you.

CHAIRMAN MULLER: Good. Michelle? Michael, did you have plans to come back? Because I’m not going to invite you at the moment. We'll get through our cards here and we'll see where we are.

MS. PLA: Good morning, Chairman Muller and Board Members. My name is Michelle Pla, and I'm the Executive Director of the Bay Area Clean Water Agencies, BACWA. And as you know, BACWA is a JPA -- which we heard about earlier today -- of the clean water agencies, the waste water agencies here in the Bay Area.

We are governed by publicly-elected officials, or people who are appointed by publicly-elected officials, and we are financed entirely by user rates from all of us who use the waste water systems here in the Bay Area. And we work 24 hours a day, seven days a week, 365 days a year to protect the San Francisco Bay and this watershed.

I want to urge the Board to adopt this Mercury TMDL today. I want to commend the Staff on this excellent work that they've been doing over the last 11 months since the remand of September of 2005. And I also want to commend the Staff and specifically State Board

Member Wolff for working with us and the NGOs over the last month in a series of meetings, which I believe were very productive. And every meeting that we get a chance to sit down and talk about our concerns and our issues and our perspectives is a good time. It's a good time to do that, and we should always take that opportunity. So I really want to thank the Staff for setting up those meetings and having them.

The issue you've been hearing about is whether the waste load allocations are enforceable. They are enforceable. And if you look at -- what came out of those meetings was additional language that the Board Staff is recommending be added to the TMDL today, that's in the comments to responses -- response to comments, thank you, RTC-23 and 24.

And this specifically requires that if either the concentration or the mass trigger are exceeded by an individual clean water agency, that they are to respond immediately within 60 days, develop a report, look for

the reasons why this trigger, either of these triggers were exceeded, and implement corrective actions. In my mind, that is enforcement.

I understand that the NGOs are concerned that this doesn't mean that this is a different approach from their perspective. I don’t necessarily think that this is a different approach. We’ve seen this kind of trigger in many instances in our permits for other things.

I want to also mention that the EPA’s comments this morning were a complete surprise to me, and to BACWA members. In May we had a very productive meeting with Baykeeper, and after that meeting we then asked to meet with the EPA Region 9 to talk about these group allocations and the triggers. We had that meeting in Bruce Wolfe’s office with Alexis Strauss and her staff, and at that time we were completely understanding that EPA was supporting this. And in fact, we did CPA’s letter.

So EPA’s comments this morning and this e-mail which Sejal mentioned, and which we have not seen, were a complete surprise to us as well. But I do think -- I want to say that I think we disagree with EPA. Again, we have seen many times in permits where we have triggers that are enforced through the standard process that is laid out here in this TMDL.

Reports, it’s very much like toxicity, where if we violate a toxicity limit, we go in and we investigate it right away, and figure out what’s going on and we make corrections. So this is not new, it is not a precedent. It is something that’s been done before.

Jim Kelly spoke of the long history of the partnership that the clean water agencies in the Bay Area had with the Regional Board, and the fact that we’ve gotten out ahead of regulatory requirements and developed some very innovative and nationally cutting-edge programs. And he mentioned the local effects monitoring, the regional monitoring program, and the Clean Estuary

Partnership. And he mentioned that we've done these in advance of having requirements and permits to do that.

So we feel very confident in saying that the way this TMDL is written, and with all the requirements, not just the numerical requirements for concentration and waste load allocation, but all the narrative requirements that are also in this TMDL for municipal waste water, will be enforced and will ensure that there is no backsliding from current performance.

I'm very disappointed to hear the NRDC, which is an organization that I have the highest regard for, I'm very disappointed to hear that they just want to go back to a very old command and control approach to things. When what we are trying to do is do things that are going to focus on a shared responsibility for this watershed. I would like to remind the Board, which Board Member Eliahu has reminded the Board a few times that we are focusing on a very small amount here,

a total of about 1.4 or 1.5 percent of the total loading to the Bay.

And that we have in this TMDL a very comprehensive program, extremely comprehensive. It is not just the group allocation, it is the concentration trigger, a mass trigger, and additionally narrative requirements, in addition to continuing to work with the Clean Estuary Partnership, the Regional Monitoring Program and the NGOs on risk reduction, which we welcome.

So I normally don’t stand up and pound on the table, but I feel compelled to pound on the table today and say there is a lot in this TMDL which is going to require municipal waste water to take care of the San Francisco Bay. We are going to be very involved, and very -- and there is a huge amount of enforcement capability on the Regional Board here to make sure that we’re involved.

This revised TMDL fully responds, in our opinion, fully responds to the remand. And so, again, I would like to say that one of the issues that's pointed out in the response to comments is that the 17 kilograms, which was part of the waste load allocation for municipal waste water, which was in the TMDL adopted by this Board two years ago, is fully protective. Yet this version is looking to reduce that even more.

So I think that what you've seen is that the Staff has fully responded to the Remand Order, and we are trusting -- and we will be involved in the adaptive implementation. We are being required to do methylmercury monitoring, the Water and Project Research Foundation project, which is looking at methylmercury impacts in the Bay is underway. And we will continue to work through the Clean Estuary Partnership and the Regional Monitoring Program through SFEI to undertake a series of studies to improve our knowledge, so that when we get into an adaptive

implementation timeframe, we will have more information and we can improve upon this.

So let us not delay. I really urge the Board to go ahead and adopt this TMDL today. You have all been undertaking a huge task over these last two years, it's a Herculean task. And I believe this TMDL is based on the best science that we have in the nation and internationally, and it is one of the most cutting-edge environmental documents we have ever seen. And I also want to commend the Staff on this excellent response to comments.

I also spoke earlier with Carrie about how clear this writing is, and how focused in on the comments this is, and I really appreciate it. And I'm available for questions.

MR. WALDECK: Michelle, I completely appreciate that, you know, you're in the trenches every day on this stuff, and other people might just kind of float in and

float out. In terms of what you said about NRDC, your concern was based upon the comments that some people can speed and some people can get away with it, as long as they slow down?

MS. PLA: No, that was -- my concern is that NRDC's principal reason for objecting -- because I believe that Staff has been very clear that there is no legal reason why we cannot pursue the enforcement structure that we have. And, but I believe -- at least my understanding is that NRDC's principal concern is that this is -- they say this is precedent-setting. And they're concerned that in the past NPDES permits have not been written this way.

And so I feel very disappointed that they're relying on an command and control process, which, of course, has allowed them in the past, of course, to sue. But they are not looking to the future and the way that we need to be doing things in the future for the benefit of our water quality. And focusing on this small, little

piece in this entire document that is just an incredible piece of water quality protection.

