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April 4, 2007

Chairperson Doduc, and Members of the Board  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100



Re: WSPA Comments on the Proposed Basin Plan Amendment for the San Francisco Bay Mercury TMDL

Ms. Doduc and Members of the Board,

This letter contains the comments of the Western State Petroleum Association (WSPA) regarding the proposed amendments for the San Francisco Regional Water Board (Regional Board) basin plan to incorporate the Mercury TMDL for San Francisco Bay.

WSPA urges the Board adopt the Mercury TMDL and proposed basin plan amendments as submitted by the Regional Board.

As you recall, the State Board remanded the TMDL back to the Regional Board in September 2005. The re-submitted TMDL incorporates changes addressing all remand items. The Regional Board has incorporated additional provisions to establish enforcement and accountability for the point dischargers. These include multiple triggers based on individual performance that will require enforceable follow up action on behalf of the discharger. Lastly, the proposed basin plan amendment establishes a framework for an innovative, scientifically sound, and legal approach to implement group waste load allocations (WLA) for the point discharger regulated community.

The group WLA approach is not new, but has been implemented in several other regions across the nation. Our detailed comments (attached) highlight programs already in existence reflecting group WLA approaches for both point and non-point discharges. Of particular note is the Neuse River Basinwide Water Quality Plan that implements a point discharger group WLA approach for total nitrogen.

WSPA urges the Board to adopt this TMDL so that reductions can be implemented. If you have any questions, please contact me in our Sacramento office. Thank you.

s/Kevin Buchan  
(sent via email)

Enclosure: Detailed Comments of the Western States Petroleum Association on  
Amendments to the San Francisco Bay Basin Water Quality Control Plan  
(Resolution R2-2006-0052): Group Wasteload Allocations in the Mercury Total  
Maximum Daily Load

April 4, 2007

**Detailed Comments of the Western States Petroleum Association  
on Amendments to the San Francisco Bay Basin Water Quality Control Plan  
(Resolution R2-2006-0052):  
Group Wasteload Allocations in the  
Mercury Total Maximum Daily Load**

I. Applicable EPA Guidance

Recognizing the benefit of addressing air pollution on a regional basis, the U.S. Environmental Protection Agency ("EPA") has long endorsed the "bubble approach" to permitting sources of air emissions under the federal Clean Air Act. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As with permitting for air emission sources under the Clean Air Act, EPA also encourages a watershed approach to permitting point source discharges to water bodies under the federal Clean Water Act ("CWA"). *See Draft Framework for Watershed-Based Trading* (EPA May 1996, EPA-800-R-96-001) ("*Draft EPA Watershed-Based Trading Guidance*"); *Draft Guidance for Water Quality Based Decisions: The TMDL Process (Second Edition)* (EPA August 1999, EPA-841-D-99-001) ("*Draft EPA TMDL Guidance*"); *see* October 16, 2001 Memorandum by Craig M. Wilson, Chief Counsel, California Water Resources Control Board (concluding that regulating point sources under a "bubble" does not violate the CWA).

Section 303(d) of the CWA directs states to establish Total Maximum Daily Loads ("TMDLs") for waters that do not meet applicable water quality standards. By its very nature, the TMDL program is a type of watershed-based approach to achieving water quality standards in a particular waterbody or region. EPA describes the TMDL process as an "essential element to the water quality-based approach to watershed management." *Draft EPA TMDL Guidance*, at Chapter 3.1.

The mercury TMDL proposed by the San Francisco Regional Water Quality Control Board ("Regional Board"), in an amendment to the San Francisco Bay Region Water Quality Control Plan ("Basin Plan Amendment"), contains group allocations for industrial and municipal dischargers. However, these are not "pure" group allocations, because the facilities are also subject to individual mass limits or wasteload allocations ("WLAs"), the sum of which equals the aggregate mass limit. If the aggregate limit is exceeded, those dischargers whose mass discharges exceed their individual limits will be subject to enforcement action. In addition, if a facility exceeds its individual WLA, as a 12-month rolling average or a specified effluent mercury trigger concentration, it must report the exceedance to the Regional Board and implement a corrective action plan. Both aggregate mass limits and the conditions requiring corrective action must be incorporated in National Pollutant Discharge Elimination System ("NPDES") permits. Thus, the TMDL takes a "tiered" approach that provides for two levels of regulatory control and oversight – an individual WLA and an aggregate limit – with compliance requirements triggered by exceedance of either limit. *See* Basin Plan Amendment at 20-21. As discussed below, EPA guidance and the relative contribution of mercury in the

San Francisco Bay Basin support the Regional Board's "two-tiered" approach, which neither the CWA nor federal regulations prohibit.

