

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION –DIVISION OF WATER QUALITY
MAY 2, 2017**

ITEM 6

SUBJECT

CONSIDERATION OF A PROPOSED RESOLUTION ADOPTING THE PROPOSED PART 2 OF THE WATER QUALITY CONTROL PLAN FOR INLAND SURFACE WATERS, ENCLOSED BAYS, AND ESTUARIES OF CALIFORNIA – TRIBAL AND SUBSISTANCE FISHING BENEFICIAL USES AND MERCURY PROVISIONS

DISCUSSION

This proposed Part 2 of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California – Tribal and Substance Fishing Beneficial Uses and Mercury Provisions (Provisions) will establish three beneficial uses, five mercury water quality objectives to protect humans and wildlife, and a program of implementation. The Provisions will apply to all inland surface waters, enclosed bays, and estuaries of the state, but its water quality objectives generally do not supersede site-specific mercury objectives and its implementation provisions do not supersede applicable total maximum daily loads.

In developing the definitions for the new beneficial uses definitions, staff met with representatives from a variety of interests including tribes, agriculture, water agencies, storm water agencies, wastewater treatment facilities, non-governmental organizations, environmental justice organizations, industries, dairies, and cattle associations. Based on input, and working from State Water Board [Resolution No. 2016-0011](#), staff developed three proposed beneficial use definitions for Tribal Tradition and Culture, Tribal Subsistence Fishing, and Subsistence Fishing beneficial uses. If the State Water Board adopts these beneficial uses, they will be available to Regional Water Boards to designate to waters within their regions.

The Provisions include five new objectives for mercury in fish tissue to protect humans and wildlife that consume fish. The five new objectives are a Sport Fish Water Quality Objective, a Tribal Subsistence Fishing Water Quality Objective, a Subsistence Fishing Water Quality Objective, a Prey Fish Water Quality Objective, and a California Least Tern Prey Fish Water Quality Objective.

The Provisions also include a program of implementation, which consists of water column translators to translate fish tissue concentrations to water column concentrations for use in individual non-storm water NPDES permitting, a revised reasonable potential analysis, routine monitoring, permit requirements for stormwater discharges, waste discharge requirements for mine sites, and considerations for nonpoint source discharges, dredging activities, and wetland projects.

The State Water Board issued a notice of availability of the Provisions and the supporting documentation on December 16, 2016, and the documents were available for review on January 3, 2017. On February 7, 2017, the State Water Board held a public hearing pursuant to Water Code sections 13170 and 13244 to receive public input. The written comment period ended on February 17, 2017.

POLICY ISSUE

Should the State Water Board adopt the beneficial use definitions and mercury provisions?

On February 16, 2016 the State Water Board adopted Resolution No. 2016-0011 directing State Water Board staff to develop proposed beneficial use definitions as part of the Provisions project. If adopted, the beneficial use definitions will then be available to the Regional Boards to designate to waters within their regions as appropriate through the basin plan amendment process. As with the new beneficial uses, the mercury water quality objectives will be included in the statewide water quality control plan for inland surface waters, enclosed bays, and estuaries.

Pursuant to a consent decree, U.S. EPA is obligated to propose mercury water quality criteria for California to protect wildlife by June 30, 2017. If the State Water Board adopts the proposed Mercury Provisions and U.S. EPA approves the provisions by June 30, 2017, U.S. EPA's obligation to establish water quality criteria for wildlife would be satisfied. If the State Water Board fails to adopt mercury water quality objectives to protect wildlife, U.S. EPA will propose water quality criteria and may promulgate mercury water quality standards for California without a program of implementation.

FISCAL IMPACT

The Provisions propose to implement mercury control actions through the existing process for NPDES permits and Waste Discharge Requirements (WDRs). No additional State Water Board resources are proposed.

REGIONAL BOARD IMPACT

The Regional Boards will be impacted as each incorporates or implements the elements contained in the Provisions.

The Tribal Tradition and Culture, Tribal Subsistence Fishing, and Subsistence Fishing beneficial use definitions will be available to all Regional Boards. However, the Regional Boards will still need to complete a basin plan amendment to designate any of these beneficial uses to water bodies within their regions.

The mercury water quality objectives are applicable to all inland surface waters, enclosed bays, and estuaries in the state and will impact waters within all Regional Boards. The program of implementation contained in the Provisions does not supersede existing applicable TMDLs and the objectives generally do not supersede site-specific mercury water quality objectives.

STAFF RECOMMENDATION

Staff recommends that the State Water Board adopt the Part 2 of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California.

