



California Council for Environmental and Economic Balance

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Via Electronic Submission

commentletters@waterboards.ca.gov

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
PO Box 100
Sacramento, CA 95812-2000

RE: SWRCB Proposed Inland Surface Waters, Enclosed Bays & Estuaries Plan for Tribal & Subsistence Fishing Beneficial Uses and Mercury Provisions

Dear Ms. Townsend:

On behalf of the California Council for Environmental & Economic Balance (CCEEB), we appreciate consideration of the following comments regarding the proposed Tribal, Tribal Cultural & Subsistence Fishing Beneficial Uses and Statewide Mercury Water Quality Objectives under the Inland Surface Waters, Enclosed Bays & Estuaries Plan released January 4, 2017 for public review and comment ("Mercury WQO," "Beneficial Uses" and/or "Staff Report").

CCEEB is a coalition of business, labor, and public leaders that works together to advance strategies to achieve a sound economy and a healthy environment. Founded in 1973, CCEEB is a non-profit and non-partisan organization.

As currently proposed, the State Water Resources Control Board (SWRCB) draft policy is intended to establish new three beneficial uses associated with tribal traditional and cultural use, tribal subsistence fishing and subsistence fishing; mercury water quality objectives (WQO) to protect human health and aquatic dependent wildlife; and an implementation program to control mercury discharges throughout the state. This approach is slated to be adopted by June 30, 2017, in line with the US EPA's Consent Decree for mercury water quality criteria for aquatic life and aquatic-dependent wildlife.

While CCEEB appreciates that these issues have been under discussion for a number of years, we are concerned the current proposal would have significant, widespread ramifications for all dischargers in the state. Further, although the new Beneficial Uses are being proposed in conjunction with the Mercury WQOs, they will have impact on a host of other contaminants for which permit thresholds will be established and/or

significantly decreased. Although staff and Board members have attempted to reassure the regulated community that the new Beneficial Uses would not become effective until a regional board designates specific water bodies as part of their Basin Plan amendment process, the Board and staff have thus far declined to develop clear guidance on the site specific factors that should be considered in designating uses, and criteria for Mercury, not to mention the other contaminants that will be tied to their use.

Suction Dredge Mining

While CCEEB has a number of concerns with the proposed provisions, we support the Staff Report recommendation (page 363) to prohibit suction dredge mining in mercury impaired waters or up stream of impaired waters. As you know, under SB 637 (2015), the SWRCB is required to issue WDRs for suction dredge and mining and related mining activities. Further, this law requires the SWRCB to establish a permitting process for suction dredge mining and related mining activities in rivers and stream in the state by July 1, 2017. We strongly support the recommendation that if the State Board develops a permit for suction dredge mining, any such permits should consider prohibiting suction dredge mining in mercury impaired waters or up stream of impaired waters.

Schedule & Bifurcation Request

Notwithstanding the concerns CCEEB has with the proposal, we appreciate the need to protect waters throughout the state for tribal and subsistence fishing purposes where those uses have historically existed. Additionally, we acknowledge the challenges associated with the timing of the Consent Decree that are driving the state to adopt the Mercury WQOs for wildlife.

We remain concerned, however, that the current Board schedule will drastically decrease the opportunity for meaningful engagement by stakeholders. The Staff Report raises a host of questions and concerns that indicate widespread impact on all dischargers in the state, yet we have had a mere 45 days to review, digest, formulate comments and craft solutions on over 700 pages of the Staff Report and technical supporting documents, both of which provide new information that has not previously been discussed in stakeholder meetings.

As noted in our prior letter, we do not object to having the Mercury provisions move forward in line with the Consent Decree timeline. We continue, however, to urge the Board to bifurcate the Mercury provisions for wildlife from the Beneficial Uses so as to provide time for more robust discussion and an opportunity to work with the Board and staff to ameliorate the related concerns and broad impacts. This time would provide the opportunity to work with the Board and staff to make adjustments to the proposal and develop clear guidance for regional boards to utilize in designating waters in a consistent, clear manner across the state.