A. EPA Encourages Innovative Approaches When Implementing TMDL Plans

The Regional Board's group WLA scheme is intended to provide flexibility and stimulate incentives for multiparty cooperation. See Regional Board's September 2, 2004 Response to Comments, p. 117. EPA has long-recognized that the TMDL process provides excellent opportunities to consider "alternative approaches" for making watershed based water quality management decisions. *Draft EPA TMDL Guidance*, at Chap. 3.2. EPA encourages States to consider innovative approaches (such as watershed permitting and pollutant trading) when establishing a pollutant load allocation strategy. *Id.* Although, the Regional Board's group WLA approach is not a trading scheme, it is based on similar principles in that a limit is placed on the total amount of mercury that can be released from a group of regulated sources. EPA recognizes that a "bubble approach" provides a basis for a successful trading program because: "(1) TMDLs allocate pollution control responsibilities using a process that can be easily adapted to incorporate trades; and (2) data and analysis generated in TMDLs typically enable water quality managers to better understand and predict general effects of proposed trades." *Draft EPA Watershed-Based Trading Guidance*, at 2-6. EPA further supports such an approach for *point* sources that are issued NPDES permits in the context of a TMDL, because such an approach "will ensure that permittees are clearly accountable for compliance." *Id.* at 5-2.

EPA offers the following guidelines when formulating alternative approaches for making watershed based water quality decisions:

1. the TMDL implementation plan should provide reasonable assurances that allocations will be achieved and water quality standards met when using the approach;
2. the legal requirements associated with the allocation process (and the TMDL process in general) are met;
3. any trades or systems for reallocation of loadings involving point sources are established as enforceable conditions of NPDES permits and are consistent with the overall loading requirement established in the TMDL; and
4. the TMDL implementation plan should contain detailed, specific provisions for follow-up evaluation and potential revision or elimination of the approach in favor of a more traditional approach (based on that review).

*Draft EPA TMDL Guidance*, at Chap. 3.2. The Regional Board's "two-tiered" approach clearly satisfies EPA guidance. The individual and group WLA are enforced through individual permit limitations that are incorporated into an NPDES permit for each industrial wastewater discharger. Facilities that exceed their individual mercury load

allocation (as a 12-month rolling average or effluent mercury trigger concentration) are required to report the exceedance and submit and implement a corrective action plan to the Regional Board. Industrial dischargers are also subject to enforcement action for failing to respond to an exceedance or implement reasonable corrective actions. Moreover, if the aggregate mass limit is exceeded, individual dischargers that exceed their individual mass limit are subject to further enforcement actions.

A TMDL allocation scheme must demonstrate that (1) water quality standards will be attained and (2) the load reductions set forth are technically achievable. *Draft EPA TMDL Guidance*, at Chap. 3.2. The Regional Board can consider many factors including “technical and programmatic feasibility, cost-effectiveness, relative source contributions, equity, and the likelihood of implementation to develop the most cost effective allocation strategy.” *Id.* As noted above, the CWA and related federal regulations do not prohibit a group WLA as part of a TMDL, and the Regional Board group WLA approach is consistent with the legal requirements associated with the allocation process and the TMDL process in general. Indeed, the group WLA system is consistent with a “watershed-based” approach to satisfying water quality standards.

#### B. EPA supports Regional Board’s Approach to the Mercury TMDL

Under Section 303(d)(2) of the CWA, EPA must approve the load level necessary to implement the applicable water quality standard. However, the States and local agencies have broad discretion in how they determine load and wasteload allocations. The Regional Board considered the unique local circumstances and appropriately sought EPA input in formulating the two-tier approach. *See Guidance for Developing TMDLs in California*, (EPA Region 9, January 7, 2000) (“The State should coordinate with EPA prior to proposing a wasteload allocation *which addresses more than one discharge*, and clearly explain how the group wasteload allocation would be implemented”) (emphasis added). Based on input from EPA, the Regional Board determined that group wasteload allocation approach appropriate in this circumstance.

EPA supports the two-tiered approach set forth by the Regional Board. In its June 17, 2004 letter commenting on the Regional Board’s initial version of the TMDL, EPA approved of the group WLA because it provided both individual and group permit limitations. Specifically, EPA stated that it

does not object to including a group WQBEL in the permits, as long as the permits also include individual WQBEL consistent with the individual WLAs in the TMDL document. In terms of enforcement, EPA would not object to a two-tier WQBEL enforcement provision under which individual dischargers were deemed to be in compliance with their permit as long as the group limit was met – provided that individual limits are in fact enforceable when the group limit is, if ever, exceeded.