State Water Board action on this item will assist the Water Boards in reaching Goals one, four, and six of the Strategic Plan Update: 2008-2012 to implement strategies to fully support the beneficial uses for all 2006-listed water bodies by 2030; to comprehensively address water quality protection and restoration and the relationship between water supply and water quality, and describe the connections between water quality, water quantity, and climate change, throughout California's water planning processes; and to enhance consistency across the Water Boards, on an ongoing basis, to ensure our processes are effective, efficient, and predictable, and to promote fair and equitable application of laws, regulations, policies, and procedures. In particular, approval of this item will assist in fulfilling the following specific objectives: Objective 1.3, to take appropriate enforcement actions and innovative approaches as needed to protect and restore all surface waters; Objective 4.2 to insure that Basin Plans are organized and updated to provide a clear structure that readily conveys key elements (e.g., beneficial uses, potential impacts of climate change, water quality objectives, goals for watersheds, plans for achieving those goals, and monitoring to inform and adjust the plans) and that fully integrates other statewide plans and policies such as the California Ocean Plan; and Objective 6.1 to target consistency improvements in process and policy for Water Board enforcement activities to promote compliance.

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STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2017-

ADOPTING PART 2 OF THE WATER QUALITY CONTROL PLAN FOR INLAND SURFACE WATERS, ENCLOSED BAYS, AND ESTUARIES OF CALIFORNIA—TRIBAL AND SUBSISTENCE FISHING BENEFICIAL USES AND MERCURY PROVISIONS

WHEREAS:

Tribal and Subsistence Fishing Beneficial Uses

1. The State Water Resources Control Board (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.
2. The Porter-Cologne Act declares, “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 beneficial uses of the “waters of the state that may be protected against quality 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.” (*Id.*, § 13050, subd. (f).)
3. The State Water Board is authorized to adopt a water quality control plan in accordance with the provisions of Water Code section 13240 through 13244, insofar as they are applicable, which may include the establishment of beneficial uses. (Wat. Code, §§ 13170, 13050, subd. (j).)
4. In 2014 and 2015, State Water Board received input from California Native American tribes and representatives of tribal interests regarding the frequent use of water unique to tribal culture, tradition, ceremonies, and lifeways. During that time, the State Water Board also received input from environmental justice representatives concerning subsistence fishing by other individuals or cultures associated with their respective cultural customs or economic circumstances.
5. Of the nine Regional Water Boards, only the North Coast Regional Water Board’s water quality control plan contains a beneficial use pertaining to the cultural and traditional rights of indigenous people and a subsistence fishing beneficial use.
6. On February 16, 2016, the State Water Board adopted [Resolution No. 2016-0011](#), which recognizes the importance of identifying and describing beneficial uses unique to California Native American tribes, in addition to subsistence fishing by other cultures or individuals, and directs staff to develop proposed beneficial uses pertaining to tribal traditional and cultural use, tribal subsistence fishing use, and subsistence fishing use by other cultures or individuals. The resolution also provided that the proposed beneficial uses should be combined with the proposal to establish statewide mercury water quality objectives.
7. The proposed Part 2 of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California—Tribal and Subsistence Fishing Beneficial Uses and Mercury Provisions (Provisions) contains three new beneficial uses: Tribal Tradition and Culture (CUL), Tribal Subsistence Fishing (T-SUB), and Subsistence Fishing (SUB).

