

BENEFICIAL USES DEVELOPMENT

**TRIBAL TRADITIONAL AND CULTURAL, TRIBAL
SUBSISTENCE FISHING AND SUBSISTENCE FISHING
BENEFICIAL USES**

STAKEHOLDER OUTREACH DOCUMENT
JUNE 2016

I. Purpose of Stakeholder Outreach Meetings

The State Water Resources Control Board (State Water Board) staff is developing beneficial categories pertaining to tribal traditional and cultural practices, tribal subsistence fishing, and subsistence fishing by other cultures or individuals. The purpose of the stakeholder meetings is to inform key groups of the beneficial use development and gather input to aid such development (*See Section III for the draft beneficial use definitions*).

II. History & Background

Beneficial Uses

The State Water Board and the nine Regional Water Quality Control Boards (Regional Water Boards) administer the Porter-Cologne Water Quality Control Act (Wat. Code, Div. 7, § 13000 et seq.) (Porter-Cologne Act) to achieve an effective water quality control program for the state. The Porter-Cologne Act declares that “the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for the use and enjoyment by the people of the state.” (Wat. Code, § 13000.) The State Water Board and Regional Water Boards (collectively, Water Boards) carry out their water quality protection authority through, among other actions, the adoption of water quality control plans. Through these plans, the Water Boards establish water quality standards, which comprise beneficial uses, the designation of specific waters with beneficial uses, water quality objectives to protect those uses, and an antidegradation policy.

Beneficial uses are the cornerstone of water quality protection. The Porter-Cologne Act provides that the beneficial uses of the state’s waters to be protected against degradation include, but are not limited to, “domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.” (Wat. Code, § 13050, subd. (f).) See Attachment 1 for a complete list of designated beneficial uses for each region.

Even when a beneficial use category or definition is established, specific waters are not designated with that beneficial use unless a water quality standards action occurs to make the designation, which is typically done through the adoption of a water quality control plan (basin plan) amendment. Generally, the Regional Water Boards designate specific waterbodies within their respective region where the use applies. A Regional Water Board's waterbody-designation would occur through its basin planning process in accordance with Water Code sections 13244 (hearing and notice requirements) and 13245 (approval by the State Water Board). Additionally, the State Water Board can adopt statewide water quality control plans which can develop or designate beneficial uses.

The North Coast Region (Region 1) has a Native American Culture (CUL) beneficial use and a Subsistence Fishing (FISH) beneficial use. These beneficial uses have been designated to few waters. However, no specific water quality objectives have been developed to protect these beneficial uses. Accordingly, the Water Boards establish beneficial uses after fulfilling public participation requirements, including public information, public notification, public consultation, and a public hearing.

The beneficial uses that the State Water Board would consider at the end of the public process contemplated by this resolution are for purposes of the Porter-Cologne Act, and may also serve as designated uses under the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.) (Clean Water Act). Beneficial uses under the Porter-Cologne Act are distinct from the statutory and common law beneficial uses applicable to appropriate water rights.

Water Quality Objectives

Water quality objectives (narrative or numeric) must be established to ensure the reasonable protection of beneficial uses and the prevention of nuisance (Wat. Code, § 13241). A water quality objective specifies the level of protection reasonably necessary to protect a beneficial use. A water quality objective for one beneficial use may be sufficiently protective of other beneficial uses. As a result, even when new beneficial uses are designated for a waterbody, that does not necessarily mean that additional water quality objectives, restrictions on waste discharges, or other new or different actions will be necessary. Existing water quality objectives for an existing beneficial use may be sufficient to protect the newly developed beneficial uses. In instances where water quality objectives for existing beneficial uses are not protective of the new beneficial uses, new water quality objectives may need to be developed.

Tribes

In July of 2013 several tribes sent a letter to the Board stating that the existing beneficial uses do not protect their cultural uses or tribal subsistence fishing practices. State Water Board staff began having discussions with tribes and non-governmental organizations regarding the need to develop beneficial use categories to protect these uses.

State Water Board Resolution 2016-0011

On February 16, 2016, the State Water Resources Control Board (State Water Board) adopted [Resolution No. 2016-0011 \(Attachment 2\)](#), which directed staff to develop proposed beneficial uses categories pertaining to tribal traditional and cultural uses, tribal subsistence fishing, and subsistence fishing by other cultures or individuals. In accordance with the resolution, staff is

developing the beneficial use categories by considering the specific language contained in Attachment A to the resolution and soliciting meaningful input from stakeholders.