So it’s disappointing to me. I understand what he’s saying, I completely understand his issue. But I’m disappointed that that’s where they're falling out.

MR. WALDECK: And again, with U.S. EPA blindsiding, or not knowing what U.S. EPA has come in at, that’s something I’d like to see Staff address here. Because if we can address those concerns by changing or -- I’m not saying changing, I’m looking for Staff augmentation of moving forward so we can have these things here. And perhaps -- is the way it’s written now, only the Board can take action towards violations of the permit?

CHAIRMAN MULLER: I don't think you should be addressing Michelle on that. I’d rather you address the Staff.

MS. PLA: Yeah, I appreciate that. But I did want to point out, Board Member Waldeck, I hope that there is

no misunderstanding of my comments about being surprised by EPA. I’m not in any way faulting your Staff. I’m surprised that we didn’t hear from EPA directly that they had an issue when we had met with them in May and we had understood that they were supportive of this approach. And I’m surprised that Sejal has a copy of an e-mail which I don't have a copy of. I thought we were all working together on these issues.

So I don’t -- this is in no way a criticism of your Staff. I hope that was not interpreted that. way.

MR. WALDECK: Okay, I just wanted to ask those couple of things.

MS. PLA: No.

MR. WALDECK: Thank you.

CHAIRMAN MULLER: Thank you. We still have more cards. Mike, is it? I'm not sure on the last name, Mike.

MR. CONNER: Hi, I'm Mike Conner from San Francisco Estuary Institute.

CHAIRMAN MULLER: Sorry, Mike.

MR. CONNER: I had anticipated talking, but I wanted to follow-up on a discussion that Ms. Deluca and Bruce were talking about. But before I -- you know, I'm up here, I think that I salute the Staff, Dr. Mumley, Carrie, Dyan -- who's on my board and whose name I can't remember now -- for the work they've done. And I think to the best extent that I know, it's up to date with all the science that we understand about the Bay.

But that science is changing really quickly, and our understanding of how best to control mercury getting into fish in the Bay is going to be different in three, four years than it is today. And that's why the

emphasis on adaptive management that they're taking in this permit is so important. And Tom and I have had long talks about what would work, and what strategies should they propose.

So I just wanted to say, in background, that I think they are thinking as deeply as possible about how to be most effective in making this work.

The second piece is on the issue of risk reduction and communication. And, in fact, there’s a lot of work being done on that with the environmental justice community. We’re doing a lot with Cal-Fed, the Department of Health and Human Services are extraordinarily active on this issue. We are providing small grants to EJ community members to work with them to get out into the community, and we’re really looking forward to this CEP exercise with Dr. Kyle. We think she knows her stuff, and that should further move us ahead in what’s a really difficult thing to figure out, exactly what to do.

So there is a lot of work going on in that way. And I don't know, Dyan, if you gave them a copy. We've just come out with a risk communication book on fish levels in the last week or two -- and we'll make those available to the Board -- in part of our ongoing efforts to communicate about that issue.

Similarly, we're finding that the monitoring of very small fish -- and we've talked a lot about the human health side, but actually I think the bigger impact is going to be on the prey fish work, that don't get much talked about in the permit. And it's a very stringent standard, more stringent than the human health standard.

And looking at the prey fish, while Carrie had it mostly affecting birds, it will also have a huge impact on the EJ side. And we can see very clearly whether or not there are effects associated with local mine cleanups or upstream/downstream of other restoration

actions, which also is going to be a big issue in the future with this permit. So, thanks.

CHAIRMAN MULLER: Thank you. I'm sorry, we have not had the pleasure to meet. So I apologize for that. I don't think -- over the years everybody knows you, but I'm sorry. We have one more card, but Michael, I know you were hot. I will give -- it’s very unusual for me to do this, I’ll give you one minute if you want to make a brief comment.

MR. WEIL: I very much appreciate that. My recollection of my colleague -- or Dr. David Beckman’s conversation with WSPA is a bit different than WSPA’s. But the simple logic of our analysis is that the Clean Water Act and regulations require individual waste load allocations. The State Board has also said that, and EPA has said that.

The Clean Water Act implementing regulations require that water quality based effluent limits consistent

with the individual waste load allocations. And the Clean Water Act says that individual water quality based effluent limits are enforceable; that the simple reasoning -- I also, since Staff is wondering, I could identify the language in the Basin Plan Amendment that is a concern from the enforcement perspective. Or I could --

CHAIRMAN MULLER: Clifford has a quick question, and then I'll ask you to stand down, please.

MR. WALDECK: So, in your interpretation, is this something that we can clean up now? Or is this something -- I mean, is there certain -- I mean, I'm looking to make augmentations or improvement to the existing language. Is, are the concerns that you bring up -- and forgive me for asking you to speak for other groups that you're a part of, too. Is this something that we can address now, or is the only way we can do this is to go back to part of the drawing board and bring it back up in three or four months?

MR. WEIL: There is one change that you can make now that would go a fair distance towards addressing our concern, and it is the change that reflects the advice of counsel. Which would be to make it clear that nothing in the TMDL, Basin Plan Amendment, implementation plan does anything to limit enforcement of individual waste load allocations and permit limits by you, by EPA, or by third parties -- that you may decide to exercise your enforcement discretion to prioritize certain enforcement actions. But nothing in the Basin Plan Amendment limits that enforcement.

CHAIRMAN MULLER: Are you concluded?

MR. WALDECK: Yes. Because I know I was heartened by what Mr. Kelly said about making current limits the --

CHAIRMAN MULLER: Craig Johns is the next card.

MR. WALDECK: Yes. Thank you, Mike.

CHAIRMAN MULLER: And the last card at this point is Craig Johns.

MR. JOHNS: It’s like a maze getting down here. For the record, my name is Craig Johns. I’m here on behalf of the Partnership for Sound Science and Environmental Policy, and I appreciate the opportunity to speak to the Board this morning on this. To quote the pre-eminent 20th century philosopher, Yogi Berra, it does seem like it’s deja vu all over again.

Because it was almost two years to this very month that this item was before you, was adopted by you or at least the majority of you, and sent on to the State Board for its consideration and ultimate remand. And I think it’s important to recognize two very important points.

One is that, if anything, what is now back before you today after the remand is even more strict than it was two years ago, in every respect. The second thing --

and I appreciate Mr. Eliahu’s point on this and clarification by one of the other speakers, is I think it’s important to keep things in perspective, keep our eye on the ball. In this case, keep our eye on the Bay.