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8. The Provisions' corresponding staff report, titled, "The Final Staff Report, including the Substitute Environmental Documentation, for Part 2 of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California—Tribal and Subsistence Fishing Beneficial Uses and Mercury Provisions" (April 21, 2017) (Staff Report), is a detailed technical and environmental document that analyzes and describes the necessity and scope of the CUL, T-SUB, and SUB, beneficial uses.
9. The establishment of a beneficial use in a statewide water quality control plan does not also operate to designate any waterbodies with the use. Generally, the Regional Water Boards designate specific waterbodies within their respective regions where the use applies, which would occur through a basin planning process in accordance with Water Code sections 13244 (hearing and notice requirements) and 13245 (approval by the State Water Board).
10. The Provisions (Chpt. II) provide that the Regional Water Boards shall use the beneficial use definitions contained in the Provisions for CUL, T-SUB, and SUB, to the extent the Regional Water Boards describe such uses in a water quality control plan. The Provisions do not require the Regional Water Boards to designate specific waters within their regions with the CUL, T-SUB, or SUB beneficial uses nor does it set forth a prioritization schedule for such designations to occur. The Water Boards generally consider prioritizing the designation of waters during their triennial review process.
11. When the State Water Board is acting on applications to appropriate water, it is required to consider water quality control plans and may subject appropriations to conditions the board deems necessary to carry out the plans. (Wat. Code, § 1258.) When acting on Clean Water Act section 401 water quality certifications, the State Water Board must include conditions deemed necessary to carry out the goals of water quality standards (i.e., the protection of beneficial uses) during the term of the permit. (Cal. Code Regs., tit. 23, § 3859, subd. (a).) Flow objectives may be established in water quality control plans for the reasonable protection of beneficial uses. (Wat. Code, § 13241.) Waste discharge requirements implement relevant water quality control plans and take into consideration the beneficial uses to be protected. (Wat. Code, § 13263.)
12. Chapter II of the Provisions provide that the T-SUB and SUB beneficial uses, and the consumption of fish and shellfish component of the CUL beneficial use, relate to the risks to human health from the consumption of aquatic resources, including fish and shellfish. To maintain fish and shellfish populations, the aquatic life habitats where fish or shellfish reproduce or seek their food must be protected. The Provisions explain that the functions of the CUL, T-SUB, and SUB beneficial uses "are not to protect or enhance fish populations or aquatic habitats" and that "fish populations and aquatic habitats are protected by other beneficial uses" (e.g., Warm Freshwater Habitat (WARM), Cold Freshwater Habitat (COLD), Fish Spawning (SPWN), Migration of Aquatic Organisms (MIGR), and Aquaculture (AQUA)). As a result, orders or water quality control plans will not contain conditions or requirements to address flow needs for fisheries or aquatic habitat to protect a CUL, T-SUB, or SUB beneficial use. Orders or plans could include flow requirements for fisheries or aquatic habitat for beneficial uses that expressly support fisheries and aquatic habitat and ecosystems (e.g., WARM, COLD, SPWN, MIGR, AQUA).

Mercury Fish Tissue Water Quality Objectives

13. Water Code sections 13170 and 13241 authorize the State Water Board to establish water quality objectives and Water Code section 13242 sets forth the requirements for a program of implementation to achieve water quality objectives.

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14. The mercury water quality objectives in the California Toxics Rule do not protect wildlife or people that consume fish contaminated with methylmercury.
15. The mercury water quality objectives and implementation provisions contained in the Regional Water Boards' water quality control plans vary and there is a need for statewide uniformity to protect beneficial uses involving the consumption of fish.
16. The Provisions contain five water quality objectives (Mercury Water Quality Objectives) and implementation requirements to protect the health of humans and wildlife that consume fish. Instead of directly measuring the mercury in surface water, the Mercury Water Quality Objectives assess the accumulation of the mercury found in the tissue of fish living in the water.
17. The Mercury Water Quality Objectives protect the following beneficial uses: Commercial and Sport Fishing (COMM), Tribal Tradition and Culture (CUL), Tribal Subsistence Fishing (T-SUB), Subsistence Fishing (SUB), Wildlife Habitat (WILD), Marine Habitat (MAR), Preservation of Rare, Threatened or Endangered Species (RARE), Warm Freshwater Habitat (WARM), Cold Freshwater Habitat (COLD), Estuarine Habitat (EST), and Inland Saline Water Habitat (SAL).

Mercury Control Activities and Exposure Reduction Strategies

18. The Provisions (Chpts. IV.D.5-IV.D.7) provide that the State Water Board and Regional Water Boards (collectively referred to as Water Boards) have authority under existing law to include permit requirements for nonpoint source discharges and applicants for wetlands projects or dredging activities to control mercury. The Provisions provide that in areas with elevated levels of mercury, the Water Boards should consider requiring wetland design features or management practices to minimize methylation or control sediment from transporting out of the wetland. However, the Staff Report (Section 6.10) recognizes that wetlands and wetland restoration projects provide valuable wildlife habitat and flood control functions and should not be dis-incentivized due to mercury concerns.
19. The State Water Board recognizes that the Regional Water Boards have developed substantial technical and analytical data about mercury in California's surface waters. Much of that information has led the Regional Water Boards to develop numerous mercury total maximum daily loads (TMDLs) to address mercury-related risks to humans, aquatic life, and wildlife, including the Clear Lake Mercury TMDL, Cache Creek Mercury TMDL, San Francisco Bay Mercury TMDL, Calleguas Creek Metals TMDL, Walker Creek Mercury TMDL, Guadalupe River Watershed Mercury TMDL, Sacramento-San Joaquin Delta Methylmercury TMDL, and Tomales Bay Mercury TMDL.
20. The State Water Board acknowledges that much of the information and technical analyses developed about the sources of mercury analyzed in the aforementioned TMDLs demonstrate that in many water bodies there is ongoing mercury loading from inactive mines, mercury-enriched geology, dredging and disposal activities, and atmospheric deposition. For example, a substantial amount of the mercury in the Sacramento-San Joaquin Delta and the San Francisco Bay is the legacy of historic mining dating back 150 years to the Gold Rush era. Waters subject to such circumstances lack the water quality to support relevant beneficial uses and are identified on the Clean Water Act section 303(d) list of impaired waters. The mercury accumulated in such waters over many decades and it is anticipated that it will take many decades to achieve full attainment of mercury water quality objectives.

