



CALIFORNIA FARM BUREAU FEDERATION

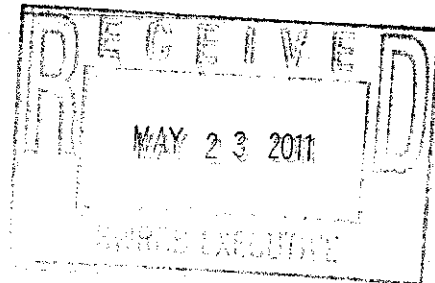
OFFICE OF THE GENERAL COUNSEL

2300 RIVER PLAZA DRIVE, SACRAMENTO, CA 95833-3293 · PHONE (916) 561-5665 · FAX (916) 561-5691

Submitted via E-Mail
commentletters@waterboards.ca.gov

May 23, 2011

Jeanie Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Re: Comment Letter – Delta Methylmercury TMDL

Dear Ms. Townsend:

The California Farm Bureau Federation (“Farm Bureau”) is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home, and the rural community. Farm Bureau is California’s largest farm organization, comprised of 53 county Farm Bureaus currently representing approximately 76,500 agricultural and associate members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California’s resources.

Farm Bureau appreciates the opportunity to provide comments on the State Water Resources Control Board’s (“State Board”) Proposed Approval of Amendments to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Methylmercury and Total Mercury in the Sacramento-San Joaquin Delta Estuary. Farm Bureau has been actively engaged in this process, including serving as a stakeholder. Nevertheless, Farm Bureau continues to have questions and concerns regarding the mercury TMDL’s overall regulatory effect.

During the public comment period on the Central Valley Regional Water Quality Control Board’s (“Regional Board”) Basin Plan Amendment for the Control of Methyl and Total Mercury in the Sacramento-San Joaquin Delta Estuary, as well as during the Regional Board’s hearing on April 22, 2010, Farm Bureau raised concerns, through written and oral statements, regarding the Regional Board’s analysis and standards used in the February 2010 Staff Report and the resulting Basin Plan Amendment (“BPA”). Specifically, Farm Bureau expressed that the BPA does not conform to the requirements and standards set forth by the Porter-Cologne Water Quality Control Act since the BPA is

NANCY N. McDONOUGH, GENERAL COUNSEL

ASSOCIATE COUNSEL

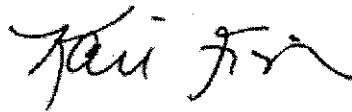
CARL G. BORDEN · KAREN NORENE MILLS · CHRISTIAN C. SCHEURING · KARI E. FISHER · JACK L. RICE

Delta Methylmercury TMDL Comment Letter

based on inappropriate and arbitrary standards that are incorrectly utilized and relied upon to formulate the fundamental core of the water quality objectives that will be used to control methylmercury in the Delta. Although these comments were raised in a timely manner numerous times before Regional Board staff and Board members, appropriate responses regarding the correct legal standard required were not made. Thus, the legality of the standard used within the BPA remains an open question that should be brought before the State Board, as outlined in the attached comments.

Thank you for the opportunity to provide our comments and concerns. We look forward to further involvement and discussion with the State Board on the development of the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Methylmercury and Total Mercury in the Sacramento-San Joaquin Delta Estuary.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kari Fisher", written in a cursive style.

Kari E. Fisher
Associate Counsel

KEF/pkh
Attachment



CALIFORNIA FARM BUREAU FEDERATION

NATURAL RESOURCES AND ENVIRONMENTAL DIVISION

2300 RIVER PLAZA DRIVE, SACRAMENTO, CA 95833-3293 · PHONE (916) 561-5665 · FAX (916) 561-5691

April 7, 2010

Sent via U.S. Mail & E-Mail

pmorris@waterboards.ca.gov.

Patrick Morris
Central Valley Water Board
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670

Re: Basin Plan Amendment for the Control of Methyl and Total Mercury in the Sacramento-San Joaquin Delta Estuary

Dear Mr. Morris:

The California Farm Bureau Federation ("Farm Bureau") is a non-governmental, non-profit, voluntary membership California corporation that's purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home, and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing approximately 81,000 members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