We’re talking about less than two percent of the total mercury that is loading into the Bay, and we’ve wasted another two years getting to this point again today. We’re not doing a lot about doing any mine remediation, we don’t see U.S. EPA and its sister federal agencies doing anything about going after those cleanups. That’s where the mercury’s coming into the Bay, and we all know it.

Now, does that mean, do I mean to suggest by that comment that the waste water treatment agencies don’t care about the mercury problem? Of course not. You heard Mr. Kelly and Ms. Pla from the POTW community talk about the various programs that they're currently involved in and have been involved in for years. You

saw a slide presentation from your Staff earlier that indicated that in the last 35 years, more than 90 percent, more than 90 percent of all the mercury coming from these waste water agencies had been reduced. And I suspect that in the next five years we're going to see drastic reductions as more and more communities complete the ban on mercury thermometers, complete the kinds of pollution prevention programs that the folks at Central Contra Costa Sanitation District are doing, providing opportunities for people to bring their mercury instead of just saying, 'don't put it in our sewers, don't flush it down the toilet.' But providing options for them. And we're going to see those kinds of reductions.

All those discussions regarding the group limits and the individual limits or triggers, and how they all work and whether they're legal or not legal, if you cut away all of the rhetoric that you've heard today from some of the environmental NGO groups on this, the fact of the matter is they are legal. This isn't precedent-

setting, this isn't unique, this is not a new concept. They're doing it in Minnesota right now on a phosphorus TMDL that was adopted a few years ago. They’ve got a general permit that’s out there right now that talks about group load allocations and ways to do individual client strategies for that.

This isn't new, okay? The reason why your Staff is bringing this process to you after they’ve reduced those waste load allocations for the municipal and waste water agencies and the industrial facilities as well is because there is a recognition that when you're dealing with less than two percent of the mercury going into the Bay on an annual basis, we need to figure out a way to assure compliance. Allow some of the smaller entities that cannot get to the numbers today, to do it.

This Board has gone on record as supporting offsets and credit trading. The State Board has gone on record as supporting offsets and credit trading. U.S. EPA has

gone on record for years as supporting offsets and credit trading. And what this group allocation and individual allocation process that your Board Staff has brought to you effectively embodies that notion. It’s good policy, it’s good for the Bay, and by the way, contrary to what you’ve heard from the NRDC and the other NGOs today, it’s legal.

U.S. EPA approved a similar process. I’m not going to give you the Minnesota information. I’m sure your Staff already has it, and it’s probably in the record and the deadline obviously is well past to provide it to you. But the point is that this isn't new, it’s not unique. Your Staff is not asking you to do anything that is illegal or bad public policy.

I want to turn, if I can, to one issue relative to this mercury mass balance study that Ms. Choksi brought up again, and the 13-267 order. I wasn't planning on doing it, because frankly, this is old news, too. But

Ms. Deluca brought it up in a question, and I want to respond to it.

If you go back and look at the transcript of your hearing when you adopted this item two years ago, nearly, today, there’s a great colloquy among the Board Members with Staff on this issue of a mercury mass balance of mercury in crude oil. There was information presented to you by your Staff of nationwide studies that indicate that, despite spending millions of dollars in ongoing studies by the way, with U.S. EPA and the American Petroleum Institute, it is extremely difficult at this point -- impossible, they say -- to figure out how to do this mass balance.

Why? Because the variability of mercury in crude oil doesn't just vary from the oil based on what field it comes from, it varies based on when it’s taken out of a particular oil well in the same field. You would have to do almost continuous monitoring of the throughput of this refined product to figure it out.

And in the end, let’s ask the more important question: does it really matter? What does it matter what’s coming in in this variation on a daily basis, when what we’re really concerned about is what’s going out. What’s going out in their pipes into the Bay after they’ve refined their product, what’s going into the air. Because that stuff we know comes back down and falls to the earth, runs off in the storm water in the streets and into the creeks and into the Bay.

So we should care about that. And in fact, you said you care enough that you asked the refineries to go and do that. And they're doing it, as you heard from Mr. Buchanan. They're doing more than that. They're exchanging more information about other sources -- excuse me, other locations of where this mercury might be going out from the mercury that is actually -- or from the oil that’s refined in the product.

So I just want to touch on that, Ms. Deluca. And I hope that that answers your question. If you do have any

questions further than that, I would be happy to try to answer them. But I guess in conclusion, I simply would ask this: on behalf of PSSEP and our members, we ask you to support your Staff's recommendation. It's time to move this on, it's time to make real improvements in the Bay mercury loading.

I ask for you to specifically reject any language that was suggested by NRDC or the Baykeeper or the Clean Water Act folks relative to fixing these triggers and these waste load allocations, okay? It's good policy the way you have it, it's legal, you should just go forward with it. And I also would ask you to reject the request that Ms. Choksi asked you to do, which is to further tweak this 13-267.

If there's more information that the Staff needs after it receives its report from the WSPA folks in October, certainly the Executive Officer has the authority -- and I assume will assert that authority -- to do, ask more from the refineries. With that, I thank you very

much for your time. If you have any questions I'll try to answer them.

CHAIRMAN MULLER: I think this concludes it, with the speaker cards. Uh-oh, one more coming in here. Chuck, quickly. You're going to get more time to speak later.

SPEAKER: I know. I didn't put No. 7 down on the other card, I apologize, Chair Muller and all the Members of the Board. But I've been listening to this, and I just have to try to put some of this in perspective.

CHAIRMAN MULLER: Could you --

SPEAKER: I'm sorry, I'm Chuck Ware (phonetic), I'm the General Manager of East Bay Dischargers Authority. I'm Agenda Item No. 8, by the way.

MR. WALDECK: That's a long way off.

MR. WARE: Hopefully, that will be a little bit simpler than what we're going through at the moment. I could very easily stand here and say I support the TMDL as presented by Staff, and that's accurate. But I'm a little concerned with some of the things that I'm hearing, and some of the questions that the Board has been asking.

And I'm concerned that it may turn out to be the worst-case scenario from the Clean Water Agency perspective. When the remand came back, we sat down with the Board and the issue was, well, not all the POTWs are performing up to snuff. So we said, 'all right, what can we do.'

And we agreed to go from 17 to 11, 20 percent and 40 percent reduction for 20 years. And we agreed to do that with the provision that there would be a watershed permit. And you've heard, a watershed permit that assigns an allocation to the POTWs is an enforceable allocation. It's enforceable, it's consistent with the

Clean Water Act. The language that’s in the current version of the TMDL is exactly what’s intended to do that. There are agencies within that 11, 17 down to 11 that are not performing up to snuff, there are ways to address it.

