



February 16, 2017

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

Public Comment
Beneficial Uses and Mercury Objectives
Deadline: 2/17/17 12 noon

Re: Comment Letter – Beneficial Uses and Mercury Objectives

Dear Ms. Townsend:



On behalf of Clean Water Action, San Francisco Baykeeper, Heal the Bay, Los Angeles Waterkeeper, and our tens of thousands of California members, we thank the State Water Resources Control Board (Water Board) for this opportunity to provide comment on the provisions and draft Staff Report for Beneficial Uses and Mercury Objectives. These brief comments focus specifically on the proposed process the Water Board will use to recognize new beneficial uses for individual waterbodies.

Our organizations have been stakeholders in the development of TMDLs and other water quality regulations for decades. We have long advocated for recognition of subsistence fishing and traditional uses because water cleanup goals were repeatedly found to be inadequate to protect those most vulnerable to mercury, PCBs, pesticides, dioxin, and other bioaccumulative pollutants in California waters. Since 2013, we have worked with the Water Board and allies to define the beneficial uses needed to protect all Californians, to advance a process by which they could be recognized, and to ensure that they would not only be adopted into the mercury objectives, but actually integrated into the objectives and ultimately achieved.

While our organizations were primarily involved with developing the definitions for non-tribal subsistence fishing, we conferred with tribal allies and continue to support their definitions as a means of protecting their unique communities. Our primary goal now is to ensure that the three beneficial uses are approved with all expediency by the Water Board, so that we can begin the work to identify appropriate waterways to which they are applicable and how to ensure we address the contamination issues that affect impacted communities. With this in mind, we offer the following thoughts:

Definitions: Our organizations fully support the definitions of the three proposed beneficial uses for non-tribal subsistence fishing, tribal subsistence fishing, and tribal traditional and cultural use. These have been vetted through a robust stakeholder process which, while done separately, provided ample opportunity for impacted communities, public advocates, dischargers, regulators, and other interested parties to weigh in or clarify what the definitions would mean as they are regionally applied to waterways.

Our four organizations **do not support adding specific qualifications within the definitions themselves to address concerns about flow conditions or water rights**, a strategy suggested at the Water Board's January 7th hearing. First, the staff report adequately documents the intent of the subsistence fishing and tribal subsistence fishing beneficial uses to protect human health and differentiates them from other beneficial uses. As the Staff Report clearly states:

"The Tribal Subsistence Fishing and Subsistence Fishing beneficial uses relate to the risk to human health from the consumption of noncommercial fish or shellfish... the function of the Tribal Subsistence Fishing and Subsistence Fishing beneficial uses is not to protect or enhance fish populations or aquatic habitats. Fish populations and aquatic habitats are protected and enhanced by other beneficial uses, including but not limited to Aquaculture, Warm Freshwater Habitat, Cold Freshwater Habitat, that are designed to support aquatic habitats for the reproduction or development of fish."

Our primary reason for opposing this suggestion, however, is that no other beneficial use under Porter Cologne includes such added language. It would be inappropriate to subject those uses meant to protect low income communities and communities of color to unnecessary qualification when sports and commercial fishing beneficial uses are simply stated. If further clarification is needed, it belongs in the staff report.

Mercury Objectives for Subsistence Fishing: While numeric objectives provide a clearer pathway toward establishing remediation parameters, we understand that in determining how non-tribal subsistence fishing could be protected from mercury (or other contaminants in future) is complicated by the great variances in fishing practices water conditions. For that reason, we support the narrative objective as stated in Appendix A(c):

"Waters with the Subsistence Fishing (SUB) beneficial use shall be maintained free of mercury at concentrations which accumulate in fish and cause adverse biological, reproductive, or neurological effects. The fish consumption rate used to evaluate this objective shall be derived from water body- and population-specific data and information on the subsistence fishers' rate and form (e.g. whole, fillet with skin, skinless fillet) of fish consumption."

This provides the flexibility necessary to establish appropriate objectives and remediation goals accounting "for the wide variation of consumption rates and fish species encompassed by the SUB beneficial use." This will provide a reasonable pathway for regulators to address impacted communities' needs across the state.

Bifurcation: Our organizations oppose bifurcating the adoption of the new beneficial uses and the mercury objectives or any other strategy that will delay recognition of subsistence fishing and tribal uses. We were originally led to expect these beneficial uses to come before the Water Board in late 2013. While we regret the delay, we have come to appreciate the process that was implemented to ensure that we properly defined these uses and allowed for a free flow of input and concerns.

Nor do we agree with criticisms that suggest that these beneficial uses will lead to a chaotic opening of permits and established TMDLs or that impacted communities will expect unrealistic benefits. Communities understand the complexities of contaminants like mercury, and that it may be future generations that benefit. They simply want to make sure that they do. Furthermore, regional processes will be required to establish a subsistence or tribal designation for waterways and to identify the most effective ways to achieve water quality objectives. These will be deliberative, public processes with input from all interested parties.

Guidance: We are unclear about the need for Water Board guidance on how these beneficial uses should be adopted or addressed at the Regional Level since reevaluation of 303 (d) listings occur on a regular basis to consider changes in watershed quality, new technologies, and emerging impairment issues (see Staff Report, Section 2.4, paragraph one). However, we have no objection to the

development of such guidance, either in the Staff Report or separately, as long as that development includes public input and oversight and does not delay water body designations that may be possible in the year ahead.

In 2013 the Water Board expressed a commitment to protect all Californians by developing beneficial uses to protect tribes and others who consume high levels of contaminated fish out of economic need or cultural tradition. We applaud that commitment and the Board's continued dedication to addressing the needs of the vulnerable people of our state for whom we advocate.

Sincerely,



Andria Ventura
Toxics Program Manager
Clean Water Action



Erica A. Maharg
Managing Attorney
San Francisco Baykeeper



Rita Kampalath, Ph.D., P.E.
Science and Policy Director
Heal the Bay



Arthur S. Pugsley
Senior Attorney
Los Angeles Waterkeeper