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



February 28, 2007

Technology in balance with nature

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District Manager

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Chief Financial Officer

Re: Comments on the January 2007 Informational Document for the Public Scoping Meeting for Proposed State Policy for Water Quality Control, San Francisco Bay, Sacramento-San Joaquin River Delta and Tributaries Mercury Discharge Offset Policy.

Dear Chairwoman Doduc & Members:

The Sacramento Regional County Sanitation District (District) is pleased to provide comments regarding the CEQA scoping document for the proposed mercury offset policy for water quality control in San Francisco, Sacramento-San Joaquin River Delta and Tributaries. From a historical perspective, the District has been actively involved with mercury issues and the associated regulatory and scientific efforts that have been evolving in the Central Valley. Our efforts have been extensive, ranging from supporting mercury monitoring in the Sacramento River Watershed through in-kind services and securing federal grant funding for the Sacramento Regional Toxic Pollutant Control Program for over 12 years, to participation in the development of new analytical methods for detecting low levels of mercury (methods 1630, 1631). More recently, we have evaluated the feasibility of mercury offsets as a viable regulatory compliance tool. As a result, we have a thorough understanding of the current challenges that confront the wastewater industry in meeting increasingly stringent mercury and methylmercury goals. As we mentioned at the scoping meeting on February 20, 2007, we urge the State Board to direct staff to work with stakeholders in a collaborative process as this policy continues to develop to ensure that the policy creates incentives to implement offset projects.

Generally, this document is very 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. Further, the document recognizes that the mercury impairments of Delta and San Francisco Bay are primarily caused by legacy sources and cannot be resolved solely by further restrictions on point source dischargers. As with any anticipated new Policy from the State Board, the challenge is in the ultimate details that will be adopted in the final policy. We have identified those details that we believe to be most important to resolve in order to move a successful statewide offset policy forward. Overall, we believe this offset policy needs to be directed to provide incentives to participate in an offset program, not obstacles.

The District is very interested in this Policy as a means to achieve greater reductions in mercury loading throughout the Bay-Delta System, as well as providing overall net environmental benefits. Because our discharge contributes less than 1% of total mercury to the Sacramento River, the District believes that it is vitally important to our ratepayers that the State Board adopt an Offset Policy that creates reliable credits, is voluntary, and that is consistent with the State Board's Resolution 2005-0060, relative to fairness, equity, and proportionality. Our interpretation of what the SWRCB meant in the San Francisco Bay TMDL remand resolution when it indicated that point sources should not bear a disproportional burden is that our responsibility would remain proportional to our mass contribution. This interpretation is drawn from our attendance at the September 7, 2006 SWRCB hearing and our resulting perspective on the intent of the State Water Board members, based on their comments made at the hearing. It is also our understanding that our mass contribution would not be leveraged to an unfair extent such that our ratepayers would be burdened with a disproportionate responsibility to address what is acknowledged as a legacy issue.

With respect to the term "net environmental benefit", there are (at least) two different interpretations of this concept. One is the traditional cost-benefit analysis with thresholds or targets. In the water quality trading context, this has most typically been referred to as a cost-effectiveness analysis. The second concept, which is present in many trading policies and programs including EPA's, is that trading should provide greater environmental benefits compared to not trading which would be measured as a net gain in one or more metrics, (e.g. mass of mercury load reduction). This is where the "equal or better" standard or threshold, implicit in EPA policy and many existing trading and offset programs, comes in. There is also a concept of how trading or offset ratios are developed to achieve an "equal or better" result. For reasons of uncertainty, location, hydraulics, or season, more pounds need to be reduced from the offset site to ensure the environment is getting at least the same or similar benefit it would get from a reduction at the outfall.

We agree that along with General Principle 1 that an offset project provide a net environmental benefit, that the offset project must also not allow the discharge that is being offset to result in disparate localized impacts. However, the policy should clearly define what constitutes disparate localized impacts. Rather than "disparate localized impacts, we suggest that the policy consider either of the following definitions:

1. A significant and unacceptable localized impact that is readily apparent and of sufficient magnitude to compel abandonment of the offset project concept, or
2. Evidence of environmental risk that is so clear and convincing that any reasonable decision maker would conclude that some local action must be taken.

In addition, the policy should clearly define an approach to determining when and where there are such impacts so that it is not an ambiguous concept that differs over time or from Region to Region. 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 or early 2008.

