

April 7, 2010

Ms. Kathryn Hart, Chair
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, Suite 200
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Cc:

Cheryl Maki, CVRWQ Vice Chair
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Robert Walters
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Re: Proposed Sacramento-San Joaquin Delta Estuary Basin Plan Amendment / Methylmercury Total Maximum Daily Load

Dear Chairwoman Hart and Fellow Members of the Board,

Thank you for the opportunity to submit the following comments on the proposed Sacramento-San Joaquin Delta Estuary Basin Plan Amendment (BPA)/ Methylmercury Total Maximum Daily Load (TMDL).

We wish to first to thank the CVRWB Staff for their dedication to developing this plan to address methylmercury in this watershed, for their attempts to combine stakeholder comments into their Staff Report, and for their assistance in providing information and answering our questions.

In light of the description of the stakeholder process in the resolution to adopt this Delta Methylmercury Control Program, we do however wish to reiterate that the proposed BPA is not a consensus document. Of note, the following two circumstances prohibited participation by impacted communities and Tribes in the creation of the BPA and in the stakeholder meetings and workgroups:

1. Outreach to California Native American Nations (Tribes) by the Waterboard and EPA staff, including the one day informational meeting in November, was too late for tribal environmental offices and tribal council members to review materials, commit and prepare staff, seek funding for participation, and as necessary, obtain legal consultation in order to truly participate in the development of the BPA/TMDL.
2. The Public Stakeholder process was not fully inclusive of Tribes or community based groups; in fact, their participation was restricted by the process and inequitable. Community-based organizations and Tribes did not have the resources to attend the large number of meetings required to follow and participate in the stakeholder and workgroup meetings. The limited comments and suggestions made by impacted community representatives were eclipsed by the large number of dischargers, agencies and their representative lawyers present and commenting. The dates and times chosen for these meetings disallowed community members to participate since most were participating on a volunteer basis. Additionally, the technical nature of many discussions was prohibitory for many community

members and tribal representatives who were not given the time to conduct the appropriate research or receive training as noted above. The low tribal and impacted community participation rates evident in the minutes of these meetings posted on the Regional Board web site do not reflect a lack of caring on the part of these entities, but is instead reflective of the exclusive nature of the “stakeholder process”.

Therefore, we respectfully submit the following comments and recommendations to the CVRWB in hopes of addressing our concerns that are not included in current staff recommendations:

1) The fish tissue target is not acceptable for the protection of Tribes and many communities for subsistence, traditional or ceremonial use.

The BPA’s objective of 32 grams/day (one meal a week) of trophic level 3 and 4 Delta fish, plus some commercial fish, will not protect the beneficial uses of tribal members who fish for subsistence, ceremonial, and cultural purposes. Currently, tribal community members fear for their health when eating fish at traditional levels. Their stated preferred beneficial uses of Delta waters are subsistence fishing, shellfish gathering, materials gathering (including but not limited to plants used for food, healing and regalia), navigation, and ceremonial uses. Eating fish and traditional fishing are not only desired to maintain community health, but the connection to fish effectively maintains the cultural, spiritual, and physical connection of tribal Peoples to this watershed. The current and future existence of Tribes relies on their ability to re-establish these uses.

- We recommend that the BPA establish a fish tissue target that will enable people to safely eat four to five meals per week (128-160g/day) of trophic level 3 and 4 Delta fish. This more closely meets the needs of tribal members, the EPA recommendation of a rate of 142.4 grams/day and is in line with the intent of the Clean Water Act to protect the beneficial uses of all people within the watershed. This recommended rate will also incidentally protect the immigrant and other subsistence fishing people consuming fish at this rate, as reflected in the recent study of fish consumers in the Delta (Shilling et al., 2010).¹
- We Recommend the CVRWB follows the lead of the North Coast Regional Water Board (NCRWB) and include **The Native American Cultural (CUL)** use and **Subsistence Fishing (FISH)** use in this BPA. We recommend these designations over the COMM recreational fishing designation suggested by Staff. Inclusion of the CUL and FISH designations would identify the traditional and cultural uses of waters within the Region and protect tribal communities as well as non-native communities that utilize this waterbody for subsistence fishing.
- We recommend the CVRWB adopt the NCRWB Beneficial Use designation of Native American Culture (CUL) of water with the addition of plants used for food and medicine. This will identify waters that *“support the cultural and/or traditional rights of indigenous people such as subsistence fishing and shellfish gathering, plants for food and medicine gathering, basket*

¹ Shilling, F. White, A. Lippert, L. Lubell, M. 2010. Contaminated fish consumption in California’s Central Valley Delta. Environmental Research. Doi:10.1016/j.envres.2010.02.002

*weaving and jewelry material collection, navigation to traditional ceremonial locations, and ceremonial uses.”*²

- We also recommend the CVRWB adopt the NCRWB Beneficial Use Designation of Subsistence Fishing (FISH) Uses of water identifies waters that “*support subsistence fishing.*”³
- Further, We Recommend that as part of Phase I of the TMDL the Board consult with tribal council members and tribal environmental officers and subsequently coordinate with tribal representatives to discuss and study historical, current and future intake rates.

