UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

MAY 18 2011

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
Post Office Box 100
Sacramento, California 95812-2000

Dear Ms. Townsend:

Thank you for the opportunity to comment on the proposed approval of an amendment to the Water Quality Control Plan for the Sacramento River and San Joaquin Basins (Basin Plan), to include a program for the control of methylmercury and total mercury in the Sacramento-San Joaquin Delta Estuary. On April 22, 2010, the Central Valley Regional Water Quality Control Board (Regional Board) adopted Resolution No. R5-2010-0043, which included the amendment to its Basin Plan. The amendment adds mercury water quality objectives in methylmercury fish tissue concentrations, and Total Maximum Daily Loads (TMDLs) for methylmercury in the Sacramento-San Joaquin Delta Estuary, to the Basin Plan. We urge the State Water Resources Control Board (State Board) to expeditiously approve the amendment. Our comments on the Regional Board Basin Plan amendment (BPA) are summarized below.

Technical Analyses: We commend Regional Board staff on their rigorous and thorough analyses to support the new fish tissue objectives and TMDLs. We strongly support the new objectives and TMDLs for methylmercury in the Delta Estuary. These objectives and TMDLs use the best available science, and focus on controlling methylmercury, which is linked to methylmercury fish tissue levels, and total mercury, which is the limiting factor in the production of methylmercury. The science supporting these TMDLs clearly indicates that controlling both methylmercury and total mercury will more effectively reduce fish tissue values to safe levels for both wildlife and Delta anglers.

Fish Consumption: The new fish tissue objectives are set to protect consumers of Delta fish eating up to 32 grams per day or approximately 1 fish meal per week. We are aware that subsistence fish consumers consuming more may not be protected. However, language in the BPA states that the Regional Board recognizes that some consumers eat four to five fish meals per week, and that the fish tissue objectives will be re-evaluated during Phase 1 of the Control Program and later program reviews, to determine whether more protective objectives can be attained. Executive Order 12898, dated February 11, 1994, entitled, "Federal Action to Address Environmental Justice in Minority Populations and Low-Income Populations" requires agencies to consider patterns of consumption of fish to ensure the protection of populations that principally rely on fish and/or wildlife for subsistence. Therefore, we strongly urge your serious consideration of higher, subsistence consumption patterns of Delta fish, when you consider revisions to the fish tissue objectives during your review of the Phase 1 Control Program and later reviews. Additionally, the U.S Environmental Protection Agency (the EPA) and State Board staff are preparing to conduct a statewide Tribal Fish Consumption Study, to determine the ranges of current and historical fish consumption values for Native Americans in

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California. This study should provide valuable information on Tribal subsistence fish consumption patterns in the Delta, and should be considered during these reviews of the Delta Program.

COMM Beneficial Use: We are pleased to see the commercial (COMM) use adopted as a "designated beneficial use" for the Delta and Yolo Bypass. However, the designation should be clarified as an existing use, to be consistent with the existing REC-1 use which includes recreational fishing. Existing use designations should be identified either where the use has taken place or the water quality sufficient to support the use has existed since November 28, 1975, or both (see Advance Notice of Proposed Rulemaking, 63 Fed Reg 36754). Recreational and commercial fishing is and has been taking place throughout the Delta; thus, an existing use designation is appropriate. We note that this issue was the topic of several stakeholder discussions, and we include our position here, should this issue be a topic of discussion at the State Board.

Implementation: We appreciate the Regional Board staff's assistance with specific language changes to the proposed April 2010 BPA regarding two issues: Regional Board action to proceed to Phase 2, and compliance schedules for NPDES permittees. The final adopted BPA on each of these two issues is consistent with our comments, and we request no further changes. However, since we understand these issues may generate discussion at the State Board, we request that the intent of the adopted BPA for each of these two issues remain intact.

1. Regional Board Action to Proceed to Phase 2: The proposed BPA contemplated that implementation of control actions for compliance with allocations (Phase 2) would begin only after formal Regional Board review and action on the development of Control Studies (Phase1), and after development of tributary TMDLs. The Delta TMDLs would be incomplete if another Regional Board action is required in order for Phase 2, implementation of control actions, to proceed. The adopted BPA contemplates that Phase 2 control actions be implemented when appropriate Phase 1 studies are completed. Regional Board action to proceed is not required. We appreciate Regional Board staff assistance with the language changes.

2. Compliance Schedules for NPDES Permittees: The proposed BPA contemplated that compliance schedules for NPDES dischargers will only start at the beginning of Phase 2, after the Regional Board completes a review of the Phase 1 Control Studies. However, this intent is inconsistent with EPA regulations concerning compliance schedules at 40 CFR 122.47 and with the State Board's 2008 Policy for Compliance Schedules in NPDES Permits, both requiring that compliance schedules, if allowed, be as short as possible. The adopted BPA added the following to Chapter IV, Delta Mercury Control Program, Final Compliance Date, fourth paragraph:

> The Regional Board will review the feasibility of meeting wasteload allocations based on reliable data and information regarding variability in methylmercury concentrations and treatment efficiencies and time needed to comply with the wasteload allocations. The Phase 1 Control Studies are designed to provide this information. As needed, the Regional Board shall incorporate the Phase 1 Control Studies into compliance schedules. When Phase 1 studies are complete, the Regional Board will review the need for additional time during Phase 2 for NPDES permittees to comply with the final wasteload allocations.

This language is consistent with both federal requirements for compliance schedules and with the 2008 State Policy. Under the 2008 State Policy, compliance schedules for water quality-based effluent limitations based on the waste load allocations in the TMDLs are authorized only where the Regional

Board determines that the Policy's scope and applicability requirements are met and the discharger complies with the compliance schedule application requirements in paragraph 4 of the Policy, demonstrating that additional time to implement actions to comply with the limitations is needed. We request this language remain included in the approved BPA.

Stakeholder Process: Lastly, we note that the Regional Board considered a very similar package in April 2008, while adoption took place in April 2010. Regional Board members directed staff to work with stakeholders to resolve concerns about the proposed program, and a significant amount of limited resources was spent on stakeholder meetings for two years. While this process may have been helpful to stakeholders able to expend substantial resources for travel and participation, we note that the objectives did not change and the revised TMDLs are very similar to the originally proposed TMDLs. We are concerned with the two year delay, and are concerned that meaningful participation from stakeholder groups with limited resources may not have been fully considered. Future stakeholder processes must be conducted in a manner that allows all groups to equally participate, and in an expeditious manner. We note our concerns with the process, should a discussion of it arise at the State Board.

The positions described in this letter are preliminary in nature and do not constitute a determination by EPA under Clean Water Act section 303(c) or 303(d). EPA will make appropriate approval/disapproval decisions following adoption of the water quality standards and the TMDLS, and the State Board's submittal to EPA.

We appreciate the great deal of work that has gone into the development of this Basin Plan Amendment. We appreciate the opportunity to review and comment. If you have any questions, please contact me at (415) 972-3572, or Diane Fleck at (415) 972-3480.

Sincerely,

Alexis Strauss 18 May 2011

Alexis Strauss
Director, Water Division