



Chuck Weir
Tri-TAC Chair
East Bay Dischargers Authority
2651 Grant Avenue
San Lorenzo, CA 94580
(510) 278-5910
cweir@ebda.org

Via Electronic Mail

August 15, 2005

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

ATTN:Debbie Irvin, Clerk to the Board
dirvin@waterboards.ca.gov

COMMENTS REGARDING PROPOSED AMENDMENT TO THE WATER QUALITY CONTROL PLAN FOR THE SAN FRANCISCO BAY REGION THAT WOULD INCORPORATE A TMDL FOR MERCURY IN SAN FRANCISCO BAY—SEPTEMBER 7, 2005 BOARD MEETING

Dear Chairman Baggett and Members:

Tri-TAC appreciates the opportunity to provide comments on the State Water Resources Control Board's options for action regarding the San Francisco Bay Mercury TMDL. Tri-TAC also incorporates by reference comments submitted by the Bay Area Clean Water Agencies (BACWA) and the California Association of Sanitation Agencies and League of California Cities. Tri-TAC is a technical advisory committee on POTW issues.

Tri-TAC believes that the San Francisco Bay Mercury TMDL is an important precedent-setting TMDL for the State of California. Not only does this TMDL affect a large and important regional watershed, it sets the stage for how TMDLs for legacy pollutants – particularly those where nonpoint or historical sources are the largest contributors – will be developed throughout the State. Additionally, largely because of the mercury- and gold-mining legacies, there are numerous waterbodies listed for mercury in California, most of which still require TMDLs. Much as early TMDLs in other regions appear to be serving as templates for TMDLs in other regions (e.g. the Santa Monica Bay bacteria TMDL), this mercury TMDL appears likely to set important precedent as well.

Vice Chair
Jim Colston
Orange County
Sanitation District
P.O. Box 9127
Fountain Valley, CA 92728
(714) 593-7458
jcolston@ocsd.com

Water Committee Co-Chairs
Ben Horenstein
East Bay Municipal
Utility District
375 11th St. MS702
Oakland, CA 94623
(510) 287-1846
bhorenst@ebmud.com

Terrie Mitchell
Sacramento Regional
County Sanitation Dist.
10545 Armstrong Ave.,
Suite 101
Mather, CA 95655
(916) 876-6092
mitchellt@saccounty.net

Air Committee Chair
Jackie Kepke
CH2M Hill
155 Grand Ave., Suite 1000
Oakland, CA 94612
(510) 251-2426
jkepke@ch2m.com

Land Committee Co-Chairs
Layne Baroldi
Orange County
Sanitation District
P.O. Box 9127
Fountain Valley, CA 92728
(714) 593-7456
lbaroldi@ocsd.com

Maura Bonnarens
East Bay Municipal
Utility District
375 11th St., MS702
Oakland, CA 94623
(510) 287-1141
mbonnare@ebmud.com

CalFOG Workgroup Chair
Trish Maguire
East Bay Municipal
Utility District
375 11th St., MS702
Oakland, CA 94623
(510) 287-1727
pmaguire@ebmud.com

Finally, it is certainly conceivable that much of the technical information, as well as the policy decisions made in the context of this TMDL, will be influential as the State Water Resources Control Board develops a statewide water quality objective and implementation policy for mercury.

As such, Tri-TAC is very concerned that the majority of the debate on the San Francisco Bay mercury TMDL has centered on the discharges from publicly owned treatment works (POTWs). The mercury discharged from these plants is, by any standard, de minimis. As the Regional Water Board has pointed out, removal of POTW discharges in their entirety from the Bay will not have a measurable impact on water quality. Yet the State Board is considering remanding the TMDL for the purpose of imposing additional treatment, pollution prevention, and other obligations on POTWs--despite the fact that when implemented, the TMDL adopted by the Regional Water Board will lead to attainment of the water quality objective. The mercury TMDL is appropriate and legally sufficient, and should be approved.

The TMDL approach to point sources is appropriate, considering the relative mercury contribution made by those sources. The approach is also consistent with EPA draft guidance, as well as mercury and other legacy pollutant TMDLs developed by EPA and other states. The goal of the TMDL should be attainment of the narrative water quality objective for mercury, and should not impose measures not necessary to achieve that attainment. The Clean Water Act (CWA) requires that TMDLs be established only for waters that are not meeting standards:

Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311 (b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. (CWA §303(d)(1)(A).)

The CWA further requires that TMDLs be established only at a level necessary to meet those standards:

Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level *necessary to implement the applicable water quality standards* with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. (CWA §303(d)(1)(C) (emphasis added).)

Finally, the CWA authorizes permit limits for point sources only as necessary to meet water quality standards:

In order to carry out the objective of this chapter there shall be achieved...not later than July 1, 1977, any more stringent limitation, including those *necessary to meet water quality standards*, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under the authority preserved by section 1370 of this title) or any other Federal law or regulation, or *required to implement any applicable water quality standard* established pursuant to this chapter. (CWA §301(b)(1)(C) (emphasis added).)