2) **Tribal Consultation is absent from the proposed BPA and TMDL in almost all cases**

Tribes have a legal status and obligatory responsibility as governments and therefore do not fall under the heading of community-based groups or community-based organizations. Tribal consultation is required under presidential Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments” and it is the responsibility of agencies receiving federal funds to adhere to principles of consultation.⁴ Additionally, SB 18 is regionally and locally applicable in both the BPA and TMDL. SB 18 was created to preserve and protect cultural places of California Native Americans and is unique as it requires local governments to involve California Native Americans in early stages of land use planning, before individual site-specific, project-level decisions are made by a local government. It extends to both public and private lands, and includes both federally recognized and non-federally recognized Tribes.⁵

SB 18 refers to Public Resources Code §5097.9 and 5097.995 to define cultural places as a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine (Public Resources Code §5097.9). These definitions are inclusive not only of archaeological or historic sites but also religious or ceremonial sites and collection or gathering sites. This of course includes specific places where California Native Americans access certain plants for food, medicine, clothing, ceremonial objects, basket making, and other crafts and uses important to on-going cultural traditions and identities. Collection and gathering sites may also qualify as religious or ceremonial sites.⁶

- Therefore, we recommend that the BPA explicitly include government-to-government consultation with Native American tribal governments, whether federally recognized or unfederally recognized immediately, throughout Phase I and in all future endeavors.
- As it is the intent of SB 18 is to provide California Native American Tribes an opportunity to participate in decisions at an early planning stage, we extend this recommendation to include Tribes in all advisory, decision-making, and review groups created in relation to this BPA/TMDL.

² http://www.waterboards.ca.gov/northcoast/water_issues/programs/basin_plan/083105-bp/03_bu.pdf

³ http://www.waterboards.ca.gov/northcoast/water_issues/programs/basin_plan/083105-bp/03_bu.pdf

⁴ <http://www.epa.gov/fedreg/eo/eo13175.htm>

⁵ <http://www.waterplan.water.ca.gov/docs/cwpu2005/vol4/vol4-tribal-tribalconsultationguidelines.pdf>

⁶ http://www.csac.counties.org/images/public/Advocacy/hlt/Tribal%20Consult%20Guidelines_03-01-05.pdf

- We further recommend guiding principles and practices of meaningful consultation, communication and coordination with Native American tribal governments be integrated into the BPA/TMDL so that consultation, communication and coordination proceeds with tribal leaders on all levels from direct communication with the CVRWB and locally.⁷
- We recommend that consultation must always occur early in the project planning process, and allow time for both sides to plan ahead, be informed of the project scope before consultation.
- We further recommend, according to consultation principles; an agency head must be present in order for the process to be a true government-to-government event. If agencies wish to assign the role to other staff, a Tribal Liaison, contractor, or discharger the Tribe shall approve this representative substitution.

3) **As proposed the methylmercury reduction program oversight is likely to be overly influenced by dischargers, with marginal input by tribal and community representatives.**

For example, the proposed BPA includes the formation of a Technical Advisory Committee (TAC) (BPA, page 7). The TAC is to be an independent body formed with recommendations from stakeholders, including dischargers, and we are in support of such an advisory committee. We are however, concerned that results will be reminiscent of the recent stakeholder process and appointees will be disproportionately chosen and influenced by dischargers, while the opinions of experts designated by Tribes and communities are either non-existent or overshadowed.

The BPA also includes the formation of Stakeholder Group(s) to assist in Control Study Workplan(s) review. Again, we are in support of such an oversight group however, since this group is charged with evaluating discharger workplans and results, it would be wrong for the dischargers to have influence over their own review.

- We recommend a more equitable system to choose members of the TAC. The BPA should explicitly include mechanisms to insure an equal number of nominees or appointees by Tribes and community-based groups as those recommended by dischargers (i.e., one-third representation each), and that for each participating jurisdiction that the appropriate Tribe is also seated.
- We also recommend any Stakeholder Group(s) charged with the review and oversight of discharger plans, requirements and outcomes be created by without discharger nominations and be created with a strict non-conflict of interest policy.
- Dischargers should not be involved, directly or indirectly through their appointees, in the approval of their workplans or the assessment of whether or not they are meeting their requirements.
- We further recommend that the BPA include mechanisms that will insure Tribes and community groups are equitable participants in these review, oversight and advisory bodies, and represent a majority in these groups.
- According to federal principles of “Consultation” tribal leaders must be contacted in all cases where decisions are being made that may affect tribal members or resources (including water),

⁷ http://www.csac.counties.org/images/public/Advocacy/hlt/Tribal%20Consult%20Guidelines_03-01-05.pdf

and whenever actions or workplans are proposed, implemented or reviewed. This consultative process must be explicitly included into the TMDL and BPA to insure it is properly carried out. *Please see issue 2, Tribal Consultation above.*

4) The timeline for the development of “Control Study Workplans,” and implementation of pilot programs and reduction strategies are unnecessarily long, while language that recommends interim actions to reduce methylmercury or total mercury are vague and without incentives.