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Compliance with Applicable Laws

21. In developing, considering, and adopting the Provisions, the State Water Board complied with the applicable procedural requirements in accordance with the State Water Board's regulations for implementing the California Environmental Quality Act (CEQA) (Cal. Code Regs., tit. 23, §§ 3720-3780):
 - a. To solicit input from public agencies and members of the public, the following public scoping meetings were held concerning the development of the Mercury Water Quality Objectives: February of 2007, in Sacramento; March 5, 2012, in Sacramento; March 6, 2012 in Oakland; March 8, 2012 in Redding; and March 12, 2012 in Riverside.
 - b. Regarding the development of Mercury Water Quality Objectives and the program of implementation, nine focus group meetings with relevant and interested stakeholders were held during June, July, August, and September of 2014, and October of 2016.
 - c. With respect to the development of the beneficial uses, eleven focus group meetings with relevant and interested stakeholders and representatives of California Native American tribes.
 - d. On December 16, 2016, notice was provided to members of the public and public agencies of the written comment period (January 3 through February 17, 2017) for the draft Provisions and draft Staff Report and the dates for a staff workshop and the board hearing.
 - e. A public workshop was held on January 9, 2017, and continued for a second day on February 1, 2017, and a public hearing was held on February 7, 2017 to receive oral comments.
 - f. The State Water Board provided written responses to 69 written public comment letters timely received and 3 written comment letters received after the comment deadline.
 - g. On March 31, 2017, the public was provided notice that the revised Provisions and Staff Report and the Responses to Comment would be available on or before April 21, 2017 and that the board would consider whether to adopt the proposed Provisions and approve the final Staff Report on May 2, 2017.
 - h. On April 21, 2017, the revised draft final Provisions and final Staff Report was provided to interested persons.
22. The Staff Report contains a sound scientific rationale for the Mercury Water Quality Objectives and the Provisions include the required Water Code section 13242 program of implementation for achieving the objectives.
23. In establishing the Mercury Water Quality Objectives, the State Water Board has duly considered the Water Codes section 13241 factors, discussed at Chapters 6 and 10 of the Staff Report.
24. The Staff Report contains a description of the project, a completed environmental checklist, an identification of any significant or potentially significant adverse impacts of the project, an analysis of reasonable alternatives to the project and mitigation measures, and an environmental analysis of the reasonably foreseeable methods of compliance, including a reasonable range of environmental, economic, and technical factors, population and geographic areas. (Cal. Code Regs., tit. 23, § 3777, subds. (a)-(c).)

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25. The State Water Board is the lead agency for the proposed Provisions. In preparing the Staff Report's environmental analysis pertaining to the reasonably foreseeable methods of compliance, the State Water Board is "not required to conduct a site-specific project level analysis of the methods of compliance, which CEQA may otherwise require of those agencies who are responsible for complying with the plan or policy when they determine the manner in which they will comply." (*Ibid.* § 3777, subd. (c).) Dischargers that have the Provisions' implementation requirements incorporated into their respective permits will be required to select the specific method or methods to employ to achieve compliance. Project-level analysis is expected to be conducted by the appropriate public agency prior to implementation of project-specific methods of compliance for the proposed Provisions. The environmental analysis in the Staff Report assumes that the project-specific methods of compliance would be designed, installed, and maintained following all applicable state and local laws, regulations, and ordinances.
26. The Final Substitute Environmental Documentation consists of the draft Staff Report dated January 3, 2017, the final Staff Report dated April 21, 2017, comments and responses to comments on the draft Staff Report and the draft Provisions, the environmental checklist, and this resolution. (Cal. Code Regs., tit. 23, §§ 3777, 3779.5, subd. (b).)
27. The State Water Board complied with the tribal consultation requirements established by Assembly Bill 52 (Gatto) (Stats. 2014, ch. 532).
28. Pursuant to Health and Safety Code section 57004, the scientific basis of the Provisions underwent external scientific peer review, solicited on August 24, 2016 and completed on September 22, 2016.
29. Adoption of the Provisions is consistent with the State Antidegradation Policy (State Water Board [Resolution No. 68-16](#)) and the federal Antidegradation Policy (40 C.F.R. § 131.12).
30. The Provisions do not become effective until approved by the Office of Administrative Law and the Provisions' beneficial uses and Mercury Water Quality Objectives are effective for Clean Water Act purposes upon approval by the United States Environmental Protection Agency (U.S. EPA).