But what I’m afraid of now is that your -- because the theme that I've heard from the good folks out here, who have the same goals in mind as we do -- Sejal and Amy and others, we all have the same common goals. What I’m hearing now is they want individual allocations and third party enforcement on those allocations. That’s acceptable if you do it under the watershed permit, under the group concept.

However, if you're going to do that to the individual allocations of each of the 40 POTWs that are there, your setting us up for failure. And there will be citizen suits and enforcement. I represent 800,000 residents of Alameda County that pay taxes for the waste water treatment plants, and I guarantee you that

if I ask them, do you want me to raise your rates to pay for citizen suits because you're getting penalized for agreeing to go to 11? They want their cake and they want to eat it, too. It’s not right, folks. It’s just not right.

So if you're going to give us each individual allocations and make it third party enforceable, then use the current performance and leave it at that. So your choice is to go from 17 down to 11, with us working on our watershed permit, or you stay at 17 and you give us individual enforceable allocations. The debate here is over six kilograms. My God, is that silly? Six kilograms.

If you were to take all of the stuff that we’ve debated about -- and this doesn't go back to 2004, it goes back to 1998. If you were to take all of the public record on this, and excise the word ‘mercury’ out of it, and give it to John or Jane Doe, they’d say, “What are you

folks doing? This is nuts, get on with it." Thank you.

CHAIRMAN MULLER: Thank you, Chuck. Just remember you have to come back up on your item.

[Laughter.]

MR. WARE: I know, there's a certain risk.

CHAIRMAN MULLER: Well, we're going to have a lot of -- a number of comments. But, again, as I stated earlier, I'd like you to -- you know, Staff to be prepared to summarize very briefly some of the comments. I don't want to continue, and I want to remind us we're working on the remand, and we've got to be careful we don't get too immersed in the permit process, I think. That's from my perspective at the moment. Clifford?

MR. WALDECK: I just have a couple of quick questions. I understand what -- that having individual permits makes it so violators that go over what their

individual permit is can -- that enforcement can be made against them. In this group permit, if the group goes over a certain point, tell me how that enforcement works, and can third parties make enforcement against the group?

MR. WOLFE: Well, one, as it’s written now, there’s nothing in there that limits third parties pursuing enforcement against the individual waste load allocations to individual effluent limits at all. And what it says now is that -- and this is somewhat revised from 2004, but it says “if any aggregate mass limit is exceeded, the Water Board will pursue enforcement against those individual dischargers whose mass discharges exceed their individual mass limit.”

In other words, we’re clarifying that if that aggregate mass limit of 14 then 11 is exceeded, we'll look at those who exceed their individual allocations as the people to go to first. Because they're most likely the

culprit, and they're most likely the ones who can achieve some improvement in performance.

Later, then, we have added language in response to all these discussions to try to clarify, really, what our expectations are through this trigger approach. And we say, the Water Board -- in this new language, “The Water Board will pursue enforcement action against dischargers that do not respond to exceedences of triggers, or do not implement reasonable actions to correct and prevent trigger exceedences.”

So, nothing here limits that enforceability of the individual effluent limits. The approach we’re taking in permitting, when we say a watershed permit, is that in my mind to get this into permits quickly -- because recognize that once you do the TMDL, then to implement that, that has to be in some Board action. And we could go back and amend each individual 60 permits, which we don’t want to have to do. Or, we can do it all at once as a blanket permit amendment, and that would be our

goal to do that and say, “Here’s the waste load allocation for the waste water, here’s -- based on the table in here -- what each individual named permittee is to achieve under this scenario of first 20 percent and then for the smaller group, the 40 percent. Here’s what we will do if that aggregate mass limit is exceeded, and here’s what we'll do if there’s exceedences of the triggers.”

And so in my mind, this is quite clear. I think where the issues come up with EPA is we’re just looking back at their June 2004 letter, that EPA picked up on a phrase that we had in the Staff Report in 2004, where we said “If the annual load exceeds the group mass limit, we will consider enforcement against those facilities.” And that term ‘we will consider’ was a red flag to EPA, saying, ‘whoa, we want to make sure there is enforcement. Don’t just consider it, do enforcement.’

So we're spelling out what that enforcement is. So later, in this same letter it says, "We see the Board's statement that it will consider enforcement if the group limit is exceeded as an articulation by the Board of its own enforcement discretion. And we emphasize that this must not be intended or construed as a bar to the enforcement of individual limits at that time by others, including EPA." We agree.

And then it says, "We look forward to discussing and working with you on specific watershed permit language concerning this important issue." We agree. So, I think there's consistently throughout. I think this is maybe a two-year-old semantics issue. As the waste water people say, they fully recognize that these are enforceable, there's nothing in here that precludes enforceability. We're trying to be as specific as possible, but we recognize that we still have to go through writing this permit, to make sure everybody's on the same page.

MR. WALDECK: And this is the bigger picture. If we adopt the permit in and of itself, does -- as the Staff has written it up, does this exclude third parties from enforcement? Because if I'm a third party, and I see this as language that precludes me from being part of the process, because I'd be extremely concerned about it.

MR. WOLFE: Well, I recognize your concern, and I recognize the concerns of the third parties. But as Tom mentioned earlier, that when we adopt this permit, it must be legal, and EPA's going to hold us to that. And we know, going through the permit process, they will be looking at the language. Everybody will be looking at the language to make sure it's legal. Nothing in here precludes that third party suit.

CHAIRMAN MULLER: And along that line, Clifford, if I may jump in here, did EPA not say we were technically and legally approvable and sound in their letter?

MR. WOLFE: Well, essentially what they're saying the issue is to them, is the water quality objective and the TMDL. And saying that, remember those individual waste load allocations need to be coupled with individual effluent limitations that need to be enforceable. And we're saying, yes, we recognize that. And they're saying, we're going to be looking at that closely in the permit process. And we say, yes, we recognize that.

CHAIRMAN MULLER: Right. Because I don't want to have double-talk from EPA. I want it on the record that they've said already that it's technically and legally enforceable, is that correct?

MR. WOLFE: Yeah.

CHAIRMAN MULLER: Okay. From my perspective that's fine. Continued discussion here. Shalom?

MR. ELIAHU: Just one last thing I want to say.

CHAIRMAN MULLER: And then I want you to summarize for us.

