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

Central Valley Clean Water Association

Representing Over Fifty Wastewater Agencies

February 28, 2007

Song Her, Clerk to the Board
Executive Office, State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Electronic Mail: commentletters@waterboards.ca.gov

Subject: Comment Letter – Bay-Delta Mercury Offset Policy.

The Central Valley Clean Water Association (CVCWA) is a consortium of 47 publicly-owned treatment works (POTWs) in the Central Valley. CVCWA's primary purpose is to exchange information and provide a unified voice on regulatory issues impacting POTWs throughout the Central Valley. CVCWA members appreciate the environmental significance of mercury and its widespread contamination in northern and central California. We are pleased to provide comments regarding CEQA scoping for proposed methylmercury objectives for inland surface waters, enclosed bays, and estuaries in California as the State Board attempts to address this problem.

CVCWA has already made efforts to coordinate comments and reviews with other wastewater stakeholder groups, including CASA, Tri-TAC, and BACWA. In general, we support their comments and provide these additional comments separately to emphasize certain issues and concerns.

First, we would like to recognize that this document is generally supportive of the concept of offsets, and describes the federal and state authority to allow the State Board and Regional Boards to adopt offsets in certain circumstances. However, while CVCWA members may be interested in participating in an offset program, participation in such a program would be discouraged by many statements in this draft policy. The policy needs to provide opportunities for success rather than conditions that would present obstacles, conflict with EPA policy, and impede environmental improvement. The state should recognize that many trading programs developed around the country have never resulted in actual trades, largely as a result of unreasonable restrictions. Municipalities do not readily decide to spend money outside of their service areas while reducing their control of outcomes and incurring undue liability.

Second, the policy should encourage state and federal agencies to direct resources towards developing a regional approach to focus on regional solutions. Streamlining the overall process of identifying, assessing, implementing, and crediting offset projects would encourage and speed up such projects.

General Comments

The state should consider the implications of statements in the Informational Document that over-emphasize the contributions of and controls on point source discharges in the Bay-Delta region. Key examples are:

- "NPDES permits are the primary mechanism for achieving water quality standards in navigable waters." In fact, NPDES permits are one of the mechanisms available to state and federal regulators for achieving water quality standards in navigable waters. Other mechanisms include bubble permits, TMDLs, and other types of watershed management plans.
- "Attainment of all load and waste load allocations would, in most cases, result in compliance with the water quality standards within a reasonable period of time." and "Compliance with permits…should result in compliance with water quality standards…over a reasonable period of time." These statements directly contradict the first sentence of paragraph 6 that states "Reduction or elimination of mercury loads from point source discharges alone will not bring the Bay-Delta system into compliance with water quality standards." Further, there has been no evidence presented to date that the proposed water quality objectives for the Delta Mercury TMDL (0.06 ng/l) could ever be achieved throughout the Bay-Delta system.

Specific Comments

- Page 2, Paragraph 6: We believe that the policy needs to modify the stated hypothesis, that "…legacy sources will contribute to the impairment until those sources of mercury are controlled or eliminated, and sufficient amounts of mercury have eroded to the ocean" to emphasize the importance of the fact that the major mass of mercury is currently present in stream sediments in the Delta and its tributaries. As stated in the first sentence of paragraph 7, compliance with mercury objectives would require control of this legacy source of mercury, which may not be feasible.
- Page 3, Policy Principles: The statement is made that requirements "must be met before any NPDES permit may be issued to discharge mercury in amounts that exceed waste load allocations specified in a TMDL." Note that neither the requirements of this offset policy, nor the waste load allocations (WLAs) in pending or future TMDLs, have been established. The policy needs to clarify if it intends to imply that all permits should be delayed pending these actions.
- Page 3, General Principle 1: The term "net environmental benefit" is subject to a wide range of interpretations. The policy should describe the general approach and any specific calculations that will be accepted as demonstration of an offset project's net benefit. EPA policy offers a number of interpretations of net environmental benefit. The state policy could consider that an offset should provide a greater pollutant reduction than without the offset. Offsets involving non-point source projects may provide additional environmental benefits over and above a load reduction alone (e.g., habitat, other pollutants, flood control, etc.). These extra benefits may indicate that a lower trading ratio is appropriate. The essential point is that trading ratios should be rationalized – for reasons such as data uncertainty, differences in locations, hydraulics, seasonality of loads – that more load need to be reduced from the offset project to ensure the environment is getting at least the benefit it would get from a reduction at the outfall.

