



Hg OFFSET POLICY
Deadline: 2/28/07 5pm

CLEAN WATER ACTION

February 28, 2007

Ms. Tam Doduc
Chairperson
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814



Sent via electronic mail in care of Song Her, Clerk to the Board, at commentletters@waterboards.ca.gov

RE: State Policy for Water Quality Control, San Francisco Bay, Sacramento-San Joaquin River Delta and Tributaries Mercury Discharge Offsets Policy

Dear Chairwoman Doduc and State Board Members Wolff, Baggett, and Hoppin,

On behalf of Clean Water Action (CWA) and our 20,000 California members, I am writing to share our thoughts on the development of a mercury discharge offset policy. We thank the State Water Resources Control Board for the opportunity to offer these comments and for your consideration of them.

CWA is concerned that such a program could in fact discourage dischargers to implement optimum pollution controls and prevention strategies, encourage greater mercury discharges, and create disproportionate impacts on local communities as a result of increased effluent or maintenance of the status quo when it comes to mercury pollution. We are further guided by the fact that mercury, even in small amounts, is a potent bioaccumulative neurotoxin, and therefore all sources of mercury, no matter the proportion of the overall problem, must be reduced or eliminated to protect public health and the environment. Given the complexity of mercury in the environment related to methylation and its bioaccumulative nature, it is unclear at this point whether an offset policy can be developed in such a way as to guarantee both water quality improvements and adherence to environmental justice principles. Certainly, we will look for clear definitions within such policy and strict parameters under which offsets would be implemented in order to see valid environmental and social benefits that we could support.

General parameters for an offset policy:

For the reasons stated above, we believe that priority must always be put on reducing mercury discharges to the greatest degree possible within reason, no matter the source. We also believe

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that the following restrictions should be integral to any policy:

- **Offsets plans or programs are acceptable *only* if it can be demonstrated that there are no disproportionate impacts on any local community.** While we hold to this principle for any impacted community, all too often low income communities and communities of color bear a particularly onerous environmental and health burden by being situated in or around pollutant discharge areas such as urban industrial centers, tribal and rural areas impacted by mine runoff, major transportation routes, or neighborhoods adjacent to municipal discharge facilities. These fence-line communities often experience cumulative impacts from air, land, and water pollution that increase contaminant exposure through breathing, drinking contaminated water, skin contact, and by eating contaminated fish. In regard to mercury, these communities are often most at risk because of high levels of subsistence fishing for economic and cultural reasons.

By disproportionate impacts we mean the effects on any community that represents a “disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.”¹ Impacts result from either contamination levels within a specific locality, the needs of the local community, or both. Mercury contamination in the water and local fish create a disproportionate impact because of high levels of pollution that impact local ecosystems and public health. The needs of the community also come into play, however, when there are the afore mentioned high levels of subsistence fishing.

It should be noted that “government inaction and lack of enforcement of existing laws are also a form of environmental discrimination”.² Consequently, disparate impacts not only include additional pollution that the communities experience as a result of local practices and policies, but the maintenance of the same level of contamination due to local inaction. For this reason, offsets that discourage or replace optimum pollution control at the discharge site can create a situation of environmental injustice. We believe it is the responsibility of the discharger to demonstrate that such a condition does not exist. Standards to define and measure such impacts are not included in the informational document, but should be formulated with public input from subsistence fishing and fence-line communities.

- **Offsets should not include or entail pollution trading schemes that allow one discharger to trade credits with another.** We approve of State Board’s statement that this policy will not address “pollutant trading” as defined by the authors. Such programs serve 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. Because low income communities and communities of color are often situated near or in industrial centers or adjacent to municipal and other discharge sites, the issue of pollution trading has serious environmental justice ramifications.
- **Dischargers must first demonstrate that they have done everything reasonably possible through treatment and pollution prevention strategies to meet their permit goals before**

¹ Federal Executive Order 12898 signed by President Clinton in 1994.

² The Environmental Justice Coalition for Water, Thirsty for Justice: A People’s Blueprint for California. June 2005, p. 7.

being allowed to comply through an offset. This is especially true given mercury's persistent and bioaccumulative nature.

- **The development of a state or regional offsets program must include broad public participation and input.** Such programs should also require public review and an opportunity for real input from local communities before specific offsets are approved for individual dischargers or groups of dischargers.

Specific comments on informational document:

Given these general parameters, it is unclear to us, based on the State Board staff's document, *State Policy for Water Quality Control, San Francisco Bay, Sacramento-San Joaquin River Delta and Tributaries Mercury Discharge Offsets Policy* (informational document), how a state offsets policy will serve to remediate impaired waters and protect local communities. Further clarification or definition will be required before such a policy can move forward toward implementation. Our specific concerns include the following:

- The informational document does not distinguish between the methyl and total mercury, leaving open the unacceptable possibility that a discharger could reduce a source of non-bioavailable mercury and be allowed to discharge additional bioavailable mercury.
- The State Board attorneys link the validity of offset policy to development of TMDL waste load allocations and implementation plans. However, they don't address the point that California intends to adopt waste load allocations which are unlikely ever be achieved--and to also adopt implementation plans which bear no clear relationship to achieving them. The proposed policy would then use these fictive waste load allocations and vague implementation plans as a basis for granting offsets.
- The state's policy should incorporate, as a requirement, State Board's counsel's suggestion that Regional Boards "incorporate[e] pertinent details of the offset or market-based provisions into the TMDL implementation plan."³ A Regional Boards' failure to do so would undermine public participation in the development of the implementation plan. If offsets are planned or contemplated, the public should have the opportunity to review those offsets as part of the TMDL process.
- We approve of the informational documents statement that this policy will not address pollutant trading as defined by the authors. As already stated, we strenuously oppose such programs.
- It is unclear from both State Board Resolution No. 2005-0060 or the informational document the conditions that must be met in order for "dischargers to perform other activities aside from eliminating more mercury from their discharges than they would be required to remove by applicable technology-based effluent limitations." We agree, however, with the statement that "dischargers must implement pollution prevention measures before qualifying for an offset" and that they "will not be allowed to avoid the responsibility to perform at the highest level feasible." (Policy Principles: General Principle 2) We believe, as already stated, that offsets should only be instituted after the discharger has demonstrated a good faith effort of

³ Memorandum from Michael A.M. Lauffler to Arthur G. Baggett, Jr. and Gary Wolff, P.E., Ph.D. (November 22, 2006). Updated Legal Authority for Offsets, Pollutant Trading, and Market Programs to Supplement Water Quality Regulation in California's Impaired Waters with Established Total Maximum Daily Loads, p.3.

reducing or eliminating mercury in their effluent through comprehensive pollution prevention strategies and treatment. This view is substantiated in Resolution number 2005-0060 through its direction to the San Francisco Bay Water Board "to evaluate effective pollution prevention practices used in other states and the pollution prevention or other appropriate programs of each San Francisco Bay discharger, and their potential effectiveness in reducing mercury in their discharges." The San Francisco Bay Water Board was further directed to revise their mercury TMDL "to incorporate requirements for appropriate programs and practices into the TMDL, and require all dischargers to aggressively implement appropriate pollution avoidance practices that are most effective at eliminating or reducing mercury concentrations in their effluent." The resolution goes on to direct the Regional Board "to evaluate and consider the effectiveness of any existing wastewater technology that enhances the removal of mercury."⁴

- Other issues related to the conditions under which a discharger would be eligible for an offset are also unclear in the informational document. For instance, to what degree is the discharger's permit compliance history going to be considered and how? Will there be differences in eligibility for private and public dischargers, and if so, what will they be?
- We oppose the use of offsets to allow for new or increased discharges of mercury. Mercury, as already stated, is both persistent and bioaccumulative and small amounts cause impairment of water bodies. Further discharges could therefore exacerbate localized water quality standard violations. Consequently, by allowing offsets to "make up for" new discharges, we run a risk of additional impacts in the form of polluted water and increased presence of mercury in fish.
- Any offsets program will require strict oversight by the State and Regional Boards. It is unclear from the informational document to what degree the Boards will manage and enforce such programs and whether there will be a guarantee of funding to do so.
- It is unclear from the informational document how a net environmental benefit in the Bay-Delta system will be measured. Why is an offset preferable to enforcing greater reductions or the elimination of mercury discharges by a particular party? Environmental benefit further requires clarification in terms of geographic scope (does an offset have to benefit specific portions of the watershed or the watershed as a whole?) and how we will measure such benefits both individually and in aggregate.
- Environmental benefits must be related to actual reductions in mercury and not include public education or community based risk reduction projects. The San Francisco Bay and Central Valley Water Boards have been directed by Resolution 2005-0060 to "address public health impacts of mercury in San Francisco Bay/Delta fish, *including activities that reduce actual and potential exposure of and mitigate health impacts* to those people and communities most likely to be affected by mercury in San Francisco Bay-Delta caught fish, such as subsistence fishers and their families."⁵ (emphasis added) Dischargers bear a responsibility in the development and facilitation of such programs, in conjunction with

⁴ Resolution number 2005-0060, Resolved numbers 2 and 3.

⁵ Resolution number 2005-0060, Resolved number 10.

impacted community groups and institutions, because they are contributing to the risk experienced by community members. Since offsets do not eliminate continued discharge, such programs should not be included on any list of potential offset projects, but must be seen as a separate duty.

- Offset projects must not include reducing the loading when that loading is the result of another permissible discharge, including that of public agencies.
- Under the informational document's heading Principles Affecting Implementation of Offsets we suggest adding another point between the current numbers 3 and 4 that states "Dischargers will be responsible for demonstrating that their offset activities do not lead to disparate local impacts both at the site of said activities and at their primary discharge site."

Again, thank you for the opportunity to express our views on the development of a mercury discharge offsets policy. While we are willing to explore the potential benefits that may come out of such a program, we reiterate our view that we will only support offsets that demonstrate actual environmental improvements, do not impact local communities either by increasing mercury contamination or by neglecting current impairment, and are subject to stringent oversight and enforcement. We do not see the purpose of such a policy as being to ease the environmental or even financial burden of dischargers, whose first responsibility is to manage their own mercury contributions to the Bay and Delta watersheds. Instead, we see offsets as one possible way to direct resources toward non-point sources of contamination when all that is feasible has been done by the discharger at their original source and they are still unable to meet their permit requirements. We look forward to further participation in discussions about an offset policy and invite you to contact us if you require clarification of any of the points made in this letter.

Sincerely,

Andria Ventura

Andria Ventura
Program Manager