



**California Construction and
Industrial Materials Association**

February 16, 2017

Public Comment
Beneficial Uses and Mercury Objectives
Deadline: 2/17/17 12 noon

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
PO Box 100
Sacramento, CA 95814



Re: Comment Letter -- Beneficial Uses and Mercury Objectives

Dear Ms. Townsend:

These comments are offered on behalf of the California Construction and Industrial Materials Association (CalcIMA). CalcIMA is a statewide trade association representing the construction aggregate, ready mix concrete and industrial minerals industries in California. Our members operate over 500 facilities statewide providing the raw materials to fuel California's infrastructure needs as well as the needs of the construction, manufacturing and industrial sectors. We recognize the importance of protecting our States water quality but we also need a regulatory structure which our members can comply with and that achieves the objective of protecting our waters in an efficient manner.

Request for Additional Time

CalcIMA would first like to reiterate our request for additional time to analyze this proposal. The State Water Resources Control Board (SWRCB) has released a complex regulatory proposal with over 700 pages of supporting documentation and information. The proposal could have significant impacts on the development of mineral resources and on development throughout the State. Mine operators may be regulated under multiple programs within the proposed implementation plan. Impacts of such regulation are not analyzed and clearly explained in the proposal, making the short review period particularly problematic.

Ubiquitous Nature of Mercury in Environment

Much of the SWRCB's supporting documentation for this proposal discusses the ever-present nature of mercury in the environment as a result of functions such as atmospheric deposition. The Report even observes that average total mercury concentrations in the state's surface water exceeded 4ng/L (4.7 ng/L) between 2004 and 2012.

The proposal documentation contains other information concerning the complexity and scale of the conditions addressed, such as:

“Inorganic mercury is available in most aquatic systems due to widespread atmospheric deposition. Therefore, any anoxic aqueous environment that is rich in organic matter and contains the conditions necessary for conversion of inorganic mercury to methylmercury can be said to be a potential source of methylmercury.” P.52

Decision makers should be aware that Water Board staff believes organic mercury and methyl mercury can exist almost anywhere and everywhere within the state. And the state’s measured average over an 8 year period exceeds 4 ng/L, a level that will likely result in many new 303(d) listings and stringent permit limits, because that level is higher than several of the water column “translators” in the proposal (which are as low as 1 ng/l).

The Report may be misleading because it focuses on certain areas of concern within the state, such as coastal mountain ranges, while not quantifying the percentage of the state’s surface waters existing in those areas. But the fundamental reality is this proposal would apply statewide. As we are not provided more time to analyze the proposed policy, we have numerous questions which appear unanswered in the report but which should be addressed based on information available to SWRCB.

1. What portion of the state’s watersheds are expected to be impacted by each adopted objective for which beneficial uses have already been established?
2. What portion of the state’s waters have a sport fishing beneficial use?
3. What 303(d) listed waters for mercury also have a sport fishing beneficial use?
4. What specific areas of the state are expected to be defined as “AREAS WITH ELEVATED MERCURY CONCENTRATIONS”?

“IMPLEMENTATION TAKING A CENTURY.” How is Compliance determined?

The Report notes that “Human activity may prevent attaining the Mercury Water Quality Objectives for many species for the next century in many waters, but there is no way to know this for certain.” In addition, it notes, “Water Boards are required to ensure that all discharges, regardless of type, comply with all water quality control plans and policies.”

The draft document takes some 700 pages describing a jumble of potential background and facts, eventually suggesting how Water Boards may comply in various programs, but leaving many questions concerning the full effect on dischargers and development in the State. The proposed Policy language in Appendix A leaves most areas to permitting agency discretion, and fails to actually create a clear path to achieving water quality objective or implementation plan compliance. It should be clearly stated that these actions create compliance for the discharger.

For example, in Chapter IV.D.3:

“Chapter IV.D.3 applies to storm water dischargers regulated under general and individual NPDES STORM WATER permits issued pursuant to Clean Water Act section 402, subsection (p). The PERMITTING AUTHORITY shall include the requirements in Chapter IV.D.3.b in individual and general NPDES STORM WATER permits when adopting or re-issuing the permits.”

