Hg OFFSET POLICY
Deadline: 2/28/07 5pm

February 28, 2007

PSSEP
Partnership for Sound Science in Environmental Policy

Ms. Song Her, Clerk
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

commentletters@waterboards.ca.gov

Re: Proposed Mercury Offset Policy for Bay-Delta

Dear Ms. Her:

The Partnership for Sound Science in Environmental Policy (PSSEP) is an association of San Francisco area and statewide public and private entities – businesses, municipal wastewater treatment agencies, trade associations and community organizations. PSSEP and its members have been involved in the development of the San Francisco Bay Mercury TMDL since about 1999, and are very interested in the State Board's proposed "Mercury Discharge Offset Policy."

When the State Board remanded the SF Bay Mercury TMDL in 2005 with directions to the Regional Board that wasteload allocations be reduced, it did so assuming that a viable, adopted mercury offset program would be in place and available for dischargers seeking means by which to achieve those reduced WLAs. Moreover, the State Board assured all parties that any policy developed would "not include requirements that would leverage existing point source dischargers as a means of forcing dischargers to bear more than their fair share of responsibility for causing or contributing to any violation of water quality standards." (SWRCB Order No. 2005-0060.) Thus, the notion of "proportionality" was introduced as a key element of any future offset policy.

We believe the Scoping Document presents a number of interesting "general principles" and other ideas related to what an effective Offset Policy might ultimately look like, but it really leaves many un-answered questions. PSSEP's members are relying on the ultimate Offsets Policy adopted by the State Board to provide meaningful opportunities for achieving their WLAs established in the Mercury TMDL. For this reason, it is vitally important that, while developing future drafts of this Policy, the State Board understand that whatever is adopted, it ***must*** be: (1) easy to use, (2) effective at reducing mercury in the Bay-Delta Watershed, and (3) proportional. Unless it meets these minimum criteria, dischargers will be unwilling to invest in offset projects.

In the spirit of the purpose of a CEQA Scoping Hearing, we offer the following comments and questions about specific aspects of the draft Policy, and look forward to further refinements and analysis by staff. The text in red is taken from the draft policy; the text following represent our comments or questions.

Bay Area Clean Water Agencies

Bay Planning Coalition

California Association Of Sanitation Agencies

California Council for Environmental & Economic Balance

California Manufacturers & Technology Association

Chemical Industry Council

Chlorine Chemistry Council

Contra Costa Council

Tri-TAC
Sponsored by:
League of California Cities
California Association of Sanitation Agencies
California Water Environment Association

Western States Petroleum Association

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General Principles

1. Offset projects must result in a net environmental benefit in the Bay-Delta system.

- *Sounds good as a general principle, but what are the parameters of demonstrating "net environmental benefit"? PSSEP believes it should be defined simply - - for instance, "a reduction in the amount of mercury mass reaching or actually in the watershed."*

- *It is well-known that a primary focus of the regulatory agencies is reducing or removing methylmercury. With this in mind, if a discharger devises an offset program that removes total mercury, does it get credit for methylmercury reduction? What about the reverse?*

2. Dischargers must implement pollution prevention measures before qualifying for an offset. Dischargers will not be allowed to avoid the responsibility to perform at the highest level feasible.

- *Fair enough, but this stated requirement to "perform at the highest level" is nebulous and dangerous to leave hanging out there. It needs more definition in terms of what is required of the Discharger BEFORE being allowed to do an offset project.*

- *If the intent is to require highest level of treatment, then the notion of creating a viable Offsets Policy is illusory. Why? Because if the discharger has to spend hundreds of millions of dollars on treatment upgrades to meet its WLA, then there will be no incentive for it to pay anything more to remove more mercury through offsets.*

3. Dischargers may be allowed to offset a portion of the mercury in their discharges if, after the effective date of the applicable TMDL, their discharge level exceeds their wasteload allocation.

- *Prohibiting a discharger from accumulating offset credits until AFTER the effective date of the TMDL doesn't make sense. The Policy should encourage mercury removal from the watershed, and the sooner the better. There doesn't need to be a "bank" to carry any pre-TMDL credits - - just a letter acknowledgement from the Regional Board that the removal project occurred.*

4. A Regional Water Board may issue a permit allowing a new or additional discharge of mercury only from a new facility or an expansion of an existing facility, and only when offset consistent with this Policy. In all other circumstances, even when authorizing an offset, the Regional Water Board may not allow the mass or concentration of mercury in an existing discharge to increase.

- *This makes no sense in the context of a POTW, unless the goal of the policy is to stop all future growth. An unwavering truth for POTWs is that when one adds sewer connections, one adds more water coming through the plant, which generally means more mass of ALL pollutants found in a*

typical municipal wastestream. As written, this Policy principle would allow no room for growth in a given service area. This might be fixed by saying the Regional Board may not allow a "net increase" in mass.

6. Dischargers should make an effort to locate their offset project near the discharge it is offsetting; however, if demonstrated to not be practical, a project not in the vicinity of the discharge may be considered.

