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

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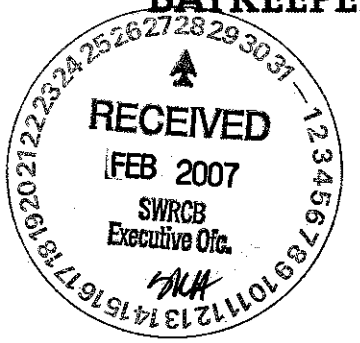
Defending Our Waters–from the High Sierra to the Golden Gate



February 28, 2007

Tam Doduc, Chair
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Sent via electronic mail to Song Her, Clerk to the Board, at commentletters@waterboards.ca.gov.

RE: State Policy for Water Quality Control, San Francisco Bay, Sacramento-San Joaquin River Delta and Tributaries Mercury Discharge Offsets Policy

Chairwoman Doduc and Members of the State Board:

On behalf of Baykeeper, thank you for the opportunity to provide input on the scoping for a State Policy for Water Quality Control, San Francisco Bay, Sacramento-San Joaquin River Delta and Tributaries Mercury Discharge Offsets Policy ("TMDL Offsets Policy"). We commend the Board for soliciting public participation early in the development of this policy, which will have significant implications for Total Maximum Daily Load ("TMDL") implementation in California and across the country. In addition to our comments below, we incorporate by reference our March 6, 2002 comments submitted to the State Water Resources Control Board ("State Board") regarding its 2001 draft Offsets Memorandum. These comments, submitted by Baykeeper and The Ocean Conservancy, are appended.

Baykeeper supports the State Board's decision to investigate innovative solutions to addressing mercury contamination in the San Francisco Bay and Delta. We are all too aware that reducing mercury in wastewater discharges alone will not result in human health protection within a reasonable timeframe.

Whether the TMDL Offsets Policy can be crafted to provide reasonable assurances that implementation will actually result in water quality improvement without local effects remains to be seen. As is true of many bioaccumulative pollutants, the fate and transport of mercury in the environment is incredibly complex. Bioconcentration factors are variable and uptake is influenced by a number of factors, including the form of mercury being released and environmental conditions affecting methylation. This complexity is no doubt one of the reasons that no trading or offsets program exists for bioaccumulative pollutants and why EPA "does not currently support trading of pollutants considered...to be persistent bioaccumulative toxics," except on a pilot project basis. U.S. EPA, *Water Quality Trading Policy* at 4, 69 Fed. Reg. 1608 (January 13, 2003).

Baykeeper also does not support trading of bioaccumulative pollutants. We recognize, however, that very carefully developed and implemented offsets projects may provide the

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State with a means to significantly reduce loading from legacy mercury sources within the context of a TMDL. As a framework for pilot offsets projects in the context of a TMDL, the State Board offsets policy must contain the following elements:

- *Does not allow the use of offsets to justify new or increased discharges;*
- *Allows only projects that reduce loading of total mercury;*
- *Does not cause localized impacts or allow existing localized impacts to continue;*
- *Requires offsets projects to be completed before credits can be used;*
- *Does not allow offsets for projects which are the responsibility of a permitted/permittable discharger;*
- *Describes, in detail, the oversight responsibilities of the State and Regional Boards;*
- *Demonstrates the feasibility of funding the development, implementation and oversight of an offsets program; and*
- *Provides opportunities for public involvement in the identification, approval and implementation of offsets projects.*

A. New or additional discharges cannot be offset.

The TMDL Offsets Policy principles inappropriately contemplate the use of offsets to allow for new or additional discharges. According to the plain language of 40 C.F.R. § 122.41(i), permits for new sources or discharges may be issued only if they are consistent with an existing TMDL and will not "cause or contribute to the violation of water quality standards." No circumstances exist in which both of these conditions can be satisfied because the State Board has not adopted TMDLs for the San Francisco Bay and Delta regions and because any new or increased discharge of mercury will contribute to a violation of water quality standards.