The proposal describes requirements that “shall” be imposed, but does not explain the full range of measures that will be required of dischargers to address the new objectives and to protect the new beneficial uses. Does this mean the MS4 or industrial facility is subject to additional obligations not discussed, potential litigation etc? The general discussion of the 700 pages often makes it sound like one shall just have to do x y or z, then falls short of clearly stating x, y or z is compliance.

Some of the Appendix A language is even more general, leaving nearly everything to Regional Board discretion. For example under nonpoint discharges the language is simply,

“The PERMITTING AUTHORITY has discretion under existing law to require dischargers to implement erosion and sediment control measures in WDRs or waivers of WDRs, and should consider requiring such measures in AREAS WITH ELEVATED MERCURY CONCENTRATIONS when adopting, re-issuing, or modifying a WDRs or waiver of WDRs.”

Similarly general language is included for dredging activities and wetlands. The Staff Report observes that the Water Boards may amend existing 401 Certifications. In this context, we as industry wonder how we will demonstrate we don’t “Cause or Contribute” to a violation of stringent new water quality objectives. For example,

1. How can an NPDES discharger required to meet a compliance schedule of 10 years demonstrate compliance with levels board staff believes can’t be achieved in a century?
2. How will a NPDES discharger be able to get a permit and begin or continue their activity?
3. Why does Appendix A not specifically note that CalTrans work and Construction Permit compliance is considered compliance with the objectives as discussed in the chapters?
4. Why is sediment and erosion controls discussed as acceptable for remediation of historic gold and mercury mines, Caltrans and construction but not clearly said to be sufficient for industrial stormwater dischargers in general?
5. What is the impact on housing and other development in the coastal range areas where fill permits may be required?

Strong Support of CASQA Comments

Second, we would like to express our support and agreement with the written comments provided to the SWRCB by the California Stormwater Quality Association. These comments raise important issues regarding SWRCB obligations, and important changes to recommendations (such as those for Industrial Stormwater).

There are, however, additional issues we need to address in regards to this proposal. First, the SWRCB needs to distinguish more clearly between historic gold and mercury mines, which directly contributed to the mercury issue, and the minerals industries of today. Second, the environmental analysis of the project must include an analysis of the program’s potential impact on current and future mining within California.

Clarification of Historic/Legacy Mining References vs Current Minerals Industries

In some sections of the document, the SWRCB has done a good job of creating clarity between historic and current operations. Section 6.9 is a good example of a careful discussion that distinguishes impacts of historic from those of current mining. However, there are other references to mining made throughout the document that do not clearly differentiate between the historic legacy mining practices and current mining practices, and have the potential to inappropriately stigmatize current mineral operators. Specifically, the discussion in *Section 4.4.1 Mining in California* should be clearly presented as a historic discussion. Statements such as this one on page 47, “However, mining is not the only important source of mercury in California” should be modified to reference historic mining: “However, **historic** mining is not the only important source of mercury in California.” Further, when discussing geology on page 49 the staff report notes, “The mercury from mine waste, naturally enriched soils, and geothermal springs is a major source of mercury in the Coast Ranges, the Sierra Nevada Mountains, and also downstream in the Sacramento/San Joaquin Delta and San Francisco Bay.” This discussion should clarify that it refers to mine waste from historic mining, and that current mining practices do not contribute mercury to the environment.

Mineral operations tend to be controversial projects, and statements taken out of context can have significant negative impacts within permitting processes and community perspectives crucial to mineral resource development. It is critically important the document not lend itself to misconstruction.

Industrial Stormwater Permit Eligibility and 303(d) Waters.

Industrial dischargers of stormwater within the state are required to have coverage under the industrial general stormwater permit or an individual discharge permit issued by their Regional Water Quality Control Board (RWQCB). Much of the mercury policy contains reference to control of mercury from sediments and the effectiveness of existing BMPs in that regard. However, when it comes to the discussion of industrial sources the SWRCB does not provide clarity on compliance measures required of industry, or describe how a new discharger will be eligible to commence discharges and obtain permit coverage.