Thus, the CWA only authorizes the development of TMDLs and the imposition of permit conditions if they are necessary to meet water quality standards. The Regional Water Board found that reductions from nonpoint sources would be sufficient to bring the Bay into attainment without demanding numeric reductions from the minor contributions from point sources. In addition, the TMDL requires that point sources comply with group wasteload allocations enforceable through watershed NPDES permits, and that they develop programs to control mercury sources and loading and reduce mercury-related risks to humans and wildlife. (SF Bay Mercury TMDL at p. 11.) Because this TMDL mandates only those reductions necessary to achieve standards in the Bay, and requires only those permit conditions consistent with that goal, it satisfies the CWA and should be approved.

In addition, the TMDL's approach to point sources—requiring programs to control mercury sources and loading rather than reductions in numeric NPDES limits—is consistent with EPA and state guidance documents and TMDLs developed to address mercury and other legacy pollutants. In draft guidance, EPA has indicated that where point source dischargers are small in comparison to nonpoint sources, “controls on the discharge itself would result in almost no improvement in water quality.” (*Guidance for Implementing the January 2001 Methylmercury Water Quality Criterion* (EPA Draft, Feb. 18, 2004) at p. 77.) As a result, EPA recommends that in such situations, the permitting authority should impose non-numeric water quality-based permit limitations, including a requirement “to implement appropriate mercury minimization measures identified through the mercury minimization plan.” (*Id.*) The San Francisco Bay TMDL requires source control efforts similar to the minimization plans recommended by EPA.¹

¹ See also *Implementation Guidance for the Idaho Mercury Water Quality Criteria* (IDEQ, Apr. 2005) at p. 99 (relying on best management practices (BMPs) related to source control rather than numeric effluent limitations, and citing similar approaches in Ohio, Michigan, and Wisconsin).

The mercury TMDL is also consistent with a number of TMDLs developed by EPA and the states to address mercury and PCBs. For example, EPA established a TMDL for PCBs in portions of the Delaware River, where point sources comprised up to 30 percent of the total mercury loadings. EPA determined that the reductions necessary to achieve the TMDL and attain standards in the river could be implemented through development and implementation of PCB minimization plans. (*Total Maximum Daily Loads for Polychlorinated Biphenyls (PCBs) for Zones 2-5 of the Tidal Delaware River* (EPA Regions 1 & 2, Dec. 15, 2003).) For mercury impairments due primarily to nonpoint sources, EPA has established a number of TMDLs that allow reductions from minor point sources to be achieved through minimization measures such as source control. (See, e.g., *A Regional Approach to Developing Total Maximum Daily Loads for Mercury in the Coastal Bays and Gulf Waters of Louisiana* (EPA Region 6, Jun. 2005); *Mercury TMDLs for Little River and Catahoula Lake Watershed* (EPA Region 6, Feb. 2003); *Total Maximum Daily Load for Total Mercury in the Withlacoochee Watershed* (EPA Region 4, Feb. 28, 2002); *Total Maximum Daily Load for Total Mercury in the Middle/Lower Savannah River* (EPA Region 4, Feb. 28, 2001).) States are following suit. For example, Minnesota has developed a statewide approach to mercury impairments, which recognizes the *de minimis* nature of point source loadings, and requires minimization plans for municipal facilities with average wet weather flows of 200,000 gallons per day or more. (*Minnesota's Total Maximum Daily Load Study of Mercury* (MPCA Draft, May 24, 2005).)

Contributions from point sources (POTWs and industries) to San Francisco Bay constitute less than 2 percent of total mercury loadings. (TMDL at p. 3 (20 kg/yr out of 1220).) As discussed above, the San Francisco Bay mercury TMDL is consistent with EPA guidance and other TMDLs addressing mercury and other pollutants in similar situations. Further, the Regional Board believes that there are adequate "reasonable assurances" that reductions from other sources of mercury are likely to occur, which has been an informal guideline proffered by EPA for States to use in determining the needed level of point source load reductions in a TMDL. (*Guidance for Water Quality-based Decisions: The TMDL Process* (U.S. Environmental Protection Agency, Office of Water, EPA 440/4-91-C, April 1991, p. 15).) For all of these reasons, the Board should adopt Version 1 of the Resolution and approve the TMDL.

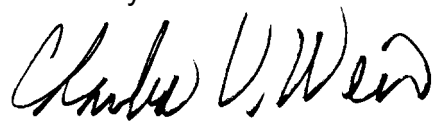
For years, POTWs have been hearing the message from regulatory agencies that they should embrace the TMDL program because the holistic watershed approach it embodies is the only way to assure reasonable and fair regulation of point sources. The Bay Area POTWs have done so, funding the Clean Estuary Partnership (CEP) and providing technical expertise and support to the Regional Water Board. The CEP has even included funding for a technical consultant to represent the interests of non-governmental organizations, including BayKeeper and Clean Water Action. The process has been viewed as a success and a potential template for supporting the TMDL

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program in other regions. To find ourselves in a prolonged debate about whether the less than 2 percent mercury contribution from POTWs should be reduced to some lesser de minimis percentage, at significant cost, is discouraging and difficult to understand.

Tri-TAC urges the State Water Board to adopt Version 1 of the resolution, approving the TMDL. Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles V. Weir". The signature is written in a cursive, flowing style.

Charles V. Weir
Chair

c: Michele M. Plá, Executive Director, BACWA
Roberta L. Larson, CASA
Yvonne Hunter, League of CA Cities
Elizabeth Allan, CWEA