

## Appendix T. Development of Beneficial Uses

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**Tribal Traditional and Cultural Use:** 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, ceremonial activities, and fishing, gathering, and/or consumption of natural aquatic resources, including fish, shellfish, vegetation, and materials, as affirmed by California Native American Tribe(s).

**Tribal Subsistence Fishing Use:** Uses of water that support human health involving the non-commercial catching or gathering of natural aquatic resources, including fish and shellfish, by California Native American Tribes, for consumption by tribal individuals, households, and/or communities to meet fundamental needs for sustenance.

**Subsistence Fishing Use:** Uses of water that support human health involving 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.

### **T.1 What are the goals of the new beneficial uses?**

*1. Question – Are the two subsistence fishing beneficial uses designed to reflect human consumption of fish (human health risk), or are they intended to ensure that there are enough fish in the water (habitat and flows) to support the higher volume or quantity of subsistence fishing?*

Answer – The two subsistence fishing beneficial uses support human health and are designed to protect people who consume fish at a subsistence level (for example, 4 to 5 meals per week of locally caught fish). The subsistence fishing uses are not designed to support aquatic resources, including fish, or aquatic habitat. Fish and aquatic habitat are protected through other beneficial uses, typically Cold Freshwater Habitat (COLD) and Warm Freshwater Habitat (WARM), and water quality objectives established for those beneficial uses. (Staff’s working definitions have been revised to clarify this issue.)

*2. Question – The navigational, ceremonial, and spiritual activities in the Tribal Traditional and Cultural Beneficial Use definition would appear to require certain flows to support those activities. Will the Tribal Traditional and Cultural Beneficial Use require flow objectives or otherwise affect water diversions?*

Answer –Pursuant to the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.), “beneficial uses” are defined, in part, as the uses “of the waters of the state that may be protected against quality degradation” and include agricultural and industrial supply, recreation, preservation of fish and wildlife, navigation, and other uses. (Wat. Code, § 13050, subd. (f).)

The State Water Board may develop a flow objective if the flow objective is necessary for the reasonable protection of a beneficial use. However, it is not anticipated that flow objectives would be developed to support the activities contained in the Tribal Traditional & Cultural beneficial use definition.

Such activities, including navigation, and to a lesser