This is exceedingly important as the Industrial stormwater permit has an obligation on new dischargers with direct discharges to 303(d)-listed water bodies qualify for permit coverage only after making one of three finding. Section 6.11 of the SWRCB draft staff report describes this challenge in detail, concluding simply that “[t]here are many mercury impaired waters throughout the state with no TMDL, where the lack of clarity for this requirement could cause a problem in how to determine compliance.” (Draft Staff Report, p. 139) However, the proposal does not resolve the issue. The draft Staff Report description of Option 4 (presumably, but not clearly, incorporated into recommended Option 5) asserts that,

“Because there would be no water column objective for mercury after the California Toxics Rule criteria are de-promulgated by U.S. EPA, compliance with the [newly proposed]

mercury Numeric Action Level (300 ng/L) is sufficient for demonstration of compliance with mercury water quality objectives for coverage under the Industrial General Permit.”

However, the *actual proposed language* for the Policy, set forth in Appendix A, does not refer to new dischargers at all. There is a single sentence relating to industrial stormwater, stating only that the existing Industrial General Permit Numeric Action Level for mercury will be made nearly 5 times more stringent, dropping it from 1400 ng/l to 300 ng/l. The proposed policy language does not dictate that showing a new discharge will contain mercury below the Numeric Action Level will qualify it for permit coverage -- how they would have thereby shown their discharge meets mercury water quality objectives at the point of discharge. It also does not address how new dischargers could qualify for individual stormwater permits (without the action level provisions) where that is a Water Board preference for a particular facility.

The policy documents do not discuss how many facilities are expected to discharge mercury at levels above or below 300 ng/l, such that even adding express language allowing coverage for new discharges below that level would affect the industry. Atmospheric deposition and soil mercury content may make ordinary, reasonably controlled runoff from industrial areas exceed levels considered to contribute to impairments based on the very low new water quality objectives. Even if a facility is permitted to technically demonstrate these background conditions are the cause of mercury levels, such demonstrations can be prohibitively costly and time consuming. Further, the new beneficial uses and water quality objectives will lead to expansion of 303(d) listed water bodies. The additional potential cost to industry and development, as well as the burden on the Water Boards managing this problem, would be immense without much benefit, since the report generally concludes that the existing BMP system for sediment control provides effective water quality control.

We recommend that in Appendix A, where the SWRCB notes implementation actions under the industrial Stormwater Permit, the SWRCB should also require a future modification to the Industrial Stormwater Permit to include explicit language that new industrial dischargers in Areas with Elevated Mercury Concentrations would still be eligible for coverage under the Industrial Stormwater Permit, and that coverage for these and other new dischargers would not require demonstration that they comply with the new mercury water quality objectives at the point of discharge.

In addition, the proposal must more clearly define the means to compliance with industrial Stormwater Permit receiving water limits. Otherwise, industrial facilities will be in perpetual jeopardy of enforcement and have no compliance end goal to reasonably plan for.

Environmental Analysis of Mineral Resources

Documentation supporting the draft proposal contains inadequate analysis of its impacts on mineral resources. It contains only one observation on page 227 of the staff report, which focuses exclusively on gold and silver mining and potential wastewater treatment from gold, silver and mercury mines, which to a large extent no longer exist within the state.

This is a flawed analysis which does not analyze nor discuss the rule’s potential impact on current and future mining within the State of California. California ranked sixth among the states in non-

fuel mineral production in 2014 and has approximately 660 active mines. Construction sand and gravel are the dominant mineral commodities produced.

It is our belief that SWRCB staff generally believes the existing mining industry in California is adequately regulated, with sufficient sediment controls required in existing regulatory programs. This view has been reflected in agency statements throughout many years of regulatory development, and it seems to be the context of statements elsewhere within the SWRCB staff report on this item.

The potential impacts on the existing industry are not unknown to the SWRCB as the staff report reflects in other locations. For example, on page 129 the Staff report discusses regulatory interfaces of currently operating mines which may intersect with this policy.

