

February 28, 2007

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



Re: Comment Letter: Proposed Methylmercury Objectives
and Proposed San Francisco Bay/Delta Mercury Offset Policy

Dear Ms. Her:

Thank you for the opportunity to review and comment on the Informational Documents for the Proposed Methylmercury Objectives and the Proposed San Francisco Bay-Delta Mercury Offset Policy. We appreciate the hard work to develop these documents, and found them thorough and reasonable. We fully support the State's efforts to develop and adopt methylmercury fish tissue water quality objectives and a San Francisco Bay/Delta mercury offset policy. We believe both the objectives and the offset policy will provide environmental protection in a reasonable, uniform manner. We have specific comments on each.

Methylmercury Water Quality Objectives

While implementation of water quality standards is key to achieving and maintaining environmental benefits, it is important to first set appropriate water quality objectives that protect all beneficial uses. Concerning the proposed methylmercury water quality objectives, we fully support Options 2 through 6. For reasons discussed below, we cannot support Option 1, the No Action alternative. Option 1 would mean that the California Toxics Rule (CTR) water column criteria would be the only applicable criteria for mercury in most water bodies in California. We do not support this Option for two reasons. First, EPA updated its Clean Water Act section 304(a) national mercury human health criteria guidance. The revised criterion is 0.3 mg of methylmercury per kg of fish tissue, based on a national fish consumption rate of 17.5 grams per day. The revised human health methodology used to derive this criterion accounts for bioaccumulation. The science supporting the derivation of human health water quality criteria has improved.

When we promulgated the CTR, we were required to consult under the Endangered Species Act with the U.S. Fish and Wildlife Service and the U.S. National Marine Fisheries Service (now NOAA Fisheries). The Services determined that the CTR mercury water column criteria were not protective of threatened and endangered species and other wildlife. In order to avoid a Jeopardy Determination, we agreed to amend the

CTR, to ensure that it included protective criteria. In subsequent discussions with the State, the State agreed to take the lead on the needed revisions. Options 2 through 6 are consistent with our commitment under the Endangered Species Act. Option 1 does not protect water bodies with wildlife beneficial uses.

Each of Options 2 through 6 fully protects wildlife through the fish tissue wildlife objectives. In Options 2 through 6, the wildlife objective of 0.20 mg methylmercury per kg of fish tissue is applied to the highest trophic level fish in the water body, and is more stringent than most of the human health objectives. Only Option 5's human health objective is more stringent. Option 5 uses a consumption rate of 32 grams per day, and applies the resultant 0.16 mg methylmercury per kg of fish tissue to trophic level 4 fish. Therefore, we support each of Options 2 through 6.

We support converting the fish tissue objectives into water column values to assist in implementation. We recommend the use of site-specific bioaccumulation factors as they become available, to better reflect the water column values.

Option 6 does not convert fish tissue values into water column values; we believe this option may result in variable outcomes across the State, and may place an undue burden on permit writers. Unless more detailed direction is included concerning how to implement Option 6, Options 2 through 5 may result in more consistent and manageable implementation across the State.

Several water bodies in California have State-adopted and EPA-approved site-specific fish tissue water quality objectives for methylmercury, for both human health and wildlife. These objectives are appropriately based on site-specific human health and wildlife information. We suggest that the informational document clarify the State's intent with respect to these established site-specific objectives.

Concerning implementation, we have two comments. The document states that variances "could provide regulatory relief while ensuring that all cost-effective mercury control measures are implemented." While we agree, and support the use of variances where appropriate, a variance is a revision to a water quality standard and is subject to EPA review and approval. The process of adopting and approving individual variances has the potential to create a substantial and unmanageable workload for both the State and EPA. This workload could be minimized by adopting a detailed variance authorization provision, or a statewide variance provision such as those adopted in some of the Great Lake States, that specifies when variances would be considered appropriate. EPA staff would be happy to work with State staff on this issue.

Lastly, the document contemplates the use of pollutant minimization plans or PMPs. EPA supports the use of PMPs, but we recommend including more direction and detail. EPA staff would be happy to work with State staff on this issue.

San Francisco Bay/Delta Mercury Offset Policy

EPA fully supports the State's efforts to develop an offset program for mercury at this time. A carefully crafted offset policy for dischargers is a good alternative to meeting stringent limits, and a useful tool to achieve environmental benefits. We believe that the policy is consistent with the Clean Water Act. EPA supports the enforceability provision, as this will ensure full accountability within the confines of the NPDES program. This type of provision is important in order for an offset program to work well.

We have three specific comments. First, we hope the State considers expanding the policy to apply to potential pilot projects on a statewide basis. Consistency throughout the State on this issue would help create a simpler and fairer program for dischargers, wherever they are located.

General Principle 4 states that a Regional Board may issue a permit allowing a new or additional discharge of mercury only from a new facility or an expansion of a new facility. We are concerned that this would exclude facilities experiencing growth within their system, but not expanding their treatment works. We suggest the State consider allowing POTWs that are experiencing an increase in flow due to growth, to take advantage of the policy, regardless of whether they intend to physically expand. We suggest the State clarify its intent for General Principle 4, or its intended definition of an expansion.

Concerning the factors to be taken into account in determining offset ratios, under Principles Affecting Offset Amounts, we agree that the offset ratio should exceed 1:1. However, we are concerned that if the degree to which a discharger is exceeding its wasteload allocation is a factor in determining a greater offset ratio, it could unintentionally serve to discourage those facilities that have the greatest incentive to participate.

Also, it is unclear from the text how the State intends "projected cost savings from performing an offset" to factor into the calculation of the offset ratio. If the State's intent is to increase the offset ratio for facilities with a high projected cost savings, this provision may also unintentionally discourage facilities with the most incentive to participate.

It has been our experience that the calculation of offset ratios has relied primarily on scientific and technical considerations along with scientific uncertainty. If fate and transport factors and scientific uncertainty were properly taken into account, the offset ratio has generally been high enough to provide adequate protection with a margin of safety to the water body. However, it is appropriate that the State include some flexibility to increase the rigor of the offset activities based on compliance and cost factors.

We recommend that the State clarify its intent concerning how these factors will be used to determine offset ratios. We would be happy to work with State staff to

determine the most appropriate way of incorporating these factors into the determination of offset requirements.

Thank you for the opportunity to review and comment on the proposed objectives and offset policy. If you have any questions concerning these comments, please call me at (415) 972-3572 or refer staff to Diane Fleck at (415) 972-3480 concerning the objectives and Matt Mitchell at (415) 972-3508 concerning the offset policy.

Sincerely yours,

Alexis Strauss
Director, Water Division