Even if the State Board were to adopt TMDLs that assign loads to new or additional discharges, these sources would, per se, cause or contribute to a violation of water quality standards. We do not support an interpretation of the Clean Water Act that allows new discharges to impaired water bodies, but we recognize that EPA and the Supreme Court have allowed new discharges upon a factual finding that the discharge would not cause or contribute to an exceedance of water quality standards. *Arkansas v. Oklahoma*, 503 U.S. 91, 112 (1992); *In re: Carlota Copper Company*, 2004 EPA App. LEXIS 35 (EPA App. 2004). In these instances, however, the pollutants at issue were not bioaccumulative, were subject to dilution, and most were subject to attenuation and degradation. In contrast, mercury is incredibly persistent and bioaccumulative. The addition of even a relatively small amount, especially in its methylated form, will contribute to a violation of the San Francisco Bay's bioaccumulation water quality objective for surface waters. *See In re City of Annandale*, 702 N.W.2d 768 (Minn. Ct. App. 2005). Because of its bioaccumulative nature, a factual finding that new or increased discharges of mercury will not cause or contribute to a violation of water quality standards is impossible.

Therefore, no new discharges can be permitted, even if offset, until water quality objectives are achieved to the point that a new discharge will not cause or contribute to an exceedance of water quality objectives. *See In re Mayaguez* 1993 EPA App. LEXIS 32 (EPA App. 1993).

At least one court has squarely addressed whether new or additional discharges to an impaired water body can be offset and concluded that they cannot. In *In re City of Annandale*, the Minnesota Court of Appeals considered whether a permit could issue to a new wastewater treatment plant that would discharge into a water body impaired for phosphorous. In rejecting the permitting agency's argument that the discharge would be offset by upstream reductions, the court determined that the reduction "does not rectify the violation of water-quality standards.' *Id.* at 774. The *Annandale* court further noted that EPA has proposed and rejected offsets and that EPA's decision "demonstrates that the regulation [40 C.F.R. § 122.4(i)] is not intended to incorporate a system of offsets." *Id. Annandale* clearly demonstrates that new or additional discharges to water quality limited segments cannot be offset.

B. "Net Environmental Benefit" should be defined as a reduction in total mercury at the site of the discharge.

No question exists that any offsets policy must result in a net environmental benefit to the Bay-Delta system as articulated in General Principal 1. As recognized by Mr. Wolff during the February 20, 2007 scoping meeting, the challenge lies in defining "net environmental benefit" and determining the nexus that the benefit must have to the discharge's environment. Baykeeper believes that the environmental benefit of an offsets project should be measured in terms of total mercury, and that offsets must result in reductions of total mercury at the site of the permitted discharge.

We suggest reductions in total mercury—including inorganic, elemental, and methylmercury—loading as the metric for "net environmental benefit" because of the interchangeability of the different forms. If methylating factors exist downstream of an offset, then reduction of methylmercury alone will not necessarily have the desired downstream effect. Instead, the offset must reduce total mercury loading upstream to the extent that the downstream environmental benefit is equal to or greater than if the permittee had reduced loading from its own discharge.

Additionally, the "net environmental benefit" of an offset must exist in fact. Only projects that actually reduce mercury loading should be considered as eligible projects. These could include cleanups of contaminated Bay margin sites or abandoned mines, but can not include education and outreach, risk reduction, ongoing mercury collection efforts, or scientific studies other than those necessary to demonstrate the feasibility and benefits of an offsets project. Furthermore, the load reduction from an offset should be demonstrated via empirical evidence collected at the discharge and offset sites.

C. Offsets must not cause disparate local impacts or allow existing impacts to continue.

If the State Board adopts an offsets policy, it must explicitly prohibit disparate local impacts. Disparate local impacts are localized concentrations of pollutants in excess of standards intended to protect aquatic and human life. Before being allowed to offset mercury discharges, a permittee must characterize and remedy its discharge's impacts on local receiving waters. For example, a discharge must not cause chronic or acute toxicity within or outside the discharge mixing zone, contain methylmercury concentrations higher than those in the receiving waters, or contaminate bottom sediments. Allowing offsets despite local impacts is unjust; it confers a benefit on the discharger at the expense of local communities.

