Public Comment
Statewide Mercury Policy-CEQA Scoping
Deadline: 03/30/12 by 12:00 PM

PSSEP
Partnership for Sound Science in Environmental Policy

March 30, 2012

RECEIVED
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SWRCB Clerk

State Water Resources Control Board
c/o Jeanine Townsend, Clerk
1001 "I" Street, 24th Floor
Sacramento, CA 95814

Sent via email to:
commentletters@waterboards.ca.gov

Re: Statewide Mercury Policy – CEQA Scoping Comments

Dear Ms. Townsend:

The Partnership for Sound Science in Environmental Policy (PSSEP) presents these comments for State Water Board staff consideration as it continues its efforts to develop a Statewide Mercury Policy and Mercury Control Program for Reservoirs. PSSEP is an affiliation of public agencies, private companies and trade associations who support the adoption and implementation of reasonable environmental regulations that are based on sound, objective science.

PSSEP was organized in 1999 and was substantially involved in the development of the San Francisco Bay Mercury TMDL developed by the San Francisco Regional Water Board. Many of our members are currently complying with Watershed Permits that implement the SF Bay Mercury TMDL, and thus have a direct interest in the State Board's development of the Statewide Mercury Policy. We have the following comments for State Board consideration as it pursues a Statewide Mercury Policy.

1. The State Board's Effort to Develop a Statewide Mercury Policy Must Avoid Conflict With Existing Mercury TMDLs.

In the case of the San Francisco Bay and Delta Mercury TMDLs, thousands of hours and millions of dollars were dedicated to the final products. Regulated parties in the Bay region have been complying with permits based on the mercury TMDL for several years. It is unlikely that any policy to address mercury on a statewide basis could possibly improve upon the existing TMDL, which is carefully tailored to fit the circumstances of the San Francisco Bay region, and for that reason, PSSEP strongly urges the State Board to ensure that its Statewide Mercury Policy does not conflict with the SF Bay Mercury TMDL.

It stands to reason that most, if not all, of the other mercury TMDLs completed for specific watersheds around California have also been developed after many years of

Regional Board and stakeholder efforts, and at substantial cost. Unless the Statewide Mercury Policy is premised on new or better information than those individual mercury TMDLs, it makes little sense for the TMDLs to be superseded by a more general policy to be developed by the State Board.

For these reasons, PSSEP respectfully requests that the Statewide Mercury Policy specifically exclude from coverage those waters for which adopted and approved mercury TMDLs are in effect.

2. Fish Tissue Standards Included Within the Statewide Mercury Policy Must Be Carefully Tailored to Specific Watersheds And/Or Specific Fish Species.

PSSEP supports the concept of developing appropriate fish tissue standards against which progress can be evaluated after mercury control measures are implemented. PSSEP also recognizes that developing an appropriate fish tissue standard can be both complicated and controversial. It is vitally important that whatever fish tissue standard that is ultimately selected by the State Board be cognizant of disparate fish consumption patterns, as well as disparate fish species around the state. PSSEP is concerned that adopting a "one-size-fits-all" fish tissue standard out of expediency would undermine the credibility of the very standard itself.

When one considers that any fish tissue standard adopted by the State Board would likely be used to establish water quality objectives for municipal and industrial dischargers, and that such water quality objectives may require dischargers to adopt costly new treatment regimens, the need to show a close nexus between the fish tissue standard and anticipated control measures is vital. In the context of TMDLs, federal regulations require that an adequate linkage analysis be included in any TMDL. A linkage analysis is the conceptual and quantitative connection between pollutant sources and the impairment(s) that the TMDL intends to protect. A verifiable linkage between proposed control measures and actual reductions in fish tissue levels for mercury must be established to justify expensive control measures on local governments and businesses. We see no reason why a Statewide Mercury Policy should not also be supported by a rigorous linkage analysis.

3. The Statewide Mercury Policy Must Include a Viable Offset Approach In Order to Achieve Realistic Mercury Reductions in Fish Species.