MR. ELIAHU: First off, they did an excellent job and should be commended. We should not waste more time. I think we should approve that order as is. All the discussion today is centered on 1.7 percent of total load, 1.7 percent. I think also, the reduction that we made from two years ago -- which is, what, six kilograms, it’s only about half a percent of the total load. It’s insignificant and I don't think has any impact on the health of the Bay.

CHAIRMAN MULLER: Mary?

MS. WARREN: Thank you very much, Mr. Chairman. First, I would like to compliment the Staff. I think they have done exceedingly outstanding work on this issue. No one’s going to quarrel that mercury isn't a major issue in our society here, particularly here in the Bay

Area. It's a health issue, it's an issue that will continue until we can correct it.

I, too, remember two years ago when this issue came up again, before. I think it's just a rehash of that, with maybe some new language in it, but not any major changes. And Mr. Chairman, I'm prepared at this time to make a motion for approval of Staff's recommendation.

CHAIRMAN MULLER: Let me just ask for a little point of clarification. If we do have a motion and a second, and we go to discussion, we could still refer to Staff for discussion, is that correct?

MS. WON: I would recommend that you entertain all comments prior to entertaining motions.

CHAIRMAN MULLER: Thank you.

MR. MUMLEY: One point of clarification.

CHAIRMAN MULLER: Excuse me. She, have you made the motion?

MS. WARREN: No, I said I'm prepared to make the motion.

CHAIRMAN MULLER: Oh, okay.

MR. WOLFE: But not doing it quite yet.

MR. MUMLEY: So I'm saying we have an obligation to present responses to new comments heard today for the record, that will be part of our brief recap of what you heard today, so you're fully -- that's on the record that you considered not only comments, but as necessary our responses that lead to you to, if you so desire, to -- so when you're ready, we're prepared to do a quick recap that would respond to any new comments that otherwise weren't already responded to in our general package.

CHAIRMAN MULLER: And Mary and Cliff, do you understand where we're going?

MR. WALDECK: I would like to hear -- I saw a bunch of back and forth between Dyan and Tom and Yuri, and I'm not -- and I am looking for something added. And I'd like to see what Staff has to say. I know at the very least we will add current -- what is it that Mr. Kelly said, current performance being put into the -- in the interim now?

MR. WOLFE: Well, I actually think he said we were talking about going to lunch.

[Laughter.]

We have looked at some possible language, but I guess to me -- and I can summarize, really, where the points that seem to be still in contention that you've heard this morning, where we are on those, and make some suggestions.

MR. WALDECK: I would like to hear those before we make a vote.

CHAIRMAN MULLER: I agree. I would like to also throw in there, if the Board decides to move forward, or whatever direction the Board gives this TMDL, is there ever a crack in the door to work with the State Board staff and our staff? Or does it pretty well seal it up to the direction that we're sending it to on the TMDL? If there's a need.

MR. WOLFE: Well, as Yuri commented --

CHAIRMAN MULLER: Because I don't want to lose --

MR. WOLFE: When it goes back to the State Board, in effect, a second time, they do have broader discretion now, to a certain degree, then they need to address that in the public notice. And potentially, depending on how significant any augmentation changes, they may need to go through the CEQA process. Because to a

certain degree, we are running up against the fact that if we try to make broad-brush changes, we have to recognize what was in our CEQA process, what was in our public notice, have all parties had an opportunity to comment.

CHAIRMAN MULLER: Thank you.

MR. WOLFE: There is some leeway, but it’s not unlimited.

CHAIRMAN MULLER: Okay. I think the Board’s ready for Staff’s summary.

MR. WOLFE: Before we talk about the enforceable limits issues, I’d say two other themes you’ve heard from some of the commenters include the issue about risk reduction. As Mike Conner commented at the end, Dr. Kyle is making progress on the risk reduction study, sort of putting the issue in context and determining the next step. And what I would recommend on that is,

rather than make any further change to the Basin Plan Amendment, that this is something that we can continue to address, but address it outside of wording. And that I'm committed to bringing an information item back to the Board, initially this fall, and then as needed to first say where we are with the work that Dr. Kyle is doing and what that implies for our next steps, and what we should be doing as Board Members have said -- working with multiple agencies to recognize that we're not the only game in town when we look at risk communication, risk management, risk reduction.

And so I would recommend that the way to address that issue is to have continuing dialogue in a public forum with the Board on that, look for ways to move forward. But also recognize that we do have language already in the Basin Plan Amendment that focuses on the need to address risk management and risk reduction.

This issue about mercury and crude oil has continued to flare up, and as Kevin Buchanan reported, that WSPA is

pursuant to the 13-267 letter I issued in early 2005, will be reporting back to us in October on their progress and their next steps on their air deposition study. And so my recommendation is to make no change to the Basin Plan Amendment, because in my mind it’s very clear in the Basin Plan Amendment that we are going to move forward to address mercury and crude, and we have. And that we'll report back -- once we have this WSPA report, we will report back to you, again, in an information item with both where we are, what we’ve done pursuant to 13-267, and what are the next steps. And, really, is there in our view a need to either have a new 13-267, modify our current request, or really where we go from there.

And I don't think there’s really any need to, in the Basin Plan Amendment, make any further change. But that’s something we can address.

In the enforceable limits, I think it’s come down to sort of two themes there. One is the discussion about,

as Clifford said, should we include something in here that makes current -- which we've been calling interim -- current limits that are based on current performance, make those enforceable during the first 10 years. And then the second is to make sure that there's nothing in here that precludes third party suits.

Towards the second point, I would say there is nothing, as I commented, that the two areas where we do talk about our enforcement approach, do not preclude that third party suit, but just give direction as to how we will frame the enforcement. And again, this is something that actual wording in the permit has to be done as part of the permit process. So I don't think there's anything further that is needed or appropriate for the Basin Plan Amendment.

Then it comes down to the issue about having, using the 'interim limits' that are in current permits as enforceable limits. And I think Staff has been looking

at a language that we could add -- a sentence to the municipal waste water and to the -- I think to the industrial waste water section that would say that. And you had some suggested language?

CHAIRMAN MULLER: So why don’t we do this, from my perspective -- Bruce, you're kind of cleaning it up here. We'll let Tom, and I’d like Dyan and Carrie to just make some brief comments because of the importance of this matter.

MR. MUMLEY: Okay, and I will end with the issue of enforceable limits. So my general overview of -- reflecting on all the comments received, essentially all of them are restatements of comments that are already in the record, and therefore our existing responses to comments covers them. And those include such things from ranging from actually the enforceability of the limits themselves, the timeframe for implementation -- that’s an explosive issue that we have addressed in the record. Such issues as

individual waste load allocations, the legacy sources, air depositions, all those are addressed in the record.

