



February 16, 2017

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



**Via Email and U.S. Mail**

Jeanine Townsend, Clerk to the Board  
State Water Resource Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814  
Email: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

**Re: SJTA COMMENTS ON 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**

Dear Ms. Townsend:

The San Joaquin Tributaries Authority (“SJTA”) has reviewed the Draft Staff Report, including 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 (“Proposed Provisions”). The SJTA does not oppose the Board’s efforts to recognize and protect Tribal beneficial uses. However, the SJTA has concerns regarding the specific requirements and implementation methods of the Proposed Provisions. The following comments are provided with the aim of furthering the Board’s efforts, and for the purpose of obtaining additional clarity with respect to certain issues.

**I. Extension of Comment Period**

As a preliminary matter, the SJTA respectfully requests the State Water Board (“SWB”) extend the time for submission of written comments on the Proposed Provisions. Considering the significance of these actions, the substantial volume of documents released (724 pages), and technical nature of the information, a 45-day comment period is insufficient to allow for thorough public review and comment. Currently, there is a large degree of confusion on the part of the regulated community due to the broad scope of the proposed actions. Specifically, SJTA requests extension of the public comment period by an extra 60-days, to on or about April 17, 2017, and postponement of the SWB’s first hearing on this issue until May 2017.

## II. Regulation of Mercury Levels of Reservoirs and Lakes.

The Proposed Provisions are a separate and distinct project from the Reservoir Program. State Water Board Staff is currently developing the Reservoir Program which aims to establish a program to implement the Proposed Provisions' "water quality objectives for Commercial and Sport Fishing (COMM), Wildlife Habitat (WILD), and Rare, Threatened, or Endangered Species (RARE) in all California reservoirs impaired by mercury for those uses." (SED, 1.6 at p. 4.) In the substitute environmental document ("SED"), SWB Staff states that if the Board fails to adopt the Reservoir Program, the Proposed Provisions will be implemented on a case-by-case basis for discharges to reservoirs, as described in options 1-3 of Section 6.13.3. (*Ibid.*) If SWB Staff plan to rely on the Proposed Provisions to regulate discharges to reservoirs, it must first disclose the regulation, then it must evaluate the environmental impacts of the regulations, and disclose these impacts to the public. The SED does not contain any such disclosure or evaluation. The casual reference to the Proposed Provisions as a fall-back for the Reservoir Program does not comply with CEQA. State Water Board Staff must either (1) evaluate the impacts of regulating reservoir discharges now; or (2) develop a Reservoir Program that complies with CEQA later. It cannot provide a placeholder in the Proposed Provisions for regulations that are not fully disclosed and evaluated.

One of the difficulties with relying on the Proposed Provisions for reservoir regulations is the irregularities with the proposed options for calculating effluent limitations for municipal wastewater and industrial discharges that preclude the Board and the public from understanding the true impacts the use of the Proposed Provisions will have on the environment.

For instance, under the Proposed Provisions only municipal wastewater and industrial facilities that discharge directly to a reservoir or lake would require new water quality objectives based on effluent limitations. (SED, 1.6 at p. 4.) By the Board's own account there are few discharges to these waters (about twelve), and only six of these discharges would need to be regulated. (SED, 6.13.3 at p. 155.) In opposite, the Reservoir Program *may* include waste load allocations for discharges upstream of reservoirs. These are intended to help achieve the mercury water quality objectives in the reservoir, rather than the upstream water body. (SED, 6.13.3 at p. 157.) However, the Proposed Provisions are unclear on whether this approach will be used on upstream dischargers if the Reservoir Program is not adopted. Furthermore, it is not clear why the Board focuses on regulating these few discharges (potentially only six), when municipal wastewater and industrial discharges are a relatively minor source of mercury to the environment compared to other sources. (SED, 6.13.2 at p. 151.)

