

CALIFORNIA STATE LANDS COMMISSION

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**PAUL D. THAYER, Executive Officer**

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April 1, 2010

Patrick Morris
Central Valley Water Board
11020 Sun Center Road, Suite 200
Rancho Cordova, CA 95670

Dear Mr. Morris:

Staff of the California State Lands Commission (Commission) has participated in the Delta Methylmercury TMDL and Basin Plan Amendment Stakeholder group for the past year, and we want to thank the Regional Board for the opportunity to join in this process. While we appreciate the Regional Board's approach to include the stakeholders and the public in this process, we feel the path chosen by the Regional Board is not the most effective way for confronting methylmercury in the Delta.

The Delta Methylmercury TMDL and Basin Plan Amendment include an implementation plan that seeks to reduce the sources of methylmercury located on lands in the Delta. Lands under the Commission's jurisdiction involve sovereign lands (*aka* "public trust lands") of the State of California held in trust for the people of California to be used to promote the public's interest in water oriented and water dependent needs and uses. These sovereign lands were acquired by California on September 9, 1850 as an incident of being admitted into the Union as a sovereign state. In 1938 the California Legislature placed these sovereign lands under the newly created State Lands Commission's jurisdiction.

Although the Basin Plan Amendment does not specifically identify the Commission as a non-point source discharger, it treats the Commission as such by assigning a methylmercury allocation to the Commission together with the Department of Water Resources and the Central Valley Flood Protection Board, as managers of open water areas in the Yolo Bypass and Delta. The allocation is described as corresponding to the methylmercury load that fluxes to the water column from sediments in open-water habitats within channel and floodplains in the Delta. While the Commission does have jurisdiction over some of the land located in the Delta, these lands are sovereign

land owned by the people of the State of California. The Basin Plan Amendment should be clarified to reflect that the State of California owns the natural beds of its tidal and navigable waterways, including those in the Delta, and is the recipient of discharges of waterborne pollutants made by point and non-point source dischargers into the State's waters.

The assignment by the Basin Plan Amendment of a methylmercury allocation to the Commission would obligate the Commission to include requirements for future projects, conduct control studies, conduct compliance monitoring and implement methylmercury reductions as necessary to comply with allocations by 2030. More immediately, the Commission would be required to conduct control studies and evaluate options, including inorganic mercury reduction to reduce methylmercury production in open waters under the Commission's jurisdiction. Compliance monitoring of land in the Delta is to begin within two years of starting Phase 2 and annual reports are to be submitted to the Regional Board. The Basin Plan Amendment suggests that the Commission may be able to satisfy monitoring requirements by participating in a regional monitoring program.

Although the Commission manages certain sovereign lands located in the Delta on behalf of the state, it has neither the legal authority nor the financial authorization to regulate many of the variables that affect methylation rates of mercury on those lands. Factors such as the rate of water flow, turbidity, and the chemical constituents of the water are beyond the Commission's authority and are regulated by other state or federal agencies. The Commission does not control how much water is flowing through the Delta and its channels or the quality or content of the water. In fact the Commission has sought legislation to amend Public Resources Code Section 6327 to give it the authority to require an application for a permit to construct drainage facilities into navigable rivers, streams, lakes and bays. Presently if a discharger has a permit from a local reclamation district, the Reclamation Board, the Department of Water Resources, the California Debris Commission or the Corps of Engineers, the Commission is barred from requiring an application. The Legislature has not approved such an amendment. From 1893 through 1986 the responsibility for controlling the flow of material into California's rivers flowing into the Delta was placed under the authority and responsibility of the California Debris Commission. As such, the State Lands Commission has lacked and continues to lack the ability to prevent discharges that have caused or continue to cause mercury to accumulate in the Delta or to significantly reduce the methylation of the legacy and ongoing accumulation of mercury that exists in the Delta.

In addition to the previously discussed obligations, the Basin Plan Amendment states that "methylmercury dischargers in the Delta and Yolo Bypass shall participate individually, through their representatives, or through an appropriate entity, in the development and implementation of an Exposure Reduction Program to reduce mercury exposure of people who eat Delta fish." The dischargers, individually or in the form of a stakeholder group, must work with those in affected communities, community organizations and public health agencies to formulate an exposure reduction workplan.

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Then the dischargers must implement the plan and submit progress reports every three years to the Regional Board's Executive Officer. We understand that the Regional Board and the Department of Fish and Game, which regulates the taking of fish, have effective control over these issues.

Insofar as the Commission's budget is controlled by the Legislature and Governor, the Commission would like to restate that we lack the necessary funding to undertake the tasks that the proposed Basin Plan Amendment assigns to the Commission. While the Commission represents the state as owner of the sovereign lands covered by navigable waterways, the Commission is not in a position to undertake the kinds of projects you suggest without adequate funding. Currently, the Commission does not have staff or expertise to conduct the control studies or monitoring contemplated in the Basin Plan. Furthermore, in the event that funding was to become available, whether to undertake such a project as suggested in the proposed plan would be a decision that must be left to the discretion of the Commission.

Currently, the proposed Basin Plan Amendment places the bulk of the responsibility on individual stakeholders to formulate a plan for conducting control studies. This seems to limit the role of those with expertise and experience in dealing with California's water quality problems. The staff of the Regional Water Board have the expertise in water quality testing and monitoring, not the staff of the State Lands Commission. The Regional Water Board is uniquely positioned and should take the lead in deciding what control studies should be carried out and crafting reasonable a solution to the high levels of methylmercury in the Delta. Instead of assigning responsibility to individual State agencies, a more comprehensive solution may be to deal with the California natural resource agencies in a coordinated fashion. Each of the agencies is responsible for resources that are inextricably linked to the others and collectively have an impact on methylmercury levels in the Delta. Since the natural resource agencies are all trustees for the people of the State of California, it seems more efficient to approach the agencies as a group for seeking funding and developing a strategic approach for the State of California to participate in reducing methylmercury in the Delta.

The Commission staff would like to thank the Regional Board again for involving us in the process of developing the Basin Plan Amendment. We urge the Regional Board to support your staff in continuing to work with the conclusions, recommendations, and decisions on sound scientific evidence and the reasonable protection of beneficial uses, as required under the Water Code. Additionally, we urge you to help seek funding that will assist the Stakeholder group to work together in the future. We look forward to improving upon this collaborative stakeholder model for developing future TMDLs in the region.

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If there are any questions, please feel free to contact me at (916) 574-1800 or via email at thayerp@slc.ca.gov.

Sincerely,

A handwritten signature in black ink that reads "Paul D. Thayer". The signature is written in a cursive style with a large, stylized initial "P".

PAUL D. THAYER
Executive Officer

cc: Lester A. Snow, California Natural Resources Agency
Tim Stevens, California Department of Fish and Game
Marianne Kirkland, Department Water Resources
Dan Fua, Central Valley Flood Protection Board