

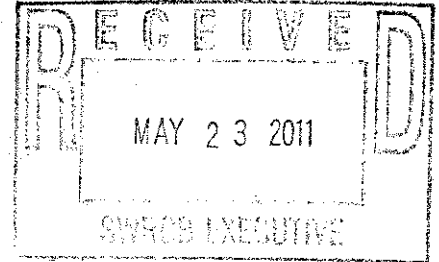
 **CLEAN WATER ACTION**
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May 23, 2011

Ms. Jeanine Townsend
Clerk of the Board
State Water Resources Control Board
Post Office Box 100
Sacramento, CA 95812-2000

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Re: Proposed Delta Methylmercury TMDL/Basin Plan Amendment



Dear Ms. Townsend and Members of the State Board,

On behalf of Clean Water Action (CWA) and our 85,000 California members, I thank you for this opportunity to submit the following comments on the proposed methylmercury total maximum daily load (TMDL) for the Delta and the amendment of the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (referred to herein as the 'proposed BPA'). We wish to begin by recognizing that addressing one of the most dangerous and widespread contaminants in the watershed is both complex and difficult. While there are positive aspects of this plan, particularly the methylmercury emphasis, we do have concerns about the proposed BPA that are serious enough that we cannot support it, despite our desire to move forward and begin addressing this critical environmental problem.

Because the Central Valley Regional Water Quality Control Board (Regional Board) states in their Resolution R5-2010-0043, that this TMDL is the result of a stakeholder process that included environmental and environmental justice representatives (Bullet 28, page 5), we are obligated to begin by informing you that the proposed BPA does not represent a consensus of all stakeholders, especially those most impacted by methylmercury in the Delta and in Delta fish. While we recognize that the Board's decision to establish a public stakeholder process may have been well intentioned and that Staff did attempt to be inclusive, the result was in fact a discharger and government agency (some of whom are also dischargers) driven process. For this reason, we specifically requested that the Regional Board remove this reference from their Resolution out of respect to those who were not able to fully engage in the process. This, as you see, did not happen.

The reality is that community groups are outnumbered by and cannot compete with dischargers and agencies that have dedicated personnel and even budgets for such time intensive processes, held solely in one part of the Delta that is inaccessible to many living in this geographically broad region. An attempt to overcome these problems by holding phone meetings specifically with community groups, while again well intentioned, in fact isolated their concerns and comments, as opposed to integrating them into the larger discussions by the stakeholder group. In addition outreach to tribes, who bring both unique expertise and needs



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to this process, did not happen until late 2009, meaning that they were left out of the development of the current BPA draft. This is not merely an egregious oversight, but does not comply with Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments, November 2000, http://www.usace.army.mil/CECW/TribalIssues/Documents/eo_13175.pdf)

Weaknesses of the proposed TMDL

In the end, what is most important is the development of a TMDL that will reasonably address the mercury contamination in the Delta, and return the watershed to its beneficial uses. We applaud the Regional Board for focusing on methylmercury. The following is a partial list of our concerns with the proposed BPA in its current form.

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

CWA has consistently, over the years, opposed a fish tissue target in this TMDL that will limit safe consumption of Delta caught fish to one meal a week. The purpose of the TMDL is to remediate the Delta to regain and protect its beneficial uses. The Clean Water Act does not condone only protecting a portion of these beneficial uses or only part of the population that takes advantage of them. Instead, the goal is to protect all populations and provide a clean, safe environment, including the low income communities and communities of color that tend to have higher levels of subsistence fishing.

The proposed BPA even recognizes this responsibility by admitting that "the long-term goal of the mercury program is to enable people to safely eat four to five meals per week (128-160 g/day) of Delta fish (BPA, page 2)", yet the proposed BPA's objective remains at 32 grams/day (one meal a week) of trophic level 3 and 4 Delta fish, plus some commercial fish. This objective is not valid because it is based on averages taken over a large population and ignores the significance of variations of fish consumption within that population. CWA further disagrees with Staff's contention that meeting a more stringent fish tissue target may not be achievable or measurable. Measurement capabilities have, and will continue to improve over time. More importantly, because understanding of how to control methylmercury (the focus of this TMDL) is also expected to grow over time, we believe that reducing fish tissue levels to allow for subsistence fishing, is in fact achievable, as opposed to if we were relying on eradicating total mercury contamination in the watershed. In the end, by ignoring the rates of subsistence fishing in the Delta the proposed fish tissue target is discriminatory, does not set a goal reflective of the watershed's true beneficial uses, and does it comply with the intent of the Clean Water Act.



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For these reasons, CWA advocated for adoption of Alternative 5 outlined in the Staff Report as the fish tissue target of this TMDL -- 128-160 g/day of Delta fish—which is in line with the US EPA's recommendation of a rate of 142.4 grams/day and is closer to actual fishing practices in many of the region's communities. We also called for the inclusion of a subsistence fishing designation as a beneficial use for the Delta and the Native American Cultural (CUL) use, in recognition of the communities who rely on such practices to provide basic nutritional and cultural sustenance for their families. We recommended this over the COMM designation suggested by Staff for recreational fishing¹, as it best characterizes the true beneficial uses of the Delta and would protect both recreational and subsistence fishers.