Along the lines of obstacles to offsets, we strongly object to the requirement that offset ratios be based on the "projected cost savings from performing an offset". This concept conflicts with the SWRCB resolution No. 2005-0060 which stipulates that point source 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 in setting offset ratios is a departure from the consideration of

relative mass loadings and proportionality. Setting ratios based on cost-savings is inconsistent with other trading programs and policies. Ratios should not be set higher than sound science would suggest (accounting for location, uncertainty, net benefits, etc.). The goal and focus should remain on getting total mercury *out* of the watershed. The closer you bring the cost of offset removal to the cost of higher treatment at the plant, the more likely you will see fewer POTWs going out and removing legacy sources of mercury from the watershed.


In regards to 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." We are not certain where the basis for this statement originates, but we believe that 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 additional 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 not be cost-effective. As an alternative, the 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, counting and reporting all exceedances of the permit limit. Offsets would then be credited against any exceedances and the balance reported.

There are two additional areas that we believe the offset policy should expand the scope of alternatives considered.

1. Since it is widely accepted that any reductions in total mercury will have associated reductions in methyl mercury, the policy should clearly acknowledge that offset projects for total mercury load reduction will provide credits applicable to effluent limits for both total and methyl mercury.
2. The Policy should clearly acknowledge and endorse the SRCSD mercury pilot offset project and any other pilot projects that are being pursued in advance of and to help make available real-world information to assist the larger policy development effort. By specifically recognizing such pilot projects, the State Board will help expedite mercury removal from the Delta-Bay System. Further, in order to ensure our ratepayers that the value of offset projects will not be negated in the future, we request that this policy explicitly grandfather in any pilot projects completed in advance of completion of this policy, thus allowing a party completing pilot offset projects to maintain the "credit" achieved through mercury reductions.

The District appreciates the opportunity to participate at this time and again, urges the State Board to continue to involve the wastewater community and other interested stakeholders in this important process. In addition to the above comments, we have provided additional specific comments by page reference following this letter. Please feel free to contact myself (876-6115) or Vicki Fry (876-6113) if you have any questions or wish to discuss any of these issues further.

Sincerely,



for Wendell H. Kido
District Manager

cc: Mary Snyder, Terrie Mitchell, Vicki Fry - SRCSD
Pamela Creedon, Executive Officer - CVRWQCB
Tom Kimball, Joanna Cox - SWRCB

Specific Comments on the January 2007 Informational Document for the Public Scoping Meeting for Proposed State Policy for Water Quality Control, San Francisco Bay, Sacramento-San Joaquin River Delta and Tributaries Mercury Discharge Offset Policy.

The order of these comments corresponds to the organization of the informational scoping document. Page and paragraph references are provided. Direct quotes from the document are *italicized*; in some cases emphasis has been added by using *bold italics*.

1. **Page 2, paragraph 2:** We disagree with the statement that NPDES permits are “the *primary mechanism* for achieving water quality standards in navigable waters.” NPDES permits are only one of the mechanisms available to state and federal regulators for achieving water quality standards in navigable waters. Other mechanisms include watershed, regional, and statewide permits, TMDLs, in California - Basin Plan Amendments, in other places - various types of Watershed Management Plans.
2. **Page 2, paragraphs 3 and 4:** We disagree with the statements that “*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 that “*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 which states that “*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 that proposed water quality objectives for the Delta Mercury TMDL (0.06 ng/l) can ever be achieved throughout the Bay-Delta system.
3. **Page 2, Paragraph 6:** We believe that the policy needs to modify the stated hypothesis, that “*...mercury added to the system from 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 mercury that has already eroded or been deposited from mining activities and is currently present in stream sediments as the major mass of mercury in the Delta and its tributaries. As stated in the first sentence of paragraph 7, “*Mining-legacy mercury that has washed into the riverbeds and the San Francisco Bay attaching to sediments is a major source of mercury loading to the Bay-Delta aquatic ecosystem.*” The policy needs to clearly acknowledge that compliance with mercury objectives would require control of these legacy sources, both the mine sites and the historical deposition in the waterways.
4. **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 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. Many offset projects may take longer than the 5-year NPDES permit cycle to complete and, in order to provide regulatory certainty to the investing discharger, there needs to be a way to provide assurance from the Regional Board that the terms of the credit will not change over time, for instance after the first or second 5-year permit cycle. This could be achieved through Basin Plan Amendments or other legal mechanisms.
5. **Page 3, General Principles, (2):** The policy should clearly reflect what is intended with the statement that dischargers have the “*responsibility to perform at the highest level feasible*”?
 - a. What is the basis for this statement? Is it derived from the Clean Water Act or the California Water Code?