We even addressed issues raised by Michael Weil and we respectfully find that his analogy about the speed limit was a very poorly-defined analogy. We addressed that, actually, in our response to comments already. And though we believe that we have been consistent in our communication, in terms of how things will be played out, I thought we've been very frank with all parties about what we can or can't do. So I was a bit troubled with his assertion that he's hearing two different things from counsel and from me or my staff. Because I think we've been consistent all along.

There are issues regarding risk reduction, risk management. We also feel that we have thoroughly addressed it. Dyan is really my go-to on this one, and I would appreciate a couple perspectives on that.

So the only issue that I think we need to respond to that’s been raised today that hasn’t been raised before is the suggestion that you add a new component to what already is a three-component scheme to implement the waste load allocations. That new component is maintaining existing limits as an enforceable limit. And I will come back to and explain what may be our response to that for your consideration.

MS. WHYTE: Dyan Whyte speaking. Just to add a little bit more. I think we all at the Staff feel very good about the response to comment documents. It really does reflect a lot of thought and energy that went into this, and numerous discussions that I've had with the parties, going through word by word, and looking at word changes. And really trying to understand the intent behind their comments and how we could get at that.

In the area of risk reduction, I feel like this is one of the areas we’re really moving forward on. And maybe

there’s semantics out here. My reading of this Basin Plan Amendment, are there risk reduction tasks associated with all our key dischargers. There is a statement that was made, ‘well, maybe they're not all at the table.’ Well, they're at the table because the CEP is taking the lead on that. And while they may not be at every meeting, they are supporting the CEP, and supporting the actions coming out of the CEP.

We’re also moving to think about how that in part could be incorporated through the RNP and other collective mechanisms such as the JPA that we talked about earlier today. So, we’re making strides forward.

At some of these meetings I sit on the committee for the risk reduction group for the CEP. They are bringing in local entities. We’ve talked about things like going to fish frees, small-scale pilot projects, drama plays in high schools to get at this issue. We’ve been working closely with nursing staff in the counties. We did a lot of work in Marin County.

What I think the issue is that you're hearing about that’s really hidden in there, is the concept of mitigating for health effects. Because all the dischargers are tagged with the concept of working towards risk reduction. And Carrie highlighted this in her presentation.

What does mitigation mean and how does one go about paying for that? And the State Board brought up the issue and they brought it up specifically in the context of the Regional Board authorities to require mitigation. It’s unclear.

What we’ve done is we’ve added that into the text for a collaborative approach for agencies and dischargers to work together to investigate ways to reduce risk, and to mitigate health effects. What we haven't done is put forth a requirement in NPDES permits to require dischargers to mitigate for those effects, because at this point we don’t know how to mitigate, and we don’t

know what effects are tied possibly with what discharger.

So it’s really, you know, a gray area in the law where we feel uncomfortable moving forward, but yet there’s certainly a willingness to investigate that with some good expertise behind it so we can evaluate that.

So I feel very comfortable we are on the right track there, and making great strides forward. And I just want to make that clear. Because it’s really semantics and details there that I think may stop us from moving forward on the effort that we have going on, just so we can further debate what mitigation means, when we’re not even there yet.

The other thing that’s in there is we’ve made a number of changes in relation to mines. It was a minor change, but I just want to tell you, we will be coming back before the Board to give you an update on the progress made on mercury mines. We’ve had Staff going

out there, we are inspecting, we are prioritizing. I've been working on the mines issue in this region for many years, and as you know, for some sites we've made great progress.

From our analysis there's no more smoking guns out there. We have a lot of legacy problems related to mining waste downstream of mines. We have a few small problems out there that we've identified, and we're moving forward on those. Little, bitty mines owned by a property owner in Brazil that we're looking at the facility, and trying to figure out if indeed mining waste is coming off, but it's hard to tell from the photos we have. We're gaining property access, we're talking to folks, but these are small-scale facilities. The big ones have been taken care of, and most of the mercury has been released from there.

So I feel really good about the Board's effort along those lines, and the language that we've added here is really just to say we're going to keep working on that,

and as part of our adaptive management program we're not going to let it drop through the cracks. When we review this TMDL, we're going to make sure that even those small mines have been taken care of. So that's a little bit more from the perspective of the work that I've been doing in the background here.

CHAIRMAN MULLER: Carrie, did you have a brief comment, or are you comfortable with -- Yuri, did you have a brief comment? Okay, Tom, you can conclude, or Bruce,

MR. WOLFE: Well, in consideration of looking at how we might address this enforceability of limits and incorporate the idea of having something included that could make sure that in the permit we include that enforceability theme of the existing limits. Rather than try to, on the fly, put language into the Basin Plan Amendment, my recommendation is to include in the resolution that adopts the Basin Plan Amendment a further 'be it further resolved' that describes how we will do that in the permitting, so that the Board is on

record that that should be a component of the permit. And that, at one hand, does not -- or that makes it so we don’t have to worry that we have some inadvertent change to the Basin Plan Amendment that we didn’t consider on the fly, but at the same time the Board has a chance to go on record saying that that’s the direction it wants to take.

As we try to tweak some of that language, one suggestion might be, knowing it’s coming close to lunch time, is for you to take a lunch break and we'll come back immediately right after the lunch break with the recommended language for that, if that’s the Board’s pleasure. Or, if you want us to plow through before lunch, we could do so.

CHAIRMAN MULLER: Ms. Deluca?

MS. DELUCA: Yes, I was going to ask Tom, were you going to talk about maintaining the existing limits as permanent? Were you going to answer that? I felt that

you weren’t prepared to -- I thought you were going to do that following Dyan’s comments.

MR. MUMLEY: Well, Bruce, that’s what Bruce was just doing. He’s taking my cue as far as exploring the options that we have to deal with that. And so, yeah, we’re suggesting that rather than changing the Basin Plan itself, we could have you make a statement, basically into the record via the resolution that there’s -- that nothing stands in the way of incorporating performance-based effluent limits in the permit process.

As we’ve already talked about, the process can allow for that. So while they're creating the process by changing the Basin Plan Amendment that’s -- let’s just use the process that already exists.

CHAIRMAN MULLER: And I personally feel -- excuse me, Clifford -- I think this is pretty intense, I don't want to break. I personally want to conclude this, and

then we can break, okay? If we break it's going to be like a shotgun, we're going to be out there scattering all over the place. So let's conclude it. Clifford, I'll go back to you. But I just want to make sure everyone knows I'm not going to break.