State Water Board Resolution 2016-0011:

1. Directs State Water Board staff to develop proposed beneficial use categories, including definitions, pertaining to tribal traditional and cultural use, tribal subsistence fishing use, and subsistence fishing use by other cultures or individuals.
2. Directs State Water Board staff to consider the beneficial uses presented in Attachment A when developing the aforementioned beneficial use categories.
3. Directs State Water Board staff to utilize the applicable public participation process when developing the beneficial use categories and seek input from representatives of tribes, environmental justice organizations, the regulated community, and all other interested entities and individuals. Upon receiving substantial public participation and input from interested persons, the board further directs staff to bring an item (no later than the end of Summer 2016) to provide an update on the input received for the board to consider and to provide further direction, if appropriate.
4. Acknowledges that, unless the board otherwise directs, the board will consider adopting the beneficial use categories and definitions proposed by staff as part of the Mercury Amendment to the statewide Water Quality Control Plan for Inland Surface Waters, Enclosed Bays and Estuaries, no later than April 2017, to create a consistent set of beneficial uses to be used by the Water Boards.
5. Affirms that specific waters are not designated with beneficial uses unless the State Water Board or a Regional Water Board does so through the process applicable to amending a statewide plan or basin plan, respectively.

III. Developing Draft Beneficial Uses

After considering the beneficial use language contained in Attachment A to Resolution 2016-0011, State Water Board staff have developed draft beneficial use categories and descriptions pertaining to tribal traditional and cultural use, tribal subsistence fishing use, and subsistence fishing by other cultures or individuals. These draft beneficial use categories are the subject of the early stakeholder outreach meetings to which staff seek input from stakeholders. The draft beneficial use categories and descriptions are as follows:

Tribal Traditional & Cultural

Uses of water that support the cultural, spiritual, ceremonial, traditional rights and/or lifeways of California Native American Tribes, including, but not limited to: navigational activities, and fishing, gathering, and/or consumption of natural aquatic resources, including fish, shellfish, vegetation, and materials, as supported by California Native American Tribe(s).

Tribal Subsistence Fishing

Uses of water that support the catching or gathering of natural aquatic resources, including fish and shellfish, by California Native Americans, for consumption by individuals, households, and/or communities to meet fundamental needs for sustenance.

Subsistence Fishing

Uses of water that support the non-commercial catching or gathering of natural aquatic resources, including fish and shellfish, by individuals for consumption by individuals, their households, or communities, to meet fundamental needs for sustenance due to cultural tradition, lack of personal economic resources, or both.

IV. Affected People and Communities

Tribes

The State Water Board recognizes the importance of identifying and describing beneficial uses unique to California Native American tribes. Tribes have cultural practices and ways of life that they wish to preserve and pass on to future generations. Changes to California's waters, along with new sources of contamination and pollution to those waters, which are part of their native heritage, present distinctive challenges to the tribes and their members. In many of these areas, tribal members are unaware of issues with water quality and the dangers they may present. Providing beneficial use categories and descriptions designed to protect Native American uses of waters is an important step in ensuring that tribes have the opportunity to continue to practice their culture.

Other Communities

Subsistence fishing is practiced by both Native American and other cultures and individuals throughout the State. For many of the non-native communities, subsistence fishing practices are part of a cultural tradition that was preserved when they emigrated from their native lands to California. In other cases, subsistence fishing is a result of the need to provide sustenance for individuals and families in poor economic circumstances. Languages, along with social and economic barriers provide many challenges to public awareness. Without designated beneficial uses to protect subsistence fishing practices, no definitive action is expected to take place. In areas where bioaccumulatives have built up in fish tissue to unsafe levels to support subsistence fishing, most of the public is unaware of the dangers associated with consuming large amounts of fish and steps are not being taken to either reduce the contaminants in the fish or to educate the public.

V. Water Quality Standards Actions Related to the Developing Beneficial Use Categories

Regional Board Designation of Beneficial Uses

After the beneficial use categories are adopted by the State Water Board they become available to the Regional Water Boards for designation to specific water bodies. The beneficial uses are

not automatically designated to any water bodies. The Regional Water Boards will need to carry out a basin planning process to designate the beneficial uses to specific water bodies within their respective regions. The development of beneficial use categories is the predicate step to a Regional Board's subsequent basin planning process.

Objectives

At present, no water quality objectives exist for the protection of the proposed Tribal Traditional & Cultural, Tribal Subsistence Fishing, or the Subsistence Fishing beneficial uses. Currently, however, two numeric mercury fish tissue objectives are being developed by State Water Board to protect the Tribal Subsistence Fishing and Subsistence Fishing beneficial uses are in the peer review process. It is proposed that the two numeric fish tissue objectives be adopted at the same time as the proposed beneficial use definitions, by April 2017.

Additional objectives to protect the draft beneficial uses pertaining to Tribal Tradition and Cultural Use, Tribal Subsistence Fishing, and Subsistence Fishing by others may be developed in the future in one of four ways.