PSSEP has long supported the use of "offsets" to enable regulated parties – who are typically very small contributors of mercury loading to most of California's waterways – to meet requirements which may be imposed via NPDES permits that are intended to achieve water quality objectives. Beginning during the development of the

San Francisco Bay Mercury TMDL, PSSEP promoted the use of offsets as the most viable means of achieving potential reductions in mercury from San Francisco Bay and the Sacramento-San Joaquin Delta watershed. We continue to support an offset approach, and urge the State Board to include one in its Statewide Mercury Policy.

Over five years ago, the State Board initiated public "scoping meetings" to take comments on a proposed Mercury Offset Policy, which the State Board had committed itself to in remanding the San Francisco Bay Mercury TMDL to the Regional Board for reconsideration. PSSEP and many other interested parties participated in those scoping meetings, and generally supported many of the approaches outlined in a staff "Informational Document" describing the effort. Unfortunately, it appears that other priorities have left the Mercury Offset Policy effort dormant. But if the State Board is serious about pursuing a Statewide Mercury Policy at this time, it must also include a component related to offsets in such a policy.

4. The Statewide Mercury Policy Should Focus on "Total Mercury" Controls and Implementation Measures.

PSSEP acknowledges much credible science suggesting that it is the bioavailable form of ***methylmercury*** that causes the most ecological impacts to fish and wildlife, and which bioaccumulates within the food chain. Nevertheless, most recognized experts trying to address mercury reduction tend to agree focusing on trying to reduce methylmercury from any given water system is difficult, at best. We are confident that the State and Regional Board staffs around California are well-acquainted with the circular pattern of mercury to methylate, de-methylate and re-methylate, and simply wish to point out that imposing methylmercury-based control measures on point sources (and even traditional non-point sources) will be difficult (if not impossible) to implement.

At a minimum, it is important for the eventual Statewide Mercury Policy to recognize that methylmercury is naturally created and destroyed within the ecosystem by natural bacteria present in wetlands and in streambed sediments, and that *de minimus* point source reductions of methylmercury by POTWs or other discrete sources are unlikely to achieve potentially proposed methylmercury fish tissue objectives. All these uncertainties must be weighed in light of anticipated regulatory requirements that may follow adoption of the Statewide Mercury Policy. When adopting new water quality policy for the state, or setting new objectives and goals, Water Code §§13241 and 13242 require a complete analysis of the feasibility of proposed implementation measures in relation to the attainment of target mercury levels in water and fish.

5. Any Statewide Mercury Policy Adopted by the State Board Must Specifically Acknowledge the Ongoing Contribution of Methylmercury to the State's Waters from Historical or "Legacy" Mercury Contamination.

The vast majority of ongoing methylmercury loading of the Sacramento-San Joaquin Delta is well-known to come from mercury-laden sediments under waters of the state which were discharged (in many cases) more than 150 years ago during the "California Gold Rush." Some of this mercury is still held back behind reservoirs on creeks and rivers of the watershed, but are nonetheless attributable to sediments that are or have been residing on land owned in trust by the State of California. To the extent state authorities are unable (or unwilling) to pursue otherwise legally responsible parties for this legacy contribution of mercury to the Delta and San Francisco Bay, the State of California must acknowledge and take on the financial burden of remedying this contamination.

According to the Central Valley Regional Board's "Delta Methylmercury TMDL", fully more than 75% of all suspected methylmercury loads to the Delta come from "open water and tributary sources." To its credit, the Central Valley Regional Board assigned a substantial legal obligation to the State Lands Commission to participate in mercury reduction and other TMDL-related actions to address the state's "share" of the legacy mercury. The State Board should follow this approach in ***all*** waters of the state where mercury-laden sediments on lands owned by the state are contributing to the respective methylmercury loadings.

Thank you for the opportunity to provide these comments for your consideration. Should you have any questions, please feel free to contact me.

Sincerely yours,

Craig S.J. Johns
Project Manager