Of further concern to the SJTA is the case-by-case or permit-by-permit regulation of effluent discharges to reservoirs and lakes implemented by the Proposed Provisions. Specific effluent limitations were not developed for discharges to reservoirs because the Board plans to assign waste load allocations using reservoir TMDLs that will be developed as part of the Reservoir Program. If specific waste load allocations are preferable in the Reservoir Program, it is not clear why the

Proposed Provisions, that propose a case-by-case approach, would be appropriate. In addition, if upstream discharges will be regulated by the Proposed Provisions, numerous (potentially more than 50) water bodies would require case-by-case effluent limitations. This approach does not inform the regulated community as to which entities could be regulated under the Proposed Provisions if the Reservoir Program is not adopted.

It is also unclear which water quality objectives the Board will seek to implement on reservoirs and lakes if the Reservoir Program is not adopted. The Reservoir Program aims to implement the water quality objectives for Commercial and Sport Fishing (COMM), Wildlife Habitat (WILD), and Rare, Threatened, or Endangered Species (RARE) beneficial uses. (SED, 1.6 at p. 4.) However, under the Proposed Provisions not only could the above beneficial uses' water quality objectives be implemented, but also the more stringent water quality objectives of Tribal Subsistence Fishing (T-SUB), Subsistence Fishing (SUB), and Tribal Tradition and Cultural (CUL) beneficial uses may be implemented. Thus, if the Reservoir Program is not adopted there is potential for more stringent effluent limitations to be implemented on reservoirs and lakes.

The above concerns relate to the Board's implementation of option one, the recommended effluent limit calculation method for municipal wastewater and industrial discharges. Option two, proposes to set the effluent limitations for discharges to reservoirs and lakes consistent with the limits from the Proposed Mercury Control Program for Reservoirs. (SED, 6.13.3 at p. 158.) While the Reservoir Program may have slightly different categories of facilities than those in the Proposed Provisions, and may include other requirements for impaired reservoirs it is otherwise the same plan. However, the SED of the Proposed Provisions does not disclose or analyze these limits or the implementation of this plan. For this reason, such limits cannot be adopted as part of the Proposed Provisions.

Based on all of the issues noted above the SJTA believes there is insufficient information to inform the public, regulated entities, and the Board of the potential significant environmental effects of using the Proposed Provisions as a backfill if the Reservoir Program is not adopted. The SJTA recommends that either additional analysis and information pertaining to the use of the Proposed Provision to regulate mercury levels in reservoirs and lakes be added to the current document (i.e., entities to be regulated, scope of the regulations, applicable beneficial uses to waterbodies, etc.), or that the Proposed Provisions be dropped as substitute regulations for the Reservoir Program.

### III. Narrative Water Quality Objective for Subsistence Fishing Beneficial Use and Reservoir/Lake Water Quality Objectives.

The Proposed Provisions recommend the Board adopt a narrative water quality objective for subsistence fishing and for lakes and reservoirs if the Reservoir Program is not adopted (SED, 6.5.3 at p. 117, and Table 6-1 at p. 153.) With a narrative water quality objective, effluent limitations contained in permits would be determined on a case-by-case basis, based on consideration of site-specific factors. (*Id.* at p. 118.) This approach would require the identification of fish consumption rates for each

specific water, identification of existing mercury levels in fish, and other very specific facts for each potential regulated water body prior to regulation. These requirements and the process by which such information would be obtained is not disclosed or evaluated.

If a Regional Board were to designate a water body with the beneficial use of Subsistence Fishing and amend its basin plan, the accompanying substitute environmental document would not alert regulated entities of potential significant economic impacts created by the amendment. Rather, regulated entities would only learn of new water quality regulations after the Regional Board determined fish consumption rates. Thus, regulated entities are precluded from participating in the initial stages. Furthermore, the Proposed Provisions highlight the challenges and lack of clarity regarding the determination of the average number of meals per week non-tribal subsistence fishers consume. “[I]t is not clear which studies or consumption rates represent subsistence fishing versus those that represent recreational fishing.” (SED, 4.9 at p. 74.) To the extent the Proposed Provisions allow for future regulation based on a new beneficial use, the SED must identify how the proposed regulations will be implemented and at what point the regulated community will be informed of potential environmental impacts.