D. Offset projects must be completed before credit for the offset is allowed.

Some comments made during the February 20, 2007 offsets workshop suggested that offsets credits might be allowed before the completion of a project generating the credits, a position which we strongly oppose and which is inconsistent with EPA policy. EPA's trading policy states that "[c]redits should be generated before or during the same period they are used to comply with a …limitation or requirement specified in an NPDES permit." It further provides that trading activities must not cause the combined point source and nonpoint source loadings to exceed the cap established in the TMDL. If TMDL-based permit limits are adjusted prior to completion of an offsets project, then the cap in the TMDL may be exceeded. Furthermore, allowing permit limits to be adjusted before a project is complete confers an unearned benefit on the permittee and removes an incentive to complete the project. Imposing a temporal requirement on offsets projects ensures that the permitee does not receive the benefits of offsets prior to incurring the costs and that water quality is not further degraded.

E. Offsets projects must result in mercury reductions that would not have occurred but for the offset.

The State Board has clearly stated it does not intend to address "pollutant trading" which it defines as an exchange between two or more dischargers. The policy principles, however, allow a discharger to offset its own mercury discharge by reducing the loading from public lands where the public agency did not cause the pollution. This is tantamount to a trade because it enables one discharger to reduce loading from another permittable discharge. A better approach is to allow offsets only for nonpermittable discharges and encourage all others to reduce loading through regulatory mechanisms—including waste discharge requirements and cleanup and abatement orders—currently underutilized by the Regional and State Boards. In this vein, we hope that any offsets policy will include a plan describing how the State and Regional Boards will use all available regulatory and legislative mechanisms to reach mercury sources that have escaped regulation to date.

F. Offsets ratios must be greater than 1:1.

If offset ratios are to be defined as the ratio of off-site reduction divided by the proposed waste load or load allocation exceedance, then they must always be greater than 1:1. A 1:1 ratio would not account for sources of scientific uncertainty in load reduction estimates or the effects of distance and hydrology on mercury loading. These factors were considered and applied in the Sacramento Regional County Sanitation District's Offset Feasibility Study, but are not mentioned in the policy principles.

G. The State Board should describe oversight and enforcement mechanisms.

In providing for citizen enforcement of the Clean Water Act, Congress explicitly recognized that government often lacks the means or will to enforce water quality laws. *See* S. Re. No. 414, 92d Cong., 1st Sess. 2-3 (1971). Rigorous oversight and enforcement, however, will be necessary for offsets to be effective and to ensure that they actually reduce mercury loading. The proposed policy principles lack any information about the respective responsibilities of the State Board and the Regional Boards. Also missing are requirements that would restrict offsets to dischargers with a demonstrated record of compliance, a limitation which would increase the likelihood of success.

H. The State Board must demonstrate that offsets are financially feasible.

The State and Regional Water Boards are already under-funded and under-staffed and an offsets program for mercury should not further drain agency resources. The stated purpose of offsets is to provide dischargers with alternative, more cost-effective methods to meet mercury effluent limits. The costs to the State of developing, administering and enforcing offsets must be considered in determining whether offsets will achieve better results at lower costs than other mechanisms. If substantial, then these costs should be born by the discharger receiving the benefit and not the public.

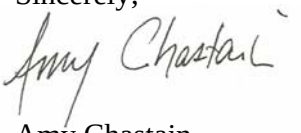
I. Opportunities for public participation must be frequent and significant.

The policy principles outlined by the State Board lack provisions providing for public involvement. Engaging the public, especially communities near discharges, will result in more informed decision-making and ensure that those most likely to bear the costs of unsuccessful offsets projects are allowed to share their perspectives and concerns. At a minimum, every proposed offsets project must be subject to notice and comment requirements and all information about specific discharges and offset projects must be publicly available.

Mercury contamination is a pervasive and challenging water quality and human health problem. Carefully developed offsets projects supported by rigorous science and oversight may offer a partial solution to this problem. Baykeeper wishes to make it absolutely clear, however, that we will not support an offsets policy for mercury unless ample evidence exists that it will be meticulously implemented and stringently enforced. We trust that the State Board will dedicate extensive time, care, and caution in developing what will be the country's first offsets policy for a bioaccumulative pollutant.