- b. We believe that 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 additional 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 not be cost-effective.
 - c. The 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. Exceedances of the permit limit shall be counted and reported. Offsets shall be credited against any exceedances and balance reported.
6. **Page 3, General Principles, (3):** It is stated that “*Dischargers may be allowed to offset a portion of the mercury in their discharges ...*” 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*”. Offsets should be allowed prior to final approval of the TMDL to encourage 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 ensure compliance once TMDL WLAs are promulgated into permits.
7. **Page 3, General Principles, (4):** A POTW that is not expanding its facilities would not be able to increase its mercury concentration or mass, even where an offset is approved. This principle is unnecessarily restrictive and would limit the benefit, and therefore implementation, of offsets. The purpose of an offset is to counter an increase above a WLA, whether that is due to increased concentrations with decreasing flows, or a combination of stable or decreasing concentrations and increasing flows. As written, this policy principle would appear to allow no room for growth in a given service area.
8. **Page 3, General Principles, (5):** While offsets must be recognized and accounted for in permits, 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, and other administrative tools available under the CWA will be needed to provide certainty and guidance that spans a NPDES permit’s 5 year period.
9. **Page 3, General Principles, (6):** We agree with the statement, except that we request that the policy reflect 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. Instead of focusing on “proximity” of offset projects to discharge locations, the policy should focus on establishing appropriate ratios that properly establish equivalency in net environmental benefits between load reductions at the offset location and load reductions at the discharger’s outfall location. Some criteria to consider include: distance between discharge location and offset project; acceleration of timing of the mercury reduction; and additional environmental benefits achieved through offset (e.g., habitat restoration, etc.)
10. **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. 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. Instead, the policy should establish guidance for determining which types of trading ratios are necessary and appropriate for a given situation, based in sound science and well-accepted principles for calculating and applying

ratios. For example, SRCSD in its Mercury Offset Feasibility Study considered three factors: one to address uncertainty in data; one to address differences in locational impacts and benefits; and one to address variations in bioaccumulation. The purpose of ratios is to establish equivalency or better between a load reduction at one source (in this case, a NPDES discharger) and a load reduction at another source (in this case, an offset project site). Ratios should not be used to establish any additional requirements or penalties that are stricter than the WLA established by the TMDL for any particular discharger.

11. **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, may not be unreasonable. 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.
12. **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” to minimize methylation of mercury. The policy should identify any additional potential offset projects that dischargers may be interested in pursuing, and add them to the list of “including but not limited to” projects.
13. **Page 4, Principles Affecting Implementation of Offsets, (4):** While it is agreed that provisions for offsets need to be included in NPDES permits, this Statewide Offset Policy must acknowledge that many offset projects may take more than the 5-year NPDES permit cycle to implement and, in order to provide regulatory comfort to the POTWs investing in significant offset projects, this Policy needs to provide a way for Regional Boards to assure that credit for an offset project won’t be taken away in future permit cycles.
14. **Page 4, Principles Affecting Implementation of Offsets, (5):** The proposed policy limits projects to public lands in instances where a public agency did not cause the mercury pollution. This policy should be expanded to include private lands to keep all feasible offset opportunities available. 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 approach to consider is to eliminate this exclusion and allow TMDL WLAs and LAs to establish baselines. If a public agency has a WLA or LA, then it has a responsibility to meet that WLA or LA, and only additional reductions would be creditable. A second approach, not necessarily mutually exclusive with the first, would be to identify specific entities that may merit an exclusion, as a right, or as a consideration (such examples might include, but not be limited to religious or educational institutions, and individuals that inherited property contributing pollutant loads, but who have not the means to implement appropriate clean up). A third approach would be 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.

It should not matter if an offset project is in a location that is already assigned a WLA and load reduction requirement. What matters, is whether action is being taken to reduce mercury loadings in the watershed. If this requirement remains, offset projects cannot take place since a TMDL will assign reduction responsibilities to all controllable sources. The Policy should recognize the environmental benefits to be achieved by allowing point source dischargers to help expedite

mercury removal projects in the watershed, particularly on or near traditional non-point source discharges, with created or restored wetlands habitat, and other situations. Further, the policy should clarify if a discharger can propose an offset project that reduces the mass of "background" mercury that is usually accounted for in TMDLs. If the goal is to remove mercury from the watershed, then offsets should be viable for any mass of mercury.

15. **Page 4, Considerations regarding pollutant trading:** The policy should be open to the consideration of trading, defined as exchanges of pollutant reduction credits between point sources, where it could result in more rapid implementation of projects to reduce mercury loading to the Delta and San Francisco Bay. 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.