EPA June 17, 2004 Comment Letter to California Regional Water Quality Control Board. This is exactly what the Regional Board proposes in the Basin Plan Amendments. As discussed above, industrial dischargers are subject to enforceable compliance

requirements if the facility exceeds either its individual allocation or the aggregate mass limit.

### C. Precedents for Group Wasteload Allocations

The concept of group allocations in TMDLs – in particular, in TMDLS for mercury – is well established. For example, see *A Regional Approach to Developing Total Maximum Daily Loads for Mercury in the Coastal Bays and Gulf Waters of Louisiana* (EPA Region 6, June 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). While those TMDLs focus largely on group allocations for nonpoint sources, other TMDLs, most notably the Neuse River Basinwide Water Quality Plan, also allow for group WLAs of point sources. *Neuse River Basinwide Water Quality Plan* (NC Dep't of Env't & Natural Res., Div. of Water Quality/Planning, July 2002) (the "Neuse River Plan"). Under the *Neuse River Plan*, point source dischargers within the basin can form a "group compliance association" to meet their combined total nitrogen (TN) wasteload allocation. Dischargers are subject to TN limits contained in a group compliance NPDES permit issued in lieu of TN limits in individual NPDES permits. An individual member of the association is subject to an individual TN limit *only* in those years in which the association exceeds the TN limit. Thus, if the association as a whole complies with its limit, the member dischargers are not subject to individual limits for that particular calendar year. See also *Columbia/Snake River Temperature TMDL* (EPA Preliminary Draft September 13, 2002) (because effect of point sources on stream temperature is quite small, 11 facilities given WLAs and 95 facilities given group WLA); *A Total Maximum Daily Load Analysis to Achieve Water Quality Standards for Dissolved Oxygen in Long Island Sound* (N.Y. State Dep't of Env'tl. Conservation, Dec. 2000) (allowing for group allocation of both point and nonpoint sources in different management zones).

### II. Flexibility Warranted for Allocation of Small Dischargers

Provided that allocations will result in attainment of water quality standards, allocation decisions in TMDL programs are left to state and local governments. In making allocation determinations, state and local governments are encouraged to consider the relative contribution of each source as a factor in developing allocations. *Draft Guidance for Implementing the January 2001 Methylmercury Water Quality Criterion*, § 6.2.3.3 (EPA August 2006, EPA-823-B-04-001) ("*Draft Methylmercury Water Quality Guidance*"). See *Columbia/Snake Rivers Temperature TMDL*, at 34 ("To provide flexibility to the managers of these facilities and to the NPDES permitting authorities, small dischargers within each river reach are allocated a 'group allocation.' That is, one load is allocated collectively to all the dischargers in the group.") Thus, it is essential that the Regional Board's group WLA approach be considered in the context of the relative contributors to mercury in the San Francisco Bay Basin.

Refineries and publicly-owned treatment works are minor sources of mercury in the San Francisco Bay Basin, making up approximately 1.47% of total mercury load in 2003. As EPA noted, further reductions in mercury discharge levels from industrial facilities will be expensive and contribute little to reducing mercury levels in the San Francisco Bay Basin. See Regional Board TMDL Basin Plan Amendment and Staff Report, at 56 (April 30, 2004) (“As a group, industrial wastewater dischargers perform well. Additional load reductions would incur substantial costs and contribute little to the overall load reductions needed to meet the proposed targets”). Moreover, EPA recommends that mercury dischargers that are not significant contributors be subject to permit conditions at *existing* effluent levels. *Draft Methylmercury Water Quality Guidance*, at § 7.5.2.2.

The minor contribution of mercury by industrial wastewater dischargers in the San Francisco Bay Basin provides further support for the group WLA approach. Limiting the Regional Board to a rigid, inflexible allocation system would hinder progress in reducing mercury loading in the San Francisco Bay Basin. Mercury is a complex, unique pollutant and programs to address it require common sense flexibility in formulating strategies, including recognizing the relative contributions of pollutants to a particular waterbody.

### III. Conclusion

The Regional Board’s group WLA approach is supported by EPA guidance and precedent as it provides flexibility to address a difficult and complex problem of reducing mercury loading in the San Francisco Bay Basin. Municipal and industrial dischargers account for a very small percentage of mercury loading, and thus, further mercury level reductions in wastewater will have little effect on improving water quality. Based on the foregoing, we encourage the State Water Resources Control Board to approve the Basin Plan Amendment that incorporates the group WLAs provision in the mercury TMDL.