Point vs. Non-Point Sources

CCEEB is highly concerned that the proposed provisions focus Mercury reductions on municipal and industrial dischargers despite the Staff Report's own admission that

point sources are but a minor contributor as compared with other non-point sources. As a matter of fact, it clearly indicates that non-point sources provide the largest loading for mercury into state waters. More specifically, the Staff Report notes the following:

“Even if all sources of the contaminants are eliminated, the contaminants are likely to remain high for decades, because either they do not degrade or they degrade very slowly. Much of the mercury in fish today is thought to be from historic mining in the late 19th century and early 20th century. Further, current sources may not be directly regulated by water boards (e.g., atmospheric emissions, naturally occurring in soils, or geothermal sources)” (page 108).

As such, it's not clear why the provisions seek to impose stringent numeric limitations on point sources when they will have little, if any, effect on mercury concentrations in fish and the environment. Such an approach raises the question about whether this is arbitrary and capricious and an abuse of discretion. In this regard, we urge the Board to only include requirements in the implementation program that are commensurate to the significance of the discharges such that it would acknowledge there may be situations where potable water, industrial and municipal discharges are considered *de minimis* discharges. As such, the proposed water column concentrations (see further discussion below) may not be applicable for setting effluent limits for most potable water, industrial, and municipal stormwater discharge permits. Additionally, the provisions should be revised to address the major sources of Mercury identified in the Staff Report, including abandoned mines.

TMDLs

As part of the Staff Report appendices, source analysis data reaffirms earlier indications that POTW and industrial dischargers are not a significant source of mercury in regions with Mercury TMDLs. More specifically, the Staff Report indicates:

- Only three of the seven Mercury TMDLs in California reference POTW and industrial dischargers as potential sources of mercury; and
- Of the three Mercury TMDLs, two quantify such POTW and industrial discharges at (4% and 1.5%, respectively).

A common theme throughout the Staff Report is that the primary sources of mercury in the environment tie back to historical mining, aerial deposition, tributaries and runoff.

Additionally, although SWRCB staff has previously indicated that the Mercury WQOs would not impact basins or water bodies that have established TMDLs with WQOs and waste load allocations (WLA), we must respectfully disagree. To the extent a regional board moves to designate a particular water body with one of the new Beneficial Uses, it would have to reopen the TMDL and WLAs to incorporate the new Mercury WQOs associated with those new Beneficial Uses. In addition, the regional boards would be obligated to reopen TMDLs for other pollutants when the subsistence and tribal subsistence fishing uses are designated, in order to recognize the higher fish consumption rates that occur with those uses. We firmly believe all regional boards will move to assign these new Beneficial Uses once they are established by the State Board.

Water Column Concentrations

While the Tribal Subsistence Fishing (T-SUB) use has numeric objective set at 0.04 mg/kg, the Subsistence Fishing (SUB) is proposed as a narrative objective subject to regional board site-specific consumption pattern determinations. The Staff Report provides for the development of water column concentration targets. For the T-SUB beneficial use, these targets are set at 4ng/L or as low as 1 ng/L, while for the SUB beneficial use, these values would be the default values unless site-specific information is available. As an example, this approach would subject some Bay Area dischargers to permit limits that would be 20-30 times more restrictive than current permit limits. Further, these values will be almost entirely unachievable and will be extremely expensive. Most importantly, meeting these objectives would result in little or no change in mercury concentrations in the aquatic environment, in fish or in aquatic-dependent wildlife. As noted above and in the Staff Report, other non-point sources are the primary drivers. Even rain water has median and mean mercury concentrations of 6 and 12 ng/L, respectively. Lowering the threshold to 4 ng/L or as low as 1 ng/L will be a significant adjustment that will be incredibly problematic and costly for dischargers across the state.

CCEEB is concerned about placing such a significant burden on point sources when regulating them based on these numeric values will have no commensurate benefit.