MR. WALDECK: Okay. I'm confused. Our resolution, where is that? Is that in the Board packet? Because I get confused, because there's another --

MR. WOLFE: Right. Your package -- and I'm even getting it confused here -- behind your green sheet, Appendix A, Tentative Resolution and Proposed Basin Plan Amendment that shows changes since September 2004. So what essentially your action today would be, is to adopt the resolution that's right after, that basically says right off the top that the Water Board adopts the Basin Plan Amendment as set forth in Exhibit A.

And then that's what is right behind that, the Basin Plan Amendment that amends the mercury water quality

objectives for the Bay, and vacates the existing 4-day mercury water quality objectives. And then it directs us how to proceed.

And so my suggestion is that where we say, “Now therefore be it resolved,” that we could add a “Be it further resolved” that provides direction that we are going to.

CHAIRMAN MULLER: What page and paragraph?

MR. WOLFE: This is in the Tentative Resolution.

CHAIRMAN MULLER: Appendix A here.

MR. WOLFE: In Appendix A. This would be the lower part of Page 3, is the “Now therefore be it resolved” section.

CHAIRMAN MULLER: Okay, right.

MR. WOLFE: So that we can add a “Be it further resolved” and that’s what we’re trying to narrow down language that would be appropriate to say, that we would recognize that existing performance-based mercury limits in existing NPDES permits shall be continued as enforceable effluent limitations.

CHAIRMAN MULLER: Okay, Clifford?

MR. WALDECK: So --

CHAIRMAN MULLER: Try to stick with this one. I don't want to get off of this one. Thanks.

MR. WALDECK: No, no, no. I’m not getting off of this one. “Current limits as fully enforceable interim limits.” So we’re doing that there, right? And third party enforcement, I still don’t quite understand. And also, just to -- and also with the 13-267 letter, I would highly encourage Staff to agendize that particular item, you know, for a Board meeting going

into the future if it’s not appropriate to put into this Board hearing.

MR. WOLFE: Right. That’s essentially my recommendation, is that once we get a report back from WSPA in October, then I would put on the agenda an information item where we’d go over this. And as part of that, it’s within the Board’s discretion to direct me to issue a new 13-267 letter if appropriate, or to consider that issue.

MR. WALDECK: Just one -- and I swear, this is my final one --

CHAIRMAN MULLER: It’s never your final one.

MR. WALDECK: If the mass limit is 20, and everybody in the group is doing such a fantastic job that it’s actually at 19 or 18, but in fact it would be a 12 if it wasn't for Muller discharging -- having, you know,

six instead of his two -- is there anything that -- I mean, would we be powerless --

MR. WOLFE: I know where he lives, so we'll be all over him.

MR. WALDECK: I mean, if Muller went from two to 2.1, I wouldn't be concerned, you know, with mass abuse here.

MR. WOLFE: Right.

MR. WALDECK: But if Muller went from two to six, and everybody else was a good actor, we can’t do anything about Muller?

MR. WOLFE: No, we definitely can. And that’s the flavor that we would. One, I guess there’s two points to that one. And in our direction, the language that we had added in there, we’re trying to -- with any violation, even as I commented earlier today on Cargill, we first try to address the situation and get it stabilized. And

then we go through and investigate and try to determine appropriate enforcement action.

Unfortunately, that takes time. Today we were only considering an ACL for Cargill in August ’06 for an action that happened in June ’05. In my mind, the benefit of having this definitive language in the Basin Plan, basically says if you exceed that trigger, boom. This is what you do. You start tomorrow doing this, and if you don’t do this, we’re going to be all over you.

At the same time we’d be looking at the circumstances of that. So if it went from two to six all of a sudden, we’d be saying, “Whoa, what’d you guys do?” And as one of the members of the waste water community pointed out in some of our meetings, there’s no such thing as a mercury control dial at the plants. It’s sort of all, the whole plant, operation.

So if they went from two to six in mercury, there’s probably big-time other problems at the plant that we’re going to be jumping all over. And to make sure that they're addressing all of those. We can’t look at mercury or some of the other issues later this afternoon -- copper is one that will come up. We can’t look at these as saying, “Oh, you haven't done everything you can on copper.”

No, it’s addressing what comes in through the plant, making sure that you have a robust day-to-day operation that has constant control of all aspects. You can’t always define what’s going to come into the plant. But you can make sure that you're operating the plant efficiently, maintaining it effectively. And if you're not, we always, throughout the history of this Board, have been on top of dischargers who have been not implementing everything to the best of their ability.

MS. WHYTE: If I can add, just briefly, another subtlety of that which may clarify the definition. The

concentration triggers, concentration-based specifically because they do act as an early warning system. So that you can’t get from two to six at the end of the year and wonder how it happened. So, basically, if you're exceeding that concentration, then there’s a daily one and then there’s one for longer periods of time, then that’s telling us right then that there’s a chance that after we calculate those 12 months worth of concentrations, you're going to be above your load.

So we know right then and there that there are problems that may be brewing, and can be addressed there to hopefully prevent any exceedence of that individual mass amount. So that’s, again, why we have total mass on a yearly basis, and then concentration on smaller increments that we look at.

CHAIRMAN MULLER: Any other comments here? Margaret? Do you understand where we’re going here, Board? Yuri?

MS. WON: I talked to Tom about the language to add to the --

CHAIRMAN MULLER: Hold your mic up closer, please, Yuri. Thank you.

MS. WON: What Bruce read earlier, I don't think that it’s appropriate to say, you know, what the Board shall do in future NPDES permits in this resolution. So I would propose that we add language in the resolution that states that “be it further resolved the Water Board does not intend for the Basin Plan to preclude the Water Board from incorporating performance-based effluent limits in NPDES permits where warranted.”

And the idea is that, for example, if anti-backsliding prevents a relaxation of the limits, makes it --

CHAIRMAN MULLER: Hold the mic up, because I want everybody to hear this.

MS. WON: Okay. So the ‘where warranted’ language would be to get at the idea that anti-backsliding might prevent permits from not -- from having limits -- I’m thinking through this, sorry.

CHAIRMAN MULLER: That’s all right. You can rethink your thoughts there for a moment.

MR. WOLFE: Well, and she brings up a good point. Because we want to make sure there’s nothing in here that predetermines what a future Board action would be.

CHAIRMAN MULLER: I think that’s the key to it, is the predetermine.

MR. WOLFE: Right, right.

CHAIRMAN MULLER: Right. One more shot?

MS. WON: Sure. Okay, so the POTWs now are, they have interim performance-based limits, and the idea is not

to relax those limits based on anti-backsliding. And anti-backsliding might prevent the relaxation, and that’s the idea behind this ‘where warranted’ concept in this resolution.