The Proposed Provisions allude to the necessity of regulating other harmful substances as part of the water quality objectives for Tribal Subsistence and non-tribal Subsistence Fishing Beneficial Uses. These other harmful substances include polychlorinated biphenyls (PCBs), dioxins/furans, benzo(a)pyrene (BaP), hexachlorobenzene (HCB), alky-led, pesticides, herbicides, and toxins produced by cyanobacteria present in algae blooms. (SED, appen. T at p. T-5.) To the extent the Proposed Provisions include the regulation of these substances, the SED must first disclose and analyze such regulation or implementation procedures for these substances. The failure to analyze the proposed regulations defeats the purpose behind the creation of a substitute environmental document by failing to inform the public or the Board of the impacts that may occur from including these substances in water quality objectives.

#### IV. Water Quality Objectives Potentially Necessary to Protect Tribal Tradition and Cultural Beneficial Uses.

The proposed Provisions include development of new Tribal and Cultural Beneficial Uses. However, the SED fails to identify or evaluate the environmental impacts of implementing these new beneficial uses.

The Proposed Provisions state that the Tribal Traditional and Cultural Beneficial uses relate to “[u]ses of water that support the cultural, spiritual, ceremonial, traditional rights and/or lifeways of California Native American Tribes.” (*Id.* at p. T-1.) However, water quality objectives have yet to be developed for many of these past, present, or probable future uses and an exhaustive list of potential uses that may require water quality control measures is not included in the current draft SED. The Proposed Provisions recommend that the Board adopt the Tribal Tradition and Cultural Beneficial Use

now with Regional Boards later doing site-specific studies to determine what tribal uses will require new water quality objectives.

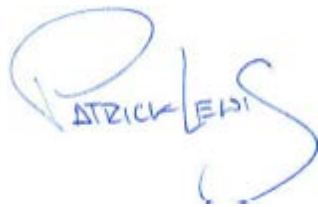
This approach is problematic for two reasons. First, without an exhaustive list of cultural, spiritual, ceremonial, and traditional rights and/or lifeways there can be no consistent application of the beneficial use designation throughout the state. The potential exists for there to be a plethora of uses requiring water quality objectives across the state and even on a single segment of a water body, as there are more than 100 recognized Tribes in California. Moreover, the Proposed Provisions fail to establish the procedures used to determine what is a qualifying use that requires water quality objectives. Thus, one Regional Board may designate a use for protection that another Regional Board may reject.

Second, without consistency throughout the state, and without procedures to establish protected uses, it is impossible to know the potential impacts from the adoption of the Tribal Tradition and Cultural Beneficial Use. For example, there is an outstanding question regarding whether these beneficial uses could result in increased flow regulation. Appendix T includes the following example, “the timing of application of aquatic herbicides so that they do not interfere with cultural practices.” (SED, appen. T at p. T-2.) Additionally, during the January 9, 2017 Staff Workshop, SWB Staff used the example of flow objectives as potentially necessary actions for the reasonable protection of a specific beneficial use. Thus, potential flow regulation is not speculative and the draft SED must be revised to include the analysis of flow impacts as mandated by the CEQA Guidelines.

The SJTA recommends Staff revise the SED to establish and include formal guidance on the manner in which the Regional Boards implement the Tribal Tradition and Cultural Beneficial Uses. By proceeding in this manner there will be consistency across the state for protected uses, and regulated entities will have an increased role in the regulatory process. Further analysis and scoping is necessary to identify the uses applicable to the Tribal Tradition and Cultural Beneficial Use in order to comply with CEQA Guidelines’ prior adoption.

Very truly yours,

**O’LAUGHLIN & PARIS LLP**



PATRICK D. LEWIS

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cc: San Joaquin Tributaries Authority