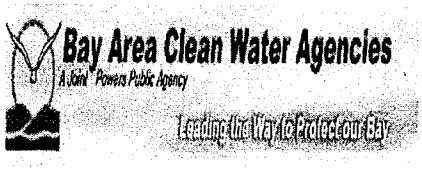
SCAP



February 28, 2007

Via Electronic Mail and Hand-Delivery

Tam Doduc, Chair
State Water Resources Control Board
1001 I Street, 25th Floor
Sacramento, CA 95812-0100

Attention: Song Her, Clerk to the Board
commentletters@waterboards.ca.gov

Subject: CEQA Scoping of the Proposed State Policy for Water Quality Control, San Francisco Bay, Sacramento-San Joaquin River Delta and Tributaries Mercury Discharge Offset Policy

Chair Doduc and Members of the Board:

The Bay Area Clean Water Agencies (BACWA), the California Association of Sanitation Agencies (CASA), the Southern California Alliance of POTWs (SCAP), and Tri-TAC appreciate the opportunity to provide comments on the Proposed State Policy for Water Quality Control, San Francisco Bay, Sacramento-San Joaquin River Delta and Tributaries Mercury Discharge Offset Policy (Proposed Offset Mercury Policy). Jointly, our associations represent the large majority of the public clean water agencies providing sewer collection, treatment and water recycling services to millions of Californians. We want to thank the State Water Resources Control Board and the staff for presenting this proposal. It represents a new approach toward protection of the uses of our water resources and we believe it will place California in the forefront on management options for mercury and other bioaccumulative pollutants. The staff and the Board are to be commended for initiating this first step.

An Offset Program Should be Fair and Voluntary

In September 2005, when the San Francisco Bay Mercury TMDL was being considered by the SWRCB, there was much discussion, by all interested parties, about the potential for offsets to result in

net environmental benefit. The community of clean water agencies has always supported a workable offset program that will result in **a net benefit** for the waters of the California. It is our understanding that the offset program was suggested by the State Board members because they were searching for a path which would allow public investment in meaningful removal (or non discharge) of mercury from the San Francisco Bay watershed. At the same time, the State Board members understood that putting all the responsibility and costs on the back of municipal wastewater is unfair, especially given the historical investment over the past thirty years which no other "source" of mercury comes close to matching, and the continued high level of investment in operations, maintenance, debt service, research and pollution prevention that municipal agencies will continue to make in order to protect the San Francisco Bay and the Delta watershed.

Consequently, the Resolution adopted by the SWRCB when it remanded the San Francisco Bay Mercury TMDL (Resolution No. 2005-0060) specifically states that any offset policy developed for the purposes of reducing the impacts of mercury on the environment would not result in an undue burden on municipal wastewater. The SWRCB resolution No. 2005-0060 stipulates that:

- The policy ***shall not*** include requirements that would ***leverage*** existing point source discharges 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, and

- That the fair share is ***proportional*** to their contribution to the impairment.

To the community of clean water agencies across the State, this language means that:

- we will not be forced, through regulations, wasteload allocations or NPDES permit requirements to be the deep pockets for clean up of and inordinate share of mercury or other pollutants, and

- the responsibility for cleanup of pollutants will remain proportional to the mass contribution of a given source in comparison to the total system loadings.

It is our strong position that an offset program has to be fair, as described in the SWRCB Resolution, and voluntary. Consistent with the Resolution, we do not believe it is the responsibility of the municipal clean water agencies to clean up a disproportionate share of legacy mercury in the Sacramento and San Joaquin Rivers Delta and the San Francisco Bay. Rather, this is a burden that belongs to all of the State of California.

The Policy Should Rely on Two General Principles

The clean water agencies appreciate that the development of an offset policy is complex. We agree that the Policy should rely on Principles in order to ensure that the underlying purpose of an offset program and the desired results are understood. In April of 2002, Tri-TAC submitted Offset

Principals to the SWRCB (which are also attached). After review of this proposal we have come to believe that there need only be two General Principles, which are:

1. Offset projects must result in a net environmental benefit.

2. Offsets must not allow a discharge to result in unacceptable, disparate localized impacts.

With these General Principles in place, the remainder of a policy should take the form of guidelines that reinforce each General Principle, but also provide for leeway for site-specific approaches. We suggest that this proposed policy is unnecessarily complex and that the approach of having, first, General Principles, then very specific additional Principles creates a huge contradiction and mis-alignment. The complexity detracts from the goals of **net environmental benefit** and hinders the ability for the policy to realize environmental benefits.