- Page 3, General Principle 2: The policy should clearly reflect what is intended with the statement that dischargers have the "responsibility to perform at the highest level feasible"?
  - What is the basis for this statement? Is it derived from the Clean Water Act or the California Water Code?
  - The state should consider how such a principle would be an obstacle to offsets, in that the likely parties to perform offsets will be dischargers operating under NPDES permits. If such dischargers are required to install advanced treatment as a prerequisite for obtaining offsets, (a) the financial resources for offsets will be diminished or eliminated and (b) the need for offsets will be similarly reduced. This approach would prevent the sort of market-driven innovation and resultant net load reduction that a trading program would provide.
  - The state should consider how this policy could require dischargers to operate and maintain all facilities and system of treatment and control (and related appurtenances) in a manner that optimizes mercury removal capability of the facility at the expense of treating to remove other pollutants and minimizing use of non-renewable energy.
  - This approach is contrary to an offset program's market-based approach for finding low-cost alternatives while maximizing environmental benefits. This requirement is something that any prudent permittee would take responsibility for anyway before committing their community's resources to reducing pollution elsewhere.

- Page 3, General Principle 3: It is stated that "Dischargers may be allowed to offset a portion of the mercury in their discharges…" The state should consider why it needs to limit the offset amount and in what situation it contemplates that discharges would have to offset their entire load. The policy should not limit dischargers from offsetting their entire mercury load, if so desired. This principle also limits offsets to the period "after the effective date of the applicable TMDL". The state should consider how this restriction, by waiting for final approval of TMDLs, discourages early action on mercury load reduction efforts. A letter of acknowledgement from the Regional Board that the removal project occurred could be used to document pre-TMDL credits. Given the lead time necessary to implement offsets, pre-TMDL credits would improve the chance of complying with TMDL WLAs.
- Page 3, General Principle 4: This principle implies that a POTW that is <u>not</u> expanding its facilities would <u>not</u> be able to increase its mercury concentration or mass, even where an offset is approved. The state should consider how this principle is unnecessarily restrictive and would limit the benefit, and therefore implementation, of offsets. As written, this policy principle would allow no room for growth in a service area where the POTW currently discharges below its capacity. Is "additional discharge" meant to refer to mass or concentration? What if a discharger reduced its concentration below a reasonable threshold but through growth increases its overall mercury load? Wouldn't it be a benefit in that case to discharge more water with that lower mercury concentration?
- Page 3, General Principle 5: While offsets must be recognized and accounted for in permits, the state should consider how the requirement to "establish" individual offsets in NPDES permits will not provide satisfactory longevity to the State and Federal commitment to credit the offset project to allow dischargers to justify or obtain local approval for the offset project. Other mechanisms, such as Basin Plan Amendments, Intergovernmental Agreements, Memoranda of Understanding, and administrative tools available under the CWA will be needed to provide certainty and guidance that extends beyond an NPDES permit's five-year period.

- Page 3, General Principle 6: This principle should be revised to say that a project not in the vicinity of the discharge may be "approved as an offset project" rather than just "considered". The policy should clarify how "near" and "vicinity" will ultimately be defined and include this as a credit ratio. Different scales to consider include: a mixing zone, receiving water reach, upstream watershed, and downstream watershed (such as the entire Delta). The use of a location ratio could be used to encourage nearer projects while still providing the opportunity for implementation of generally better projects.
- Page 3, General Principle 7: We agree with the statement's concept, but request that the state consider the following:
  - "Disparate localized impacts" could be rephrased to say "significant and unacceptable localized impact that is readily apparent and of sufficient magnitude to compel abandonment of the offset project concept" or "Evidence of environmental risk that is so clear and convincing that any reasonable decision maker would conclude that some action must be taken". This terminology is being used in Sacramento Regional County Sanitation District's localized mercury bioaccumulation study.
  - The policy should clearly define an approach to determining when and where there are such impacts. This principle can't be an ambiguous concept that differs over time or regionally. Consideration should be given to how evidence is collected, the cost of the effort and how long it will take to complete such an assessment. A valuable resource in this regard will be the project that WERF and BACWA are currently developing to establish guidelines for determining mercury bioaccumulation potential for wastewater discharge. Another valuable resource will be the mercury bioaccumulation study currently being performed by SRCSD. This work is in progress and is anticipated to be completed before the end of 2007.

- Principles Affecting the Offset Amounts: The three offset ratio bases are all inappropriate, as discussed below. Trading ratios should be based in sound science and well-accepted principles for calculating and applying ratios. The purpose of ratios is to establish equivalency between a load reduction at one source (in this case, an NPDES discharger) and a load reduction at another source (in this case, an offset project site). Ratios should <u>not</u> be used to establish any additional requirements or penalties that are stricter than the WLA established by the TMDL for any particular discharger. The state should consider completely modifying its proposed bases for offset ratios. The state should consider three other bases for setting offset ratios: uncertainty in data or goal of a net environmental benefit; differences in locational impacts and benefits; and differences in bioavailability.
- Page 3, Principles Affecting the Offset Amounts, 1a: The proposed policy requires the sources proposing the greatest use of offset credits to have the largest offset ratios. Rather, ratios should not be based on the "degree of failure [of a discharger] to meet its WLA." There is no basis in EPA policy, nor any precedent in other trading policies or programs, where "bigger buyers" face a relatively higher trading ratio than smaller ones, all else being equal. The state should consider that this basis would discourage larger-scale, more environmentally beneficial projects.
- Page 3, Principles Affecting the Offset Amounts, 1b: Basing offset ratios on the "projected cost savings from performing an offset" is the antithesis of a market-based compliance mechanism. The state should be seeking opportunities to save ratepayers and taxpayers money. The language of the SWRCB resolution No. 2005-0060 clearly stipulates that point sources dischargers would not be required to bear more than their fair share of responsibility and that the fair share is proportional to their contribution to

the impairment. The use of avoided costs is also unfair since POTWs have already installed extensive treatment systems and the next level of treatment will be highly costly.