THEREFORE, BE IT RESOLVED THAT:

1. In accordance with California Code of Regulations, title 23, section 3779.5, subdivision (c), and California Code of Regulations, title 14, section 15091, subdivision (a)(2), the State Water Board hereby finds there are potentially significant impacts to biological resources, cultural resources, geology and soils, greenhouse gas emissions, noise and vibration, public services, transportation and traffic, and utilities and service systems. As discussed in the Staff Report, potentially significant impacts to biological resources, cultural resources, geology and soils, greenhouse gas emissions, noise and vibration, public services, transportation and traffic, and utilities and service systems may arise from the installation and maintenance of one or more of the reasonably foreseeable methods of compliance to implement the Mercury Water Quality Objectives. The Staff Report explains that measures are available for each method of compliance that, if implemented, can reduce or eliminate those impacts. Selection of the methods of compliance and mitigation measures are not under the control or discretion of the State Water Board, and to the extent they are within the responsibility and jurisdiction of other public agencies, such public agencies will be required to comply with CEQA in approving the methods of compliance. Such agencies have the ability to implement the mitigation

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measures, can and should implement the mitigation measures, and are required under CEQA to consider whether to implement the mitigation measures when the agencies undertake their own evaluation of impacts associated with specific activities to comply with the Provisions.

2. The State Water Board hereby approves and adopts the [Final CEQA Substitute Environmental Documentation](#), which was prepared, where applicable, in accordance with the provisions applicable to the State Water Board's certified exempt regulatory programs, California Code of Regulations, title 23, sections 3777 through 3779.
3. The State Water Board, after considering the entire administrative record, including all oral testimony and written comments received at the adoption meeting, [adopts the Provisions, which are specifically titled "Part 2 of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California—Tribal and Subsistence Fishing Beneficial Uses and Mercury Provisions" attached to the Staff Report as Appendix A.](#)
4. The State Water Board will engage and work with, and encourages the Regional Water Boards to engage and work with, as applicable, the U.S. Bureau of Reclamation, U.S. Army Corps of Engineers, California Air Resources Board, California Department of Fish and Wildlife, California Department of Water Resources, California State Lands Commission, and other resource agencies that have regulatory authority over the lands or resources from which these mercury loadings are derived, to identify and successfully implement mercury abatement strategies and measures.
5. The State Water Board encourages the Regional Water Boards to work with relevant stakeholders (i.e., representatives of California Native American tribes, environmental justice organizations, dischargers, and public health agency representatives) when implementing the Mercury Water Quality Objectives, to develop recommendations for appropriate risk reduction and communication strategies that could be utilized as an important component to protect beneficial uses.
6. The State Water Board directs Water Board staff to ensure that orders or water quality control plans do not contain conditions or requirements to address flow needs for fisheries or aquatic habitat to protect a CUL, T-SUB, or SUB beneficial use. Fish populations and aquatic habitats are protected by other beneficial uses (i.e., WARM, COLD, SPWN, MIGR, AQUA) which could require orders or plans to include flow conditions or requirements to protect those uses.
7. The State Water Board authorizes the Executive Director or designee to submit the Provisions and the administrative record to the Office of Administrative Law and to the U.S. EPA for review and approval.
8. The State Water Board authorizes the Executive Director or designee to make minor, non-substantive modifications to the language of the Provisions and the supporting documentation, if the Office of Administrative Law determines that such changes are needed for clarity or consistency, and inform the State Water Board of any such changes.

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9. The State Water Board directs staff, upon approval by the Office of Administrative Law, to file a Notice of Decision with the Secretary for Natural Resources and transmit payment of the applicable fee as may be required to the Department of Fish and Wildlife pursuant to Fish and Game Code section 711.4.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 2, 2017.

Jeanine Townsend
Clerk to the Board