For example the proposed BPA establishes a 9 year study period to develop methylmercury control program, during which time the BPA has used vague language to suggest interim actions to begin reductions. The amendments to the TMDL currently states “*all dischargers should implement methylmercury management practices ASAP, but are not required until after the Regional Board has completed their review of plans and developed tributary mercury controls.*” Waiting until after the 9 year study period is entirely too long to begin implementing measures – this leaves fish eating populations vulnerable and poses an unacceptable risk.

Additionally “feasible” and “reasonable” are included in the BPA and TMDL in a number of locations although these words have not yet been defined. We remain concerned in a number of cases that that use of these terms will weaken the responsibilities of dischargers and agencies to reduce mercury or methylmercury, will result in a weakening of the regulatory teeth of the document and will hinder the success of the TMDL to reach their goals.

- We recommend that that Phase 1 Studies, including pilot programs, be implemented as they are developed to address mercury and/or methylmercury in the Delta as soon as possible, not after all are completed.
- We recommend that “Control Study Workplans” be completed within two years of the Effective Date of the BPA, well before the end of Phase I.
- We recommend that the case of “feasible” and “reasonable” the definition should state how each will be determined, by whom, and in such a way that the beneficial uses established will be protected following these decisions.

5) The current TMDL allows new and increased loading but it is vague about under what circumstances or how reductions of mercury or methylmercury will be maintained

Under the Clean Water Act discharge of a pollutant to a water body with no assimilative capacity is not allowable. Although there is conflicting evidence, the staff BPA allows increased loading because assimilative capacity is assumed in the form of foreseen natural export of sediment. According to Sec. 303(d)(4) (A) of the Clean Water Act, if a standard is not attained any waste load allocation established through a TMDL “may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard.”

We are also concerned that without proper review by affected communities the Regional Board may modify objectives, allocations, implementation provisions, schedules, and the Final Compliance Date of the TMDL after Phase I is completed.

- Therefore to reduce methyl and total mercury in this watershed we recommend that new sources will be prohibited and increased loads from population increase be addressed by adjusting wastewater allocations to be more stringent to make up for these increased sources.
- We also recommend that any adjustments or revisions of the total maximum daily load, including waste water allocations be reviewed by affected Tribes and communities.
- We further recommend that at the end of Phase 1 and modification to objectives, allocations, implementation provisions, schedules, and the Final Compliance Date of the TMDL must take place with Public review, with tribal consultation and with the input of affected communities.

6) Exposure Reduction section of the BPA requires clarification to insure impacted communities and Tribes are included in creation and implementation of this program.

CIEA participated in the workgroup which developed the staff recommendations for Exposure Reduction language in the BPA as directed by the State Water Quality Control Board in Resolution 2005-0060. Unfortunately, there was little time to work on this text, it was therefore rushed, participation by impacted communities and Tribes was minimal and the resulting text was not agreed upon in consensus.

CIEA therefore joined other stakeholders in recommending language that clarified the intent of communities and Tribes in the creation of this program and strengthened the program as a whole. Please refer to our group revision to the Exposure Reduction document submitted on April 1, 2010 by the Mechoopda Indian Tribe Environmental Office, CIEA the and others (*Appendix 1 attached*).

7) Historical Resources Section of the BPA lacking CEQA language to Insure Tribal Consultation

On April 1, 2010 CIEA, tribal environmental program directors and other stakeholders submitted a revision of Chapter 7 of the BPA, Historical Resources (*Appendix 2 attached*). Our recommendations strengthened the document by reintroducing CEQA language on the protection of cultural resources.

Please refer to this group revision submitted on April 1, 2010 and to our recommendations under #2 above on Tribal Consultation in relation to the BPA / TMDL.

Other topics of concern:

In addition to the above concerns and recommendations for this BPA/TMDL we share many of the concerns raised by our colleagues at Clean Water Action. We refer you to their comments being submitted today April 7, 2010 and express that we are in full support of their recommendations for the following issue areas:

- Lack of specific and measurable total mercury reduction requirement for all dischargers while methylmercury control studies are occurring (CWO issue area #2)
- Lack of clear measurement and enforcement strategies (CWA issue area #4)
- That all mercury sources not addressed. This includes missing active requirements for mercury controls and reductions and exceptions allowed in studying some sources (CWA issue area #5)
- That Offsets are being inappropriately allowed during Phase One (CWA issue area #7)

Once again, thank you for this opportunity to provide comment on this BPA.

We look forward to working with all partners to implement an effective TMDL and return the Delta to health that will re-establish local traditional food and the protection of culturally sensitive areas within the Watershed.

Sincerely,

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