The policy must encourage and provide for a structure in which **net environmental benefits** can be realized and in which there are no unacceptable and disparate localized effects of a discharge. If these fundamental principals are compromised, hindered or restricted in a State Policy, as we see with this proposal, there will be no reason for a NPDES permit holder to engage in an offset program.

It is our understanding that the California Environmental Quality Act (CEQA) asks that we look at how this policy would be implemented. CEQA also requires that there is an examination of all reasonable and foreseeable means of implementation and the environmental impacts of such implementation. We believe that within the next five years a workable policy for offsets and trading will be necessary in order to realize the waste load allocations for municipal wastewater that are proposed in Mercury TMDL for the San Francisco Bay and anticipated for the Delta Mercury TMDL. Without a workable policy, i.e. one that focuses on the fairness, equity, and net environmental benefit, there will be serious environmental consequences. These include, but are not limited to, impacts resulting from the need to site, construct and operate additional treatment facilities and the use of additional energy to operate these facilities and the potential for greater production of greenhouse gases as a result of greater energy use.

In 2005, when the SWRCB was considering the San Francisco Bay Mercury TMDL, BACWA testified that the capital, operation and maintenance costs for additional treatment to comply with WLAs smaller than 17kg/yr could approach $300 million per year over a twenty year period. BACWA stated at that time that this huge expenditure of public money will not solve the mercury problem in San Francisco Bay due to the small amount of total discharge from municipal clean water agencies (less than 1.5 % of the total mercury load).

Offsets Provide a Net Gain Compared to No Offsets

To ensure that this policy is interpreted and implemented consistently across the State, a definition of **net environmental benefits** should be part of this policy. We are aware that there are two ways to define this:

- One is a traditional cost-benefit analysis with thresholds or targets. In the water quality trading context, this has most typically been referred to as a cost-effectiveness analysis. This is not the preferred approach to this definition because it relies on metrics that have been difficult to define over the many years of the national water quality program.

- The second and preferred definition, found in many trading policies and programs including EPA's, is that an offset should provide greater pollution reduction compared to no offsets—i.e., a net gain in mercury load reduction or other metrics.

Net environmental benefit means that more pounds are reduced from the offset site to ensure the environment is getting at least the benefit it would get from a reduction at the discharge point. Fairness and equity would lead to offset reductions that are of similar magnitude to the discharge to be offset, which we strongly support.

Offsets involving nonpoint source projects may provide additional environmental benefits over and above a direct load reduction (e.g. habitat improvement, reductions in other pollutants, flood control improvement, etc.). These extra benefits may indicate that a lower offset amount is appropriate.

Determining Disparate and Unacceptable Localized Impacts Should Rely on a Reasonable Definition and Representative Studies.

Unlike the net environmental benefit definition which has been discussed across the country in many other venues, the definition of localized impacts has not. Given that offsets should not be allowed where unacceptable localized impacts are deemed to occur, it is important that we define what this term means. It is also key that the definition of unacceptable localized impacts be established in a way that distinguishes between minor impacts and significant, disparate impacts that rise to the level of being deemed unacceptable.

The Sacramento Regional County Sanitation District is currently investigating the bioaccumulation effects in the vicinity of their outfall and is utilizing this working definition. Technology allows us to measure very small changes in various parts of the river (the water, sediment, micro-organisms, small and large fish). There is a need to decide how much of a statistically significant change is important. Is it 1%, or 10%, or 50%? Whatever is decided to be statistically significant must take into consideration the effect that decision will have on the ability to manage mercury at a regional level. Further, the Water Environment Research Foundation (WERF) and BACWA are jointly funding a study to develop guidance for wastewater facilities to determine their relative localized impact to

receiving waters. Both of these studies are integrating state of the science surrounding mercury behavior in the environment. The SRCSD study will be available in 2007; the WERF/BACWA study in early 2008.