1. The Regional Water Board may develop a site-specific objective. A site specific objective would be based on local data and sound scientific principles and would be subject to full public participation and peer review requirements. Any site specific objective would require a Basin Plan amendment that, after adoption by the Regional Board, will be subject to approval of the State Water Board, the Office of Administrative Law, and U.S. EPA.
2. The Regional Water Board may develop region-wide objectives to protect a beneficial use. Most of the current water quality objectives have been adopted on region-wide bases. The region-wide objectives would need to be developed using sound scientific principles and would be subject to full public participation and peer review requirements. The region-wide objectives would require a basin plan amendment that, after adoption by the Regional Board, would be subject to approval of the State Water Board, the Office of Administrative Law, and U.S. EPA.
3. The State Water Board may develop statewide objectives to protect one or more beneficial use. Statewide objectives would need to be developed using sound scientific principles and would be subject to full public participation and peer review requirements. Statewide objectives require adoption by the State Water Board and approval by the Office of Administrative Law, and U.S. EPA.
4. U.S. EPA may determine that California is lacking water quality objectives that are necessary to protect the beneficial uses and after requesting the state to develop objectives U.S. EPA may promulgate water quality criteria for California if the Water Boards fails to take action and adopt objectives.

Examples of Objectives that may be affected

The Tribal Subsistence Fishing and Subsistence Fishing beneficial uses are related to consumption of fish at a higher rate than that of the typical California fisherperson. The threat to public health from the consumption of fish is mainly due to persistent, bioaccumulative, and toxic substances (PBTs) that build up in fish tissue. Examples of PBTs are mercury, polychlorinated biphenyls (PCBs), dioxins/furans, benzo(a)pyrene (BaP), hexachlorobenzene (HCB), alkyl-lead, and a variety of pesticides.

The Tribal Traditional and Cultural beneficial use is related to traditional and cultural Native American practices that involve either water contact activities or the gathering and use of materials from waters. Examples of the Tribal Traditional and Cultural beneficial use include water ceremonies and other religious practices associated with waters, the gathering of materials from waters, and the use of those materials for either food, medicines, or other traditional uses, such as basket weaving. These uses may be also be threatened by PBTs that accumulate in plants and animals. Other examples of constituents that may threaten these uses include high levels of bacteria, cyanotoxins, and nutrients.

It is important to note that these proposed beneficial uses are not designed to protect fish, wildlife, or their habitat. Those uses fall under other already established beneficial uses such as Wildlife Habitat (WILD), Preservation of Rare, Threatened or Endangered Species (RARE), Wetland Habitat (WET), Warm and Cold Freshwater Habitat (WARM) (COLD), and etc.

VI. Public Participation

Outreach Meetings

The State Water Board has directed board staff to conduct a series of stakeholder outreach meetings with stakeholders and interested parties to gather meaningful feedback on the proposed beneficial use categories and descriptions. Staff will conduct these meetings in May through August of 2016. Staff will present an information item to the State Water Board no later than Summer 2016 to provide an update of the input received up until that time.

After the Summer 2016 information update board item, additional opportunities for public input will be available during the public review and written comment period of the Draft Mercury Objectives Amendment and the Draft Staff Report, including the Substitute Environmental Documentation. Finally, public participation will also occur during the State Water Board hearing and meeting at which the board will consider adopting of the Mercury Objectives Amendment, which would include the proposed beneficial use categories and descriptions.

Considerations

There are several aspects of the proposed beneficial uses, for which staff are seeking input, however, input is not limited to those specific aspects listed below. Staff will consider all input on aspects of the proposed beneficial uses and summarize those comments and suggestions to the State Water Board during the information update to the Board by the end of Summer 2016.

Aspects for which Board staff are seeking input include:

- Are these proposed beneficial uses necessary?
- Are these proposed beneficial uses covered under other beneficial uses that are already included in some or all of the basin plans?

- Should the beneficial use categories be developed and approved on a statewide basis or should the regional water boards develop their own separate definitions if they determine that a specific beneficial use designation is needed for their region?
- Are the beneficial use definitions that are currently being proposed accurate and succinct so that they will adequately protect the intended beneficial uses? Or
 - Are there changes to the language that are needed to clarify meaning or assure protection?
 - Are changes in the language needed to avoid misapplication or unintended consequences?

Need

All of the regional Basin Plans include a water contact recreation (REC-1) beneficial use and all of the regional Basin Plans, with the exception of the Colorado River Basin Region (Region 7) have the commercial and Sportsfishing (COMM) beneficial use (see Attachment 1). The REC-1 beneficial use covers water contact activities associated with recreation where incidental ingestion of water is likely. COMM assumes an average consumption rate of fish from California's waters, which studies suggest is approximately one meal (8 oz) per week.

Many tribes assert that the protection of these beneficial uses does not adequately protect their cultural and traditional uses. Many Native American tribes traditionally rely heavily upon rivers and lakes as part of their cultural practices, which may involve immersion at specific times of the year and extended periods of time in and around the water to gather materials related to cultural practices. Native Americans also traditionally consume a greater number of meals per week of fish. Studies suggest an average of about four and a half meals per week of fish for tribes in California.

Other groups in California also consume a higher number of meals per week of locally caught fish than typical for California fishers. Objectives designed to protect the COMM beneficial use are not considered protective of this higher consumption rate. Groups that consume a high rate of locally caught fish may be doing so because of traditional practices, not native to California, or it may be due to an economic need to feed themselves and their families. National studies suggest that subsistence fishers consume an average of four and a half fish per week.