The Regional Board has argued that it will review the possibility of attaining a more stringent fish tissue target over the course of Phase 1 of the Control Program. CWA strongly contends that the needs of subsistence fishers should be reflected in the TMDL and implementation plan now, given that beneficial are not dependent on what the Regional Board believes at present is attainable. If, however, the State Board chooses to adopt the BPA **we strongly urge the State Board to hold the Regional Board accountable by requiring them to provide a scientific basis for conclusions that attaining a fish tissue target allowing safe consumption of 4-5 meals a week is unrealistic and to adopt a more stringent target upon State Board review of Phase 1.**

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

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

¹ http://www.waterboards.ca.gov/centralvalley/water_issues/basin_plans/sacsjr.pdf



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levels in the Delta over the next decade but also threatens to delay implementation of reduction and mitigation measures pursuant to the San Francisco Bay mercury TMDL.

The proposed BPA also permits the Executive Officer undue discretion to extend the duration of mercury control studies beyond nine years in the event it is determined that dischargers are making significant progress (BPA, page 8). Significant progress is not defined. Furthermore, the proposed BPA actually incentivizes delays by stating that dischargers will not be required to implement methylmercury controls before the Board has reviewed the Phase 1 Mercury Control Program and developed upstream control programs for tributaries (BPA, page 3). This could delay implementation beyond the nine year study period, thus extending the threat of mercury exposure to both humans and wildlife.

Nine years is more than an adequate amount of time to develop methylmercury control strategies and should be rigorously enforced. Furthermore, the Executive Officer should also retain the authority to require appropriate best management practices for methylmercury and/or other methylmercury controls at any time during Phase 1 as appropriate. **We urge the State Board to require the Regional Board to clarify the responsibilities of dischargers during Phase 1 to reduce total mercury loads by harmonizing the proposed adoption resolution with the actual BPA and assigning load allocations to all dischargers. The State Board should also require establishment of a process to enable dischargers whose studies demonstrate effective methylmercury controls to begin meeting their methylmercury allocations in advance of Phase 2 when appropriate, and publicly recognizing their achievements as an incentive for them to move forward in as expedient a manner as possible. Finally, we ask that the State Board discourage any extension of control studies beyond the 9 year deadline and to require the Regional Board Executive Director to allow public oversight and comment on any such extension when contemplated.**

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

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

The BPA also includes the development of a Technical Advisory Committee (TAC) of "independent experts ...to provide scientific and technical peer review of the Control Study



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

We ask the State Board to instruct the Regional Board to enhance true public input and participation by specifying that the TAC will include tribal and other community and public interest representation. In addition, all TAC meetings and documents should be public and allow for public comment. Finally, final approval of Control Study Workplans should be delegated to the TAC, following public comment.

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

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

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



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and managed wetlands shall develop and implement mercury and/or methylmercury monitoring, and submit monitoring reports" (BPA, page 17).

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

Finally, it is not possible to determine the appropriateness of the wastewater methylmercury allocations. Table B (BPA, page 20) provides a list of the load allocations assigned to each municipal and industrial wastewater facility, but does not indicate what the current load is. Consequently, it cannot be determined how much a reduction, if any, is being required.

While we recognize that enforcement can take a variety of forms depending on circumstances, the BPA needs to provide the public with assurances that its requirements will be enforced to ensure that remediation activities will in fact move forward in a reasonable time period. We therefore recommend that the State Board require the Regional Board to document, at least in general terms, their enforcement strategies, particularly in regard to non-point sources, and make current wastewater load allocations publicly available.

5. The BPA inappropriately allows offsets during Phase One

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

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



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that since this is a methylmercury TMDL, offsets should focus on reducing methylmercury loads and that pilot offset projects should not occur during Phase 1 as stated in this draft.

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

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

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

We ask to the State Board to instruct the Regional Board to not approve offsets during Phase 1. We ask the State Board to further specify that if an offsets policy is developed for Phase 2, it will be done through a public process that is accessible to impacted communities and is approved by the State Board, focus on reducing methylmercury loads in line with the TMDL, and prohibit pollution trading that allow one discharger to sell or trade credits to discharge total or methylmercury into the watershed.

6. Exposure Reduction language recommendations

CWA appreciates the efforts by Staff to include language to clarify responsibilities of dischargers to support and help facilitate the development of interim exposure reduction strategies to protect subsistence fishing populations over the time the TMDL is being implemented (directed by the State Board in Resolution 2005-0060). **We encourage the State Board to request full reporting during Phase 1, on the progress of these efforts.**



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

Sincerely,

Andria Ventura
Program Manager, CWA