Offset Ratios Will Determine if the Offset Policy is Fair and Workable

Underlying the State Board Resolution is the determination that public money should be most wisely and efficiently spent rather than unfairly leveraged. The General Principles expand this by also ensuring that an offset program will produce **net environmental benefit**, while still ensuring that NPDES permit holders meet their obligations and responsibilities to not unreasonably impact local beneficial uses. The community of clean water agencies understands and concurs with the purpose of a State Policy to establish an approach which all regions will utilize. We believe that there may be instances in which different offset ratios may be beneficial. We object, however, to the greater limitations on this ratio proposed by this policy, which will make this policy **unworkable**, **unattractive** and finally **unable to produce environmental benefits** of any kind. For example:

- The requirement that offset ratios be based on the "projected cost savings from performing an offset" creates a complexity that contradicts the Resolution, which states that offsets will not be used to leverage existing point source dischargers, and seriously detracts from the likelihood that any offsets will be forthcoming. This concept squarely conflicts with State Water Board Resolution No. 2005-0060, which stipulates that point sources dischargers would not be required to bear more than their fair share of responsibility and that the fair share is proportional to their contribution to the impairment. The use of avoided costs in setting offset ratios is a departure from the consideration of fair share, relative mass loadings and proportionality.

- Setting ratios based on cost-savings is inconsistent with other offset programs and policies. Ratios should not be set higher than sound science would suggest (accounting for location, uncertainty, net benefits, etc.)

- The goal and focus should remain on getting total mercury OUT of the watershed. The closer the cost of offset removal to the cost of higher treatment at a treatment plant, the more likely fewer clean water agencies will undertake to remove either legacy sources of mercury from the watershed, or taking other risks to reduce or remove mercury from other ongoing sources. Why would agencies do this if they can retain control with new treatment facilities at the same cost?

We feel strongly that basing the ratios on "projected cost savings from performing an offset" is not only a clear disincentive, but creates an unworkable program that is also unfair and inequitable. There are grave environmental impacts to this result of an unworkable policy, such as less removal of mercury from the environment.

We proposed that item **"1.b" under Principles Affecting the Offset Amounts be deleted.**

We have attached more detailed comments on other aspects of the proposed Policy. Our comments focus on how to ensure that this policy is workable. If it is not workable for municipal clean water agencies there can be no realization of the desire that we all have, for **net environmental benefits.**

The community of clean water agencies represented by BACWA, CASA, Tri-TAC, and SCAP commend the State Water Board Members and the staff on this first step toward a workable offset policy that will result in net environmental benefits, implement the State Resolution and provide a path for clean water agencies and others "sources" to comply with TMDLs WLAs. We have several suggestions on a path forward:

1. We would be remiss not to remind the State Board that EPA supports a Mercury Offset pilot project through the Sacramento Regional County Sanitation District (SRCSD). We believe that there are many lessons that can be learned from this pilot as it proceeds. We believe that the State Policy on Offsets should acknowledge and endorse the SRCSD pilot project, and any other pilot projects that are being pursued in advance of the final policy. These pilots will make available real-world information to assist the larger policy development effort.

2. This proposed policy as the first in the state will likely be a template for other watersheds for mercury (especially given a proposed the new WQO) and potentially for other pollutants across the state. Ultimately, our goal is a statewide Offset Policy. Our interest is that a workable productive and fair policy be adopted. Consequently we suggests that the SWRCB convene a small focused work group from stakeholders across the state to evaluate the lessons from the Sacramento Regional pilot, and focus on the implications of these lessons and potential improvements for this policy and how it can be applied in a broader context.

We do not want to create another long term or resource consuming process. There are experts across the state and in other parts of the country which can be engaged in helping this entire process. It may be best to allow the bioaccumulation studies and the offset pilot to proceed so that the SWRCB staff and a work group to review the process and results and integrate them into the context of this

policy. We clearly want an offset policy to be developed; we also want to ensure that a policy is **workable** and **productive.**

Sincerely,

Roberta Larson, CASA

Michele Pla, BACWA

Chuck Weir
Chair of Tri-Tac

John Pastore
SCAP

ATTACHMENT 1

Proposed Comments on the Proposed State Policy for Water Quality Control, San Francisco Bay, Sacramento-San Joaquin River Delta and Tributaries Mercury Discharge Offset Policy