Thank you for consideration of these comments.

Sincerely,



Amy Chastain
Staff Attorney

ATTACHMENT A

Issues to Be Considered During Scoping for a State Offsets Policy

In addition to our preceding comments, Baykeeper requests that the State Board consider the following issues and questions prior to taking further action. The policy principles outlined in the State Board's scoping documents are general in nature, whereas the questions below are intended to provoke discussion about actual implementation. The bases for this list include the U.S. Environmental Protection Agency's Water Quality Trading Assessment Handbook, EPA 841-B-04-001 (November 2004), the Sacramento Regional County Sanitation District's Mercury Offsets Feasibility Study, and the U.S. Geological Survey's Western Geographic Science Center's Offset Research Guidance, available at http://geography.wr.usgs.gov/science/mercury/e2.html.

1. Discharger Eligibility

- How many permittees are likely to need an offsets credit in order to comply with permit limits based on TMDL waste load allocations?
- What the factors will be considered in determining whether a permittee has implemented appropriate pollution prevention measures and is "perform[ing] at the highest level feasible". *See General Principle 2.*
- To what extent must the permittee reduce mercury in permitted storm water discharges to be eligible for an offsets project? *See General Principle 2.*
- To what extent will a permitee's history of permit compliance be considered in allowing an offset project?
- Will stormwater permit holders be eligible for offsets projects?
- Will public and private dischargers be treated differently in terms of eligibility for implementing an offsets project, and if so, how?

2. Project Eligibility

- How many potential offsets projects currently exist?
- If all potential projects were implemented, what would be the projected reduction in mercury loading?
- Is there a sufficient understanding of the fate and transport of mercury to provide a reasonable assurance that an offsets program will ultimately achieve reductions in mercury in fish tissue?
- What are the uncertainties associated with mercury loading and how will the offsets program take these into consideration to ensure tangible results?

- Must the project benefit the same water quality limited segment, the watershed or the Bay-Delta system as a whole? *See General Principle 1*.
- What level of effort must the discharger make to locate their project near the discharge? What factors will be considered in determining whether locating the project near the discharge is not "practical"? *See General Principle 6.*
- With what degree of certainty must the permittee demonstrate that the proposed project will lead to a reduction in mercury loading?

3. Offset Ratio Calculations

- Consider whether the offsets ratio should be expressed in terms of mercury or methylmercury and articulate the implications of choosing either form. *Principles Affecting the Offsets Amount.*
- Articulate the rationale for considering the projected costs savings in calculating the offsets ratio. *Principles Affecting Offset Amounts-1.b.*
- How should the estimated bioavailability of mercury at an offset project site and at the permitee's discharge be considered in calculating the offsets ratio?

4. Methylation

- How will the methylation of mercury in the wastewater discharge compare to the methylation of mercury from the offset project site? *Principles Affecting the Offsets Amount.*
- What information exists to model methylation potential of offset project mercury reductions and of permitted discharges, and is this information sufficient to provide a sound model?

5. Efficacy Evaluation

- How will the permittee(s) participating in the offsets program demonstrate an actual reduction of mercury or methylmercury in the permittee's receiving water? *Principles Affecting Implementation of Offsets-3.*

6. Timing

- When will the discharger's commitment to the offset program enable them to adjust their enforceable waste load allocation?
- If offsets projects will be implemented over multiple permit terms, how will uncertainty in terms of changing regulation be minimized?

7. Legal Issues

- How will the policy ensure that new or increased discharges comply with anti-degradation and anti-backsliding requirements?
- How are liability issues relating to site cleanups such as those addressed in the Sacramento Regional County Sanitation District's offsets pilot project likely to frustrate an offsets program – how will the number of eligible projects be affected by such liability issues?
- What is the permittee's liability if, after implementation of the project(s) and the passage of the date on which the final waste load allocations take effect, there is no appreciable change in net mercury loading to the discharger's receiving water?