CHAIRMAN MULLER: I think maybe we'll probably get into a difficult area if we start changing that around, would it not? If we start changing the ‘whereas’ and all --

MR. WOLFE: Well, that’s one benefit of putting this in the resolution, because it directs us, then, to address this as part of the permit. And we know -- once again, we know that as we go through the permitting process, we’re going to then have to be very specific on the wording. And that everybody’s going to be looking at that, and we’re at some point going to need to come back to approve the wording in the permit, once we’ve gone through the public process on that.

But this provides an opportunity for the Board to go on record that we are going to include the concept of the current performance-based limits in those permits. But we do have to make sure that it's legal --

CHAIRMAN MULLER: And we have to keep it simple.

MR. WOLFE: -- through backsliding and all these other considerations that the NPDES regulations require us to consider. And obviously we don't want to spell that out right here. But this would put the Board on record of saying, "When you bring us a permit, this is what you should consider."

CHAIRMAN MULLER: Margaret?

MS. BRUCE: Just for our benefit, Yuri, could you recap that 'be it further resolved' phrase?

MS. WON: "Be it further resolved the Water Board does not intend for the Basin Plan to preclude the Water

Board from incorporating performance-based effluent limitations in NPDES permits where warranted.”

MS. BRUCE: Okay.

CHAIRMAN MULLER: Okay. Yeah, and as Ms. Deluca just commented to me, she said “We’ve always done that anyway, have we not?” Essentially?

MR. WOLFE: I mean, that’s the bottom line to me, is the permit still has to come back through all of you. It needs to be consistent with NPDES regulations. EPA’s going to hold us to that, and we have no intention of trying to slip a fast one by anybody.

CHAIRMAN MULLER: Any other questions of Staff? I’d like to bring this to a conclusion here. I think we have someone’s -- well, we'll get Staff’s recommendation.

MR. WOLFE: I see Clifford waving his hand. But I think maybe he’s used all his points.

MR. WALDECK: Well, I --

CHAIRMAN MULLER: Don’t use my name anymore, because I do sit on the Sand Board.

MR. WALDECK: I do wish this was a city council meeting, where we could go back --

CHAIRMAN MULLER: This is not the city council, Clifford.

MR. WALDECK: -- on the consent calendar for the next meeting. Because two years ago, you know, I had kind of blind faith that, okay, well, there’s enough language in there to make it work. And I was proven wrong, we were proven wrong then. And I think in this particular case, I’m still not comfortable with it. Because, you know, I think -- you know, Staff had two meetings with the parties involved, and I just wish there might have been a third. I’m still not quite there.

CHAIRMAN MULLER: Well, again, I think it’s been more than two meetings, it’s been two years. Is that correct, Staff?

MR. WOLFE: Well, definitely. And even before, I mean, yeah, it’s definitely longer than that. And in my mind, I must say I’m -- I think we’ve come quite a long way. Even the various groups here admit that we have come a long way when we’re down to about three points. By and large, we feel we’ve addressed these three points and we’re to the point of certainly looking at semantics, and trying to see what we can come up with.

Something that provides the comfort today, but recognizing also that there’s still -- the biggest issues here are things, risk reduction, mercury and crude, we’re going to come back in front of the Board on as we implement those. And this enforceability issue is a permitting issue that we’re --

CHAIRMAN MULLER: I think I'll ask you for Staff recommendations.

MR. WOLFE: So the bottom line is, I would recommend adoption of the package as you have in front of you with one amendment, which would be the addition to the resolution. And Yuri, if you could read it one more time for the record, that we add to the resolution.

MS. WON: "Be it further resolved the Water Board does not intend for the Basin Plan Amendment to preclude the Water Board from incorporating performance-based effluent limits in NPDES permits where warranted."

CHAIRMAN MULLER: Does everyone understand that? If there's interest in a motion, and then we'll do discussion.

MS. BRUCE: Chairman Muller, I would so move that we adopt the Staff's recommendation, with the resolution as specified by Yuri.

MS. WARREN: Mr. Chairman, I would like to second that motion, and two, particularly thank everybody here today for the statements and comments that you made. And especially for the statements that we received from EPA. And with that, I second the motion.

CHAIRMAN MULLER: Okay, discussion please.

MS. DELUCA: Yes. I'd simply like to say that I have heard that the proposal is legally defensible and that the waste load allocations are enforceable. I heard from the Staff, and the scientists in particular, that there is no backsliding from current performance. And given the fact that this is an agency that is driven by science in conformance with the existing laws at both the state and federal level, I believe I can support this.

I know it's not perfect, but this isn't a perfect planet. And I have assurances from everybody sitting in front of us that we will continue working toward

that goal with each of the permits that come before us. So I think that is very reassuring, and I thank you for this remarkable piece of work. The science that’s gone into it, and the legal analysis that’s gone into it is really remarkable, and you're all to be congratulated. Thank you very much.

CHAIRMAN MULLER: Further discussion? Clifford, Margaret? Shalom, Mary?

MS. WARREN: Call for the question.

CHAIRMAN MULLER: I’ll make a comment first, please. I think, again, as Ms. Deluca always eloquently states, everyone has worked really hard on this. And I view it as the number of visitor passes I've had at CAL-EPA regarding this mercury issue. So we have been working on it, and I think we have come a long way from two years ago when we were told to come back.

And I appreciate the direction. We might not have agreed at the time, because we thought we had a pretty good amendment, but it looks like to me it's better. And so I thank everyone involved. And again, it's not perfect, but I think we're starting in the right direction. And the main thing is we've lost two years of implementation, in my opinion, for doing a better job for the communities out there. And so that's just a comment that I would like to make. And I'll call for a roll call vote, please, Mary.

CLERK: Mrs. Bruce?

MS. BRUCE: Aye.

CLERK: Mrs. Deluca?

MS. DELUCA: Yes.

CLERK: Mr. Eliahu?

MR. ELIAHU: Yes.

CLERK: Mr. Waldeck?

MR. WALDECK: No.

CLERK: Mrs. Warren?

MS. WARREN: Yes.

CLERK: Mr. Muller?

CHAIRMAN MULLER: Aye. So ordered. So, at this time we will take a -- hopefully a 30 or 40-minute break, because the community is here for other permits. So by one o'clock or so.

[END OF TESTIMONY ON ITEM 7.]

CERTIFICATE AND DECLARATION

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I hereby certify that I am a disinterested party in the above-captioned matter and have no interest in the outcome of the interview.

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