Farm Bureau appreciates the opportunity to comment on the Central Valley Regional Water Quality Control Board's ("Regional Board") Basin Plan Amendment for the Control of Methyl and Total Mercury in the Sacramento-San Joaquin Delta Estuary ("BPA"). Farm Bureau has submitted comments to the Regional Board throughout the development of the mercury TMDL and Basin Plan Amendment, as well as being an active member in the stakeholder process. Throughout the past several years, Farm Bureau has raised and continues to have serious concerns with various aspects of the proposed BPA. Before getting into specific concerns regarding the contents of the BPA, which we reserve the opportunity to provide at a later date, an overarching concern and fundamental flaw must first be raised and then addressed by staff because such a flaw impacts the entire contents of the BPA and thus, all comments on the contents itself. Specifically, Farm Bureau is greatly concerned with staff's analysis and standards used in the BPA. The BPA does not conform to the requirements and standards set forth by the Porter-Cologne Water Quality Control Act ("Porter-Cologne Act"). Rather, as cited throughout the Staff Report, the BPA is based on inappropriate and arbitrary standards

that are incorrectly utilized and relied upon to formulate the fundamental core of the water quality objectives that will be used to control methylmercury in the Delta.

The Regional Board's Statutory Obligations Under the Porter-Cologne Act

In enacting the Porter-Cologne Act, the Legislature laid out specific goals and objectives for the State's waters. Regional Boards must conform to all such statutory mandates, including the Legislature's objective:

The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to *attain the highest water quality which is reasonable*, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.

(Wat. Code, § 13000, emphasis added.) In a recent decision, the California Supreme Court recently discussed the Legislature's intent, confirming its goal "to attain the highest quality which is reasonable." (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal. 4th 613, 619.)

The use of the term "reasonable" and the "reasonableness" standard is not limited to the express goals laid out in Water Code Section 13000. Rather, the Porter-Cologne Act expressly calls for reasonable actions throughout. Specifically, and of great importance is the direct language in Section 13241, the very section that governs the Regional Board's actions here. Section 13241 states:

Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure *the reasonable protection of beneficial uses* and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

- (a) Past, present, and probable future beneficial uses of water.
- (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.
- (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.
- (d) Economic considerations.
- (e) The need for developing housing within the region.
- (f) The need to develop and use recycled water.

(Wat. Code, § 13241, emphasis added.) Section 13050(h) further defines “water quality objectives” as “the limits or levels of water quality constituents or characteristics which are established for *the reasonable protection of beneficial uses of water* or the prevention of nuisance within a specific area.” (Wat. Code, § 13050(h), emphasis added.) Thus, when analyzing impacts to water quality, preparing or amending basin plans, and in establishing water quality objectives, the Regional Board must comply with and conform to the Legislative intent of the Porter-Cologne Act by applying the “reasonableness standard,” that is, evaluate if the activity or control limit will *reasonably* protect the beneficial uses.

The Regional Board Applied an Arbitrary and Capricious Standard When Drafting the BPA

Although the Regional Board correctly cited its authority and obligation to “prepare and adopt Water Quality Control Plans, also known as Basin Plans, to regulate water quality,” the Regional Board arbitrarily and capriciously applied its authority when crafting the BPA. (Control of Methylmercury in the Delta, Draft Basin Plan Amendment Staff Report, p. 1 (hereinafter “BPA Staff Report”).) Specifically, the Regional Board did not apply the proper standard when analyzing the water quality impacts and creating the water quality objectives. Instead, as documented throughout the BPA, staff used “fully protect beneficial uses” as the standard in determining compliance limits, water quality objectives, analysis and comparison of alternatives, and in staff’s ultimate decision on the preferred alternative.

The Regional Board correctly summarized the importance of water quality objectives by stating: “Water quality objectives are established in Basin Plans by the Regional Water Boards to protect beneficial uses. Water quality objectives provide a specific basis for the measurement and maintenance of water quality. For this Basin Plan amendment, the objective that needs to be established to protect the beneficial use is methylmercury concentrations in fish tissue.” (BPA Staff Report, p. 13.) However, by failing to use the “reasonableness standard” when determining the water quality impacts and water quality objectives, the “specific basis for the measurement and maintenance of water quality” is improper and invalid.

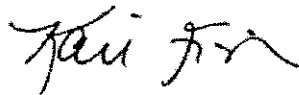
The Regional Board cites no authority allowing the use of a standard to “fully protect and fully achieve beneficial uses.” Rather, the statutory authority laid out in the Porter-Cologne Act and cited within the BPA clearly and unequivocally calls for the “reasonable” protection of water. By using a different standard, the BPA is fundamentally flawed in its analysis.

Farm Bureau urges the Regional Board to base all conclusions, recommendations, and decisions regarding the methylmercury control program on sound scientific evidence and proper legal standards, and to provide appropriate citations. We look forward to further involvement and discussion with the Regional Board regarding potential controls of

Letter to Patrick Morris
April 7, 2009
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methylmercury and total mercury within the Delta and thank you for the opportunity to provide our comments and concerns.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kari Fisher", written in a cursive style.

KARI E. FISHER
Associate Counsel

KEF:pkh