8. Administration and Oversight

- What aspects of a permissible offset will be established in the discharger's individual NPDES permit? What happens if the offset project takes longer than the five-year permit term? *See General Principle 5; Principles Affecting Implementation of Offsets-2.*
- What agency is the most appropriate lead agency for administration and implementation of an offsets program, and why? What other federal and state agencies should be involved?
- What is the projected cost of administering an offsets program and how might a program be adequately staffed and funded?
- What opportunities will the public be given to participate in development and implementation of offsets projects?

9. Offset Alternatives

- Assess the spectrum of legal and market mechanisms other than offsets projects—including mitigation banking and increased enforcement—available to address mercury pollution on public land where the public agency did not cause the pollution. *Principles Affecting Implementation of Offsets-4.*

ATTACHMENT B

March 6, 2002

Arthur J. Baggett, Jr.
Chair, State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: Response to SWRCB Offsets Memorandum dated October 16, 2001 and January 11, 2002 Offsets Meeting

Dear Chairman Baggett:

On behalf of The Ocean Conservancy and WaterKeepers Northern California, we would like to provide some preliminary comments on the State Water Resources Control Board's (SWRCB) legal memorandum dated October 16, 2001 and entitled "Legal Authority for Offsets, Pollutant Trading, and Market Programs to Supplement Water Quality Regulation in California's Impaired Waters" ("offsets memorandum"). We also provide brief comments regarding the meeting of various stakeholder groups and the SWRCB on January 11, 2002 to discuss both the offsets memorandum and proposed pilot offset programs.

In brief, we believe it is possible that offsets may work in limited situations. However, the legal and policy concerns inherent in a full-fledged offset program appear to far outweigh the benefits in terms of investment of staff time and resources. We recommend that the state focus on offsets and trading only in the context of established TMDLs, and then only where the offset or trade is within the same water body and clearly results in a significant net water quality improvement in the affected water body, over the long term, that would not have occurred but for the trade. If offsets are desired in a pre-TMDL context, we believe the better course is to ensure that the proposed increase in discharges should not occur until the water quality has improved to the point that standards are being attained and the water body can assimilate the increase, over the long term, without violating standards.

REVIEW OF OFFSETS MEMORANDUM

Page 4: Nonpoint Source Pollution

As we raised in the January 11th meeting, the discussion in the offsets memorandum of the "three-tiered process" for addressing nonpoint source pollution incorrectly describes this process as following a sequential course, from "voluntary" abatement to waste discharge requirements "if the other tiers are unsuccessful." This process actually represents three tiers of action, rather than a sequence, and any tier can be chosen at any time as appropriate. Specifically, the SWRCB's Nonpoint Source Program Plan states on page 55 that:

> Sequential movement through the tiers (e.g., Tier 1 to Tier 2 to Tier 3) is not required of the RWQCBs. Depending on the water quality impacts and severity of the NPS problem, the RWQCBs may move directly to the enforcement actions specified in Tier 3.

This fact is particularly important in the TMDL context. We request that this language be reflected in all future legal documents, and that the offsets memorandum be modified accordingly.

Page 5: EPA's Proposed Offset Rule

We had serious concerns with EPA's proposed offset rule (which is described at the top of page 5); we transmitted these concerns in writing to EPA. We request that the Board not rely on the proposed rule for any form of support for a state offset program, particularly as EPA has abandoned it.

Pages 6-7: New Sources

The offsets memorandum appears to use *Arkansas v. Oklahoma*, cited at the top of page 6, as support for the proposition that it may be possible to allow new discharges of those pollutants for which a water body is listed. However, this case is narrowly focused on the facts and does not address this particular issue. Rather, as illustrated by footnote 22 of the *Mayaguez* opinion cited in the offsets memorandum, the courts likely favor the more limited position that new discharges "may be" appropriate "[w]here, for example, the receiving waters are stressed by pollutants *other than* those in the proposed discharge *and* such pollutants do not contribute to existing stresses . . . ." (Emphasis added.)