- Page 3, Principles Affecting the Offset Amounts, 1c: The notion of relatively greater offset ratios being required for relatively longer compliance schedules, all else being equal, is reasonable. However, the policy should describe the general approach and any specific calculations for implementing this concept. The approach should reflect reasonable, science-based assumptions about temporal differences in net benefits for a proposed offset project as compared to a reduction in effluent loads. The state should consider that this basis would discourage larger-scale, more environmentally beneficial projects. It should be recognized that this basis is not really necessary, because a discharger would be accruing a deficit – and have to reduce a greater load – by choosing a slower project.
- Page 4, Principles Affecting the Offset Amounts, 2: This policy should consider adding an option to allow Dischargers, who are willing to help wetlands managers design, operate and manage their wetlands, "better" ways to minimize methylation of mercury.
- Page 4, Principles Affecting Implementation of Offsets: Recognizing the possibility that this policy may not be finalized for several years, the policy should acknowledge and endorse pilot projects that are being pursued in advance of and to help make available real-world information to assist this policy development effort. The state should consider how a pilot project would be different from a 'normal' project in terms of crediting against TMDL wasteload allocations.
- Page 4, Principles Affecting Implementation of Offsets: The policy should clearly acknowledge that offset projects for total mercury load reduction will provide credits applicable to any effluent limits for both total mercury and methylmercury.
- Page 4, Principles Affecting Implementation of Offsets: Without some standardization and streamlining, the current regulatory maze could delay offset project implementation by several years. The state should consider developing an offset project implementation program that would streamline project approvals and CEQA compliance, allow for leveraging funds from external sources, and minimize liability risk.
- Page 4, Principles Affecting Implementation of Offsets, 3: The last phrase in this principle implies that an offset project could create or contribute to a disparate local impact. Assuming that the statement is in reference to where the load reduction was foregone (i.e., at the point source outfall), the phrase should be removed from this principle and used as the basis for a separate principle associated with General Principle 7.
- Page 4, Principles Affecting Implementation of Offsets, 4: While we recognize that provisions for offsets need to be included in NPDES permits, this policy needs to acknowledge that many offset projects may take more than the five-year NPDES permit cycle to implement. To provide regulatory assurance to POTWs investing in offset projects, the state should consider providing a way to ensure that credit for an offset project won't be taken away in future permit cycles.
- Page 4, Principles Affecting Implementation of Offsets, 5: The proposed policy limits projects to public lands for instances where a public agency did not cause the mercury pollution. The state should consider expanding this statement to include private lands to keep all feasible offset opportunities available. Can a discharger propose an offset project that reduces the mass of "background" mercury that is usually accounted for in TMDLs? The ultimate goal is to remove mercury from the watershed. Offsets should be viable for any "non-responsible" mass of mercury. Some professionals, notably in the

wetlands creation, restoration, and maintenance fields, may wonder why "non-causing" public agencies are being provided this exemption, while other non-causing parties are not. The policy should lay out alternative approaches to address the issue of responsibility and creditability. One option is to eliminate this exclusion and allow EPA's TMDL WLA and load allocations (LA) to establish baselines. A second option is to use the existing administrative procedures available to the State to declare a specific property an "orphan" for the purposes of WLA and LA assignments and strip the allocation from the property, in whole or in part, which would make the released assignments eligible for offset credit creation.

- Page 4, Considerations regarding pollutant trading: Offsets are merely a subset of trading in which the credit seller is not part of the program. The state should consider broadening the policy to include other types of trading, defined as exchanges of pollutant reduction credits between trading partners. Other trading mechanisms could result in more – and more rapid – implementation of projects to reduce mercury loading. For example, if two dischargers share the cost of implementing an offset project, they have both conducted one offset project. But if instead one discharger implements the project and then asks for money from others, it is a trade. Why would the state care to restrict either option if the result leads to a net environmental benefit? While the draft policy characterizes point-point trading as complex, there is extensive basis in EPA policy, and numerous examples of successful point-point programs that could be drawn upon to develop a workable and potentially beneficial point-point trading option to supplement the offset option. At a minimum, the state should provide clear working definitions of the difference intended between "trading" and "offsets" and a clear reason why it benefits the environment to limit options.

Thank you for requesting our input and we look forward to working with you and other State Board staff as this policy is developed.

If you have any questions feel free to contact me at 530-886-4911.

Sincerely,

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Warren Tellefson, Executive Officer

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