1. General Principles:

- The community of clean water agencies strongly support the first General Principle that the result of an offset and the purpose of an offset program should be **net environmental benefit.** In fact, we believe that this is an overriding Principle with which every other principle and aspect of an offset policy should comply.
- We agree that pollution prevention measures, which are REASONABLE AND FEASIBLE, must be implemented before an offset program is proposed. In April 2005 BACWA delivered a collaborative product to the Water Board call the Pollution Prevention Guidance and Tools for POTWs. This is a groundbreaking compilation of what P2 programs are available and what the return (or environmental improvements) on each of these specific practices that can reasonably be expected. This "P2 Menu" has been fully researched to bring in programs that are underway across the country. It is our intention to update the P2 Menu every five years to determine if there are additional practices which can be incorporated into our programs. This menu specifically looks at the P2 strategy, the options for implementation, the costs and environmental benefits of these programs. We strongly suggest that not every P2 option can produce desired benefits. We propose that General Principal #2 be reworded to state:
  - **Dischargers must implement all reasonable and feasible pollution prevention measures before qualifying for an offset.**
- The second sentence in General Principal 2 states that dischargers not be allowed to avoid the responsibility to perform at the highest levels. We disagree with the tone and the negative implications that agencies are trying to avoid responsibilities. Clearly public agencies whose sole charge is to take wastewater and treat it will not avoid their responsibilities. We prefer that policy statements be more positive in establishing a standard of performance.
- In addition, we suggest that this Principle could be misconstrued to determine that before an offset can be contemplated a municipal clean water agency would have to invest in capital facilities to improve performance. In most cases it would not be desirable and such investment would eliminate the benefits and potential efficiencies of an offset program. The policy could rather require dischargers to operate and maintain all facilities and systems of treatment and control (and related appurtenances) in a manner that optimizes mercury removal capability of the facility.
  - We propose that this sentence be reworded to state:

    1. **Dischargers will operate and maintain their existing treatment facilities in a manner that optimizes the mercury removal capabilities of these facilities.**

- General Principles Number 3: It is stated that "Dischargers may be allowed to offset a portion of the mercury in their discharges..." The policy should not limit dischargers from offsetting their entire mercury load, if so desired. This principle also limits offsets to the period "after the effective date of the applicable TMDL". Offsets should be allowed prior to final approval of the

TMDL to encourage early action on mercury load reduction efforts. Given the lead time necessary to implement offsets, pre-TMDL credits would ensure compliance once TMDL WLAs are promulgated into permits. Offset programs that are implemented prior to full approval of a TMDL **MUST NOT** result in a reduction in the wasteload allocation for the agency implementing the offset.

- General Principle 4 - A clean water agency that is not expanding its facilities would not be able to increase its mercury concentration or mass, even where an offset is approved. This principle is unnecessarily restrictive and would limit the benefit, and therefore implementation, of offsets. As written, this principle would allow no room for growth (which increases mass) in a given service area. If there is no local impact from the discharge, and there is a net environmental benefit as a result of the offset, there would be no reason for the restriction provided in General Principal Number 4. We propose that it be eliminated.

- We agree that an offset has to be recognized in an NPDES permit. NPDES permits have limited time frames of five years. BACWA suggests that NPDES permits will not provide satisfactory longevity to the project owners, or the State and Federal agencies to have long term assurance for the offset. Other mechanisms, acceptable to both parties, such as Basin Plan Amendments and administrative tools available under the CWA will be needed to provide certainty and commitment that spans a NPDES permit's 5 year period.

- The community of clean water agencies, have long discussed a watershed approach to Mercury reductions for the San Francisco Bay, the Delta and the Central Valley region. We believe that a watershed approach, rather than the focus on individual pipe discharges is the only way that meaningful reductions will come about and the only way the offsets will be feasible. Consequently, in San Francisco Bay, BACWA has been expecting a single watershed permit which covers all clean water agencies (municipal NPDES permit holders). We strongly support watershed permits for POTWs for legacy pollutants in San Francisco Bay, including mercury, PCBs, banned pesticides, dioxins, etc. The wording in Principle number 5 may be interpreted as not allowing for NPDES permits which cover more than one discharger. BACWA proposes that the word **individual** be removed.

- We propose that this guideline be changed to state:

Offsets for discharges will be established in official documents such as Basin Plans or other forms of firm commitment that spans multiple future permits.

- We clearly understand the purpose of Principal Number 6. As we have stated before, we believe that **net environmental benefit** should be the overriding Principle which carries more weight and purpose than any other aspect of this policy. We suggest the General Principal Number 6 is the beginning of restricting and hindering this overriding policy. Nevertheless this Number 6 can be considered as a guideline, and in fact is written much like a guideline. We proposes that Number 6 be moved to the section called "Principles Affecting Implementation of Offsets". If an offset is not near the discharge and the **net environmental benefit** can be shown, it should be allowed.

- We concur with General Principal Number 7. We would suggest that this be Principal #2 of only two Principals.