Bioaccumulation Factors

CCEEB is also concerned with the proposed approach that derives the water column concentrations from the bioaccumulation factors (BAF) and translators. The use of this methodology that focuses on national average BAF values for lakes and rivers is inappropriate for most sites. BAFs differ in magnitude across different sites and as such should be based on site-specific data, as factors including flow, fish characteristics, chemistry and more affect BAF values at individual sites.

Mercury behavior in the environment is complex and site-specific. The approach contemplated in the Staff Report fails to account for site-specific factors. Instead, CCEEB urges the Board to consider using site-specific information to determine the values rather than set default values.

Numeric Action Levels

As you know, the stormwater Industrial General Permit (IGP) subjects permittees to Numeric Action Levels (NAL) for a number of contaminants, including mercury, with the annual NALs being specifically established as the 2008 EPA Multi-Sector General Permit (MSGP) benchmark values. Currently under the IGP, total mercury is set at 1,400 ng/L.

Although the Staff Report suggests the “provisions would not impose any new requirements,” (p.10) the provisions will in fact subject permittees to new significant, burdensome requirements by lowering the current NAL for Mercury to a much more stringent level of 300 ng/L. Although Appendix R acknowledges that current industrial

facility control measures may not be sufficient to meet the revised NAL (at p. R-40), it fails to describe the treatment controls that would be required to meet the new NAL.

Not only is this ratcheting down concerning, it inappropriately compares the use of a benchmark to a water quality criterion despite the fact that the two numbers have very different purposes. The SWRCB's proposed approach would seemingly compromise the IGP framework and use of the EPA MSGP benchmark values to gauge the performance of a permittee's pollutant control efforts. In this regard, we strongly urge the Board to retain the current IGP benchmarks.

Finally, the Staff Report provides no analysis of the economic impacts associated with the lowering of the NAL applicable to industrial facilities. We urge the Board to undertake such an analysis prior to moving forward with the provisions.

Attainability

The Staff Report acknowledges that effluent limitations may be imposed in NPDES permits even before the SUB and T-SUB uses are designated by regional boards (Staff Report at p. 11), and permittees will be responsible for implementing measures to meet the numeric thresholds identified in the Staff Report as protective of the new beneficial uses. The proposal may also result in a ratcheting down of receiving water limitations and/or total maximum daily waste load allocations. Compliance is almost always impossible for stormwater permittees as the primary sources are outside of their control. Nevertheless, the provisions in the Staff Report seek to impose stringent requirements on dischargers for pollutants for which they, by staff's own admission within the report, are not responsible. This is particularly concerning given the Staff Report's indication that 33-75% of all point source dischargers in California would not be able to meet the mercury WQOs, depending on which effluent limitation is imposed. Although the only pollutant discussed in these provisions is mercury, the impacts of the new Beneficial Uses will be widespread and will apply to far more persistent, bioaccumulative pollutants where the considerations, challenges and impossibility of attainment with associated numeric values are expected to be similar.

California Water Code § 13241 provides that the SWRCB must consider a number of factors, including the "(c) water quality conditions that could be reasonably attained through coordinated control of all factors affecting water quality." Additionally, California Water Code § 13050 requires that the water quality control plans identify the (1) beneficial uses to be protected; (2) water quality objectives; and (3) a program of implementation needed for achieving water quality objectives. Unfortunately, the Staff Report lacks clear direction for reasonably achieving the proposed objectives. Case in point, the Staff Report notes:

"...it may take a significant period of time to attain the objectives by implementing the mercury controls in the Provisions and developing and implementing other water quality control programs, such as TMDLs. Additionally, the Tribal Subsistence Fishing Water Quality Objective and the Subsistence Fishing Water Quality Objective may be very difficult to achieve in most waters as discussed in Section 6.5" (page 264).

In order for the SWRCB to meet its obligation under the Water code, the provisions should be revised to provide clear direction and acceptable implementation options that would lead toward reasonable attainment. Absent such revisions, the imposition of costly treatment requirements on dischargers without commensurate environmental benefits fails to sufficiently evaluate the economic impacts as called for under Water Code § 13241 deeming it unreasonable, an abuse of discretion and quite possibly arbitrary and capricious.