The primary practical concern behind the use of offsets is the level of certainty that will be applied to the process. The caveats described on pages 6-7 of the offsets memorandum accurately reflect the concerns of the conservation community regarding the use of offsets for new sources. It is our view that in a pre-TMDL context, "offsets" should not be used until the water quality in the affected water body has actually been improved to the point that the water body is no longer impaired for the pollutant that is

the subject of the offset, and that improvement is long-term and sustainable. That is the only way to ensure that the new discharge does not "cause or contribute" to the violation of water quality standards now or in the future, and that the allowance of the discharge does not violate state or federal antidegradation policies.

Pages 8-9 – Existing Sources and *Tosco* Decision

The conservation community strongly disputes the suggestion in *Tosco* (Order WQ 2001–06, March 7, 2001) that "interim" limits can backslide from previous "final" limits. For example, the Clean Water Act and regulations allow for interim limits during a short, prescribed, finite period if necessary to comply with final limits. By contrast, the interpretation of interim limits in *Tosco* lacks any limit on duration and is not tied to water quality standards or other Clean Water Act requirements. In effect, the Board has created a new standard that has no support in the Act. Accordingly, it should not be used as the basis for an offset program for existing sources.

Page 9 – "Bubbling" of NPDES Permitted Sources

The legal memo asserts that bubbling is another way to avoid the limits on existing discharges set up in the antibacksliding rule. The memo appears to liken "bubbling" under the Clean Air Act to airshed-based trading; however, it is our understanding that "bubbling" applies to larger single sources such as large oil refineries or airports, rather than several different sources over a larger area. Thus, there is no discernable difference between a "bubble" permit under the Clean Air Act and a single permit with multiple discharge points under the Clean Water Act. Under the latter, if a previous permit limited a particular discharge point, then any increase in that discharge would violate antibacksliding regardless of events at other discharge points at the facility.

Moreover, even true intra-airshed emissions trading (as opposed to single-source "bubbling") is limited in the amount and types of pollutants that may be involved. EPA generally limits trading to specific pollutants that do not have localized impacts, such as nitrogen and sulfur oxides (as opposed to particulates and volatile organics, which have concentrated, localized impacts). Water pollutants with such localized, "hot spot" impacts, such as bioaccumulative contaminants like mercury, would not be able to pass this test and would also raise environmental justice issues.

Trading of pollutants within an airshed is also more appropriate than within a watershed because natural meteorological and physical (geologic) barriers exist for air that often do not exist for surface water. In addition, because air pollutants mix so much more rapidly than water pollutants, the impacts of air-based trades occur much more quickly (*e.g.*, days versus months or years for water) and are far easier to track. As such, existing air pollutant trading within airsheds does not appear to be a useful model for most potential water pollutant trades within California watersheds.

Finally, inter-airshed (*i.e.*, between different airsheds as opposed to within the same airshed) trading is extremely rare. The primary example is the acid rain program in the Eastern United States. It should not be viewed as a model for trading between different watersheds in California.

Page 10 – Mini- or Partial TMDL

We disagree with the assessment that the Clean Water Act supports the development of a "mini," "partial" or other faux TMDL, especially as a way to avoid antibacksliding requirements. The Clean Water Act, which requires preparation of TMDLs for impaired water bodies, and its accompanying regulations clearly define what a TMDL is. If the action is not a TMDL, then antibacksliding applies.

Page 10-11 – Variances

We disagree with the notion that a variance on effluent limitations into an impaired water body would ever be "in the public interest." Variances provide extremely tenuous support for an offset program.

COMMENTS ON JANUARY 11, 2002 OFFSETS MEETING

We recognize that the basis for the January 11th meeting was the fact that the State Water Board's new Strategic Plan includes as a "key strategic project" the establishment of an offset program. Specifically, page F-14 of the Strategic Plan includes the objective to "[d]evelop a process to identify dischargers willing to participate in projects to reduce pollutants loadings to waterbodies from other sources by an amount that more than offsets increases in their own discharges, or required decreases in current discharges." While we agree that established TMDLs may present a viable context for trading so long as "reasonable assurance" is provided for, trading and offsets prior to TMDLs face very difficult legal challenges, and examples are hard to envision from a policy or practical perspective.