“Currently operating mines are much smaller sources than historic mines. Before a mine may discharge to surface water the mine owner must first obtain an NPDES permit. For mines regulated with an NPDES permit, the requirements are discussed in Section 6.12 and Section 6.13. Mines that don’t discharge directly to surface water still generate runoff from storm water. Storm water from a mine site may be regulated under the Water Board’s NPDES Statewide General Permit for Storm Water Discharges Associated with Industrial Activities (Industrial General Permit), and the requirements for storm water discharges are discussed in Section 6.11.”

It seems clear to us the SWRCB is aware of potential impacts to mineral resources but for some reason failed to discuss and fully assess them within the analysis section. This analysis is required by the California Environmental Quality Act (“CEQA”), and such an analysis must be undertaken before the proposal can pass muster under CEQA’s initial study requirements for potentially significant environmental impacts. (See CEQA checklist at Appendix G, II.)

In particular, as noted above, we are very concerned about the new discharger provisions of the Industrial Stormwater Permit should the SWRCB not mitigate and resolve that issue. Not being able to obtain an industrial discharge permit is more than a minor inconvenience for new industrial dischargers; without this legal authority to discharge stormwater, a facility could not exist. Only the SWRCB has any authority to mitigate provisions of the industrial stormwater permit by modifying that permit when it is reopened or a new permit is approved.

In order to aid the SWRCB in analyzing the Importance of mineral resources as well as the expected level of future permitting within California, we refer the SWRCB to several available references on mineral resources.

To understand the likely locations of future mineral resource development within the state, we recommend discussions with the Department of Conservation. Since 1976 the Department of Conservation has operated a mineral classification program which identifies primarily construction aggregate resources of statewide and regional significance. An index of those reports can be found in, *“Publications of the SMARA Mineral Land Classification Project Dealing with*

*Mineral Resources in California, 2013*¹ In addition, the California Geological Survey publishes “*Map Sheet 52, Aggregate Sustainability in California.*”² (MapSheet 52) Currently that report indicates the state currently has 34 percent of its 50 year demand under permit and will need to permit nearly eight billion tons of construction aggregate resources over the next 50 years. Many of those facilities would be “new dischargers” under the industrial permit.

MapSheet 52 does a good job of explaining the importance of construction aggregate mineral resources of the state as well as discussing the availability and shortage by numerous regions. Its nature as a low cost bulk commodity makes it ideal, both environmentally and economically, for there to be local sources of construction aggregates available. The legislature recognized this in Public Resources Code 2711(d) and 2711(f):

“(d) The Legislature further finds that the production and development of local mineral resources that help maintain a strong economy and that are necessary to build the state’s infrastructure are vital to reducing transportation emissions that result from the distribution of hundreds of millions of tons of construction aggregates that are used annually in building and maintaining the state.”

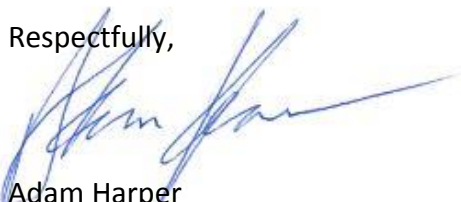
And

“(f) The Legislature further finds that the state’s mineral resources are vital, finite, and important natural resources and the responsible protection and development of these mineral resources is vital to a sustainable California.”

The SWRCB should correct the environmental analysis to reflect the policy’s potential impact on the state’s mineral resources, in particular the state’s construction aggregate mineral resources which have been the focus of the state’s identification Mapping and Resource Protection programs. Using knowledge of areas where mercury is of concern, as well as knowledge of probable locations of future mineral resource production, would allow the SWRCB to analyze properly the potential impacts of this policy.

We appreciate the opportunity to comment on the beneficial uses and mercury objectives. Should you have any questions regarding our comments do not hesitate to contact us at (916) 554-1000 Ext. 102.

Respectfully,



Adam Harper
Director of Policy Analysis

¹ http://www.conservation.ca.gov/cgs/minerals/mlc/Documents/SMARA_Publications_March_2013.pdf

² http://www.conservation.ca.gov/cgs/information/publications/ms/Documents/MS_52.pdf