2. Page 3, Principles Affecting the Offset Amounts, (1a): The proposed policy requires the sources proposing the greatest use of offset credits to have the largest offset ratios. Rather, ratios should not be based on the "degree of failure [of a discharger] to meet its WLA." There is neither basis in EPA policy, nor any precedent in other trading policies or programs where "bigger buyers" face a relatively higher trading ratio than smaller ones, all else being equal. The policy should establish guidance for determining which types of trading ratios are necessary and appropriate for a given situation, based in sound science and well-accepted principles for calculating and applying ratios. For example:
   - SRCSD in its Mercury Offset Feasibility Study considered three issues:
     a. one to address uncertainty in data;
     b. one to address differences in location of the offset site relative to the permitted discharge; and
     c. one to address variations in bioaccumulation.

The purpose of ratios is to establish equivalency or better between a load reduction at one source (in this case, a NPDES discharger) and a load reduction at another source (in this case, an offset project site). Ratios should not be used to establish any additional requirements or penalties that are stricter than the WLA established by the TMDL for any particular discharger.

3. We appreciate the list of potential projects that could qualify as an offset project. We especially appreciate that this list is not limited or limiting, thereby ensuring that if projects that meet the General Principles are proposed that they can be considered.

4. The community of clean water agencies appreciates the inclusion of the Principles Affecting the Implementation of Offsets as the first step toward a guidance document for the Regions. We also understand how this section assures all that this program is over an above the already in place NPDES permit program and TMDLs WLAs.
   - NPDES permits are in fact not the "primary mechanism" for the water quality program, but rather one of the mechanisms available to state and federal agencies for achieving water quality standards in navigable waters. Other mechanisms include watershed, regional, and statewide permits, TMDLs, in California Basin Plan Amendments, in other places various types of Watershed Management Plans.
   - We are very concerned that the inclusion of Number 5 and the subsequent discussion on the differences between offsets and trading will eliminate a potential program that would create net environmental benefit and efficiently utilize existing treatment infrastructure within the larger watershed.
   - As we read number 5 and the paragraph under Considerations Regarding Pollutant Trading, the acceptance and treatment at POTWs of some portion of municipal runoff to reduce pollutant loading through the discharges from storm water pipes could not be approved as an offset.
   - We strongly urge the SWRCB to reconsider this and open up this policy to allow the efficient use of our existing infrastructure, to create local and watershed wide net environmental benefits. If the SWRCB is concerned about reaching into a trading policy, we suggest that this be limited to clean water agencies (POTWS) offsetting or trading with municipal storm water.

- The potential for removal of not only mercury but many other pollutants would vary depending when and what amount of urban runoff is treated. We do know that in Southern California the acceptance of dry weather urban runoff has reduced the beach closures. For the San Francisco Bay, the Mercury TMDL requires nearly a 50% reduction of loading over 20 years. This is an extremely high level of reduction which will be very difficult to achieve without support from this policy.

Tri LOCC CASA CWEA TAC

Dave Williams

February 1, 2002

Arthur G. Baggett, Jr., Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Dear Chairman Baggett:

The Water Board's Chief Counsel sent you a memo concerning pollutant trading/offsets on October 16, 2001. On behalf of Tri-TAC, the statewide organization representing POTWs, I would like to share few thoughts with you and encourage development of a program in California.

We are glad to see that the Chief Counsel does not believe that legal roadblocks to program implementation exist. We concur. Program development should begin immediately. POTWs want to be involved and we stand ready to participate on a workgroup and/or other activities that the State Board undertakes.

Tri-TAC has developed the attached set of "Core Principles" which we believe are critical for a workable program. Below are the key concepts of those principles:

1. *Voluntary*-The trading/offsets program must be voluntary so that POTWs can choose offsets, source control, water reclamation or other pollutant reduction options, depending on the situation.

2. *Stable, Reasonable Costs*-Wide fluctuations in cost or high cost will have to be controlled (most likely by in-depth State involvement) in program implementation.

3. *Offset Ratio*-The offsets ratio should be 1:1, unless a different ratio is scientifically developed in a particular case.

4. *Credit Details*-Water reclamation, environmental enhancement and timing must be considered in calculating offset credits.

5. *Mitigation Bank*- A "bank" of available projects/offsets must be organized with substantial State assistance so that they are ready when needed.

6. *Documentation*- Clear legal documentation of offsets (or trades) will be necessary to attract local government participation.

Tri-TAC would very much like to participate in the development of a trading/offset program in California. Please let us know when work is commencing and we will support the effort in whatever way we can.

Sincerely,

Dave Williams
Chair, Tri-TAC