The concerns of the conservation community with regard to offsets were discussed in the AB 982 PAG report to the State Water Board on TMDLs, which states that:

> The Environmental Caucus feels that allowing discharge of a pollutant to a waterbody already impaired for that pollutant is environmentally destructive and contrary to law. Furthermore, the Environmental Caucus opposes allowing offsets for waste streams that already are, or should be, regulated through the permitting process. In addition, while the Environmental Caucus does not have a uniform view on the overall issue, it is clear to the entire Caucus that there remain serious structural and administrative hurdles to any offset or "trading" program. These include the reality that the State and Regional Boards are not adequately

funded to accomplish current mandates let alone oversee an entirely new and technically challenging program such as would be posed by the offset concept.

Specific concerns include but are not limited to the following:

- Legal and liability issues;
- Manner in which a load allocation (load reduction) would be credited to a specific offset;
- Site-specific characteristics of water bodies at issue;
- Specific characteristics of pollutants at issue;
- Accountability issues (*e.g*., how will a load reduction be measured?);
- Creation of pollutant "hot spots";
- Environmental justice implications;
- Location of the source;
- Timing of the reduction;
- Ongoing responsibility and maintenance of the reductions;
- Appropriate offset ratio(s);
- Agency management, including funding for an offset program**;**
- Type of source (nonpoint vs. point source); and
- Whether pollutant reductions that are otherwise required or would otherwise occur should be the subject of offsets.

We note that advocates of an offset program often assert that the benefit of an offsets program is its ability to regulate important sources that have typically escaped regulation (*e.g*., inoperative mines) or sources that are not currently subject to source control programs (*e.g*., fluorescent light bulbs). In fact, many of these sources already are or should be subject to regulatory control. For example, Regional Board staff have been urged for years to issue NPDES permits to landowners holding property where inoperative mercury mines are located. These discharges typically can and should be regulated by an NPDES permit or WDR. Many other pollution prevention programs, such as the reclamation of products that contain mercury, should already be underway by POTWs and MS4 permit holders pursuant to their NPDES permits. The fact that such programs are not already being implemented fully is likely being exacerbated by relaxed permits issued to point sources and vague performance standards such as those that typify many MS4 permits. Thus, we believe that the <u>existing</u> permitting system, if implemented properly, has great potential to control these "unregulated" sources without the need for an offset program.

This concern and the long list of other legal and policy concerns make offsets much more viable in a TMDL than a pre-TMDL context. We are particularly concerned that disputes over offsets will take up valuable staff and other resources that might be better spent accomplishing TMDLs.

The offset example discussed at the meeting illustrates these concerns. This example was the offset of mercury discharges into the Sacramento River by the Sacramento Regional County Sanitation District with reductions of legacy mercury

pollution in the Sierras. It appears there is some dispute over the extent to which this permit actually requires implementation of an offsets program. Nevertheless, a program to offset mercury discharges by the municipal discharger with reductions in legacy mercury outside of the area affected by the permit would: (a) have little to no impact on water quality in the permit area, (b) have uncertain impacts on water quality even in the area of the offset, and (c) raise environmental justice issues (particularly because of the fact that mercury bioaccumulates). The only certain result would be continued mercury discharges in the Sacramento River.

* * *

In summary, as noted above we believe that there are only limited situations in which an offset program may work because of the legal and policy concerns inherent in such a program. We recommend that the state focus on offsets and trading only where the offset or trade clearly results in a significant, long-term water quality improvement in a listed water body for which there is an established TMDL, where the improvement would not have occurred but for the offset. Offsets should not be used in a pre-TMDL context for a listed water body.

Thank you for the opportunity to provide comments on the proposed offset program and the offsets memorandum. If you have any questions, please do not hesitate to call.

Sincerely,

Linda Sheehan
Director, Pacific Region
The Ocean Conservancy

Jonathan Kaplan
BayKeeper
WaterKeepers Northern California

cc: Celeste Cantu, SWRCB
Craig Wilson, Esq., SWRCB
Tom Howard, SWRCB
Michael Levy, SWRCB