Not only does California law speak to attainability, Federal regulations under 40 C.F.R., 131.10(g) require states to undertake a use attainability analysis (UAA) when states designate uses that do not include the uses specified in section 101(a)(2) of the Clean Water Act (CWA). The SWRCB's proposed provisions go beyond those specified in section 101(a)(2) and therefore any designation of these new Beneficial Uses requires the regional boards to conduct a UAA first.

The Staff Report, however, does not acknowledge such federal requirements and instead suggests there are no parameters which regional boards must review and evaluate when considering designation under such new Beneficial Uses (p.111). As a matter of fact, the Staff Report goes as far as supporting designation as a goal "...where neither the water quality is currently being attained or the use is actually occurring..." (p.112). This clearly conflicts with federal requirements and inappropriately provides regional boards with guidance on adopting new beneficial uses where they do not exist and are not reasonably achievable.

CCEEB strongly urges revision of the Staff Report to rectify the inconsistencies within the proposed provisions between state and federal law.

Reservoir Program

The Staff Report provides, "[m]any methods of compliance for the Provisions could be similar to those required for the [State's Mercury Program for Reservoirs]... including sediment controls, possible wastewater treatment plant upgrades, and mercury monitoring." The Staff Report's provisions should be integrated with the Reservoir Program, such that water agencies with multiple discharges and operations understand their compliance obligations under separate but interlinked statewide mercury programs.

Beneficial Use Designation Guidance

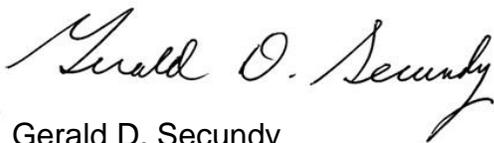
In designating water bodies with the new Beneficial Uses, CCEEB understands that each regional board will ultimately have the responsibility for identifying the beneficial uses for their own Basin Plan amendment. Given the significant concerns raised in this letter and others yet to be understood with the impacts being far broader than lead, however, it is critical for the SWRCB to provide more guidance as to how these beneficial uses are identified. We fully acknowledge and share in the importance that Native American tribal members have towards the value and importance of waterways for both ceremonial and subsistence consideration, and as such we are concerned that there is no uniformed process to identify these areas in a fair and equitable way for each region. This same consideration should apply for subsistence users. This consistency must also have some clear basis so that it does not place undue hardship

on other users of these reaches and does not impact potential alternative uses of this water for reuse for potable or other purposes. It is with this frame of reference we would suggest the State Board staff put in place specific steps in this policy that regional board staff would follow in designating a water body for these beneficial uses. These steps could include setting quantifiable parameters that would be used before an area is designated. For tribal uses it could be something such as clearly identifying the state or federal tribal group that is currently using or would like to return to the area for their benefit, some level of documentation (photos, oral or written records) of past use to ensure that the area is clearly delineated. For subsistence uses, there should be some basis of a minimal threshold for use such as 1% of the population in the watershed before the area is considered for designation.

In developing this guidance, the regulated community and broader interested stakeholder should be engaged to help ensure consistent application based on site-specific considerations, regional beneficial use determinations, a minimum data set, clear data standards, and attainability. Such guidance should be developed prior to regional boards moving to designate waterbodies with these new Beneficial Uses and prior to the implementation of associated water quality objectives so as to solidify consistent evaluation, review and application of the new Beneficial Uses by regional boards. CCEEB strongly believes that by the State providing the leadership in setting some consistent and quantifiable basis for these designations, it will ensure a consistent approach across all regions.

We appreciate your consideration of these comments. If you have any questions regarding the points highlighted in this letter, please contact CCEEB Water, Chemistry and Waste Project Manager Dawn Koepke with McHugh, Koepke & Associates at (916) 930-1993 or CCEEB Water Quality Task Force Consultant Susan Paulsen at (626) 204-4089. Thank you.

Sincerely,



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