- *What is "near the discharge"? Is it two miles? Ten miles? One hundred miles? And why is there a limit at all - - other than saying the offset has to occur in the **same watershed**?*

- *If the goal is to minimize overall watershed impacts of the presence of mercury, isn't there actually **more** benefit to getting mercury out of the system FURTHER up in the watershed itself? As long as one addresses the disparate local impacts (see #7 below) then the distance to offset project should be irrelevant.*

7. Offsets must not allow a discharge to result in disparate localized impacts.

- *Fair enough, but we need to have a clearly defined approach to determining when and where there are such "disparate impacts." This can't be an ambiguous concept that differs over time and from Region to Region.*

Principles Affecting the Offset Amounts

Offset amounts granted to individual dischargers should always involve an offset ratio of greater than 1:1, defined as the ratio of off-site mercury reduction proposed divided by the proposed exceedance of their TMDL-specified wasteload or load allocation. The Regional Water Boards shall also take into account at least the factors listed below.

1. Offset ratios will be based upon:

a. The degree to which a discharger fails to meet its wasteload or load allocations; the ratio should be greater as the magnitude of the exceedance of the wasteload or load allocation increases;

- *What this principle seems to say is that, if a POTW or industrial discharger has gone to ultra-clean sampling methods, or has implemented new, more expensive pollutant treatment/removal processes, then the POTW doesn't get a lot of credit at the back-end of this process because it will undoubtedly get a lower WLA, and find it easier to exceed those allocations and possibly even by higher margins.*

b. The projected cost savings from performing an offset;

- *This is ultra-dangerous territory, and violates the spirit – if not the terms – of SWRCB Res. No. 2005-0060, which requires "proportionality."*

- *Why should it matter how much is "saved" or what percentage of "savings" is achieved. Isn't the goal to get 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 - - there's no need to if it's equal (or close) to the cost of new treatment installation.*

c. The expected length of time before the discharger complies with the wasteload or load allocation; the ratio should be greater for longer compliance schedules.

- *This is fair, but the State Board should develop specific guidance for how much and when.*

- *Also, the reverse should be true – faster compliance should result in lower ratios.*

2. The types of projects that could qualify as offset projects include, but are not limited to: restoration of watersheds affected by mercury; stream bank stabilization; mass removal; mine remediation; removal of mercury contaminated sediments in impoundments; reduction of atmospheric deposition from local sources upwind of the discharge point (Bay Area Air Quality Management District coordination); reduction of in-Bay discharges of dredged material containing mercury; collection and appropriate disposal of mercury and mercury-containing objects from the public; and removal of legacy mercury.

- *How about adding something that deals with Dischargers willing to help wetlands managers design, operate and manage their wetlands "better" to minimize methylation of mercury - - which is generally agreed to be a primary regulatory or management goal.*

Principles Affecting Implementation of Offsets

. . . .

4. The Regional Water Board(s) shall consider request(s) to complete offset project(s) as part of the normal NPDES permit(s) renewal cycle(s) or at the discretion of the Regional Water Board(s).

- *This needs closer review. Many offset projects may take more than the 5-year NPDES permit cycle and, in order to provide regulatory comfort to the investing POTW, there needs to be a way to provide assurance from the Regional Board that the offset project won't be taken off the table after the first or second 5-year permit cycle.*

5. Offset projects may not be approved if the mercury reduction to be achieved by the offset project is already the responsibility of some other party. An exception to this principle is for offset projects on public land where the public agency did not cause the mercury pollution.

- *What about "background" - - can a Discharger propose an offset project for the so-called "background" mass of mercury that is usually accounted for in TMDLs? If not, why not? Isn't the goal to remove mercury from the watershed, and if so, then offsets should be viable for any "non-responsible" mass of mercury.*

- *The State Board should also consider making the Offset Policy applicable - - at least for a "portion" of mercury for which there is another "responsible party" identified. For instance, doesn't it make sense to allow a (traditional) point source discharger to provide money for certain activities that removes or reduces mercury loading from other sources that might not have the resources to do the removal faster - - or at all?*

CONSIDERATIONS REGARDING POLLUTANT TRADING

This Policy will not address pollutant trading; the State Water Board may consider the issue in the future. Establishing trading (market) provisions is exceedingly complex and, therefore, will be deferred. Pollutant trading generally refers to an exchange of either permitted discharge levels or required abatement levels between two or more dischargers, either in a formal commodities market or banking system or a less-structured exchange.

Considerations which make the introduction of trading provisions complex include: whether credits expire; whether credits could be traded more than once; and whether credits would be available on a spot market only, or as futures under specified conditions (e.g., for insurance in case of a spill or treatment malfunction).

- *Fair enough, but it would be nice to at least get a commitment from the State Board that it will form a "working group" of dischargers, environmental NGOs, state and federal agency types who can continue to talk about this subject because it's going to take a long time to get there.*

In sum, we believe the Scoping Document provides a good "first step" towards the development of an Offset Policy for mercury discharges. We would recommend, however, that the State Board convene an active group of interested stakeholders to discuss and provide recommendations for future policy development. As stated earlier, the Offset Policy will not succeed if it is not used. Our experience suggests that a policy developed without active input from those expected to use it will have little practical value.

Sincerely,

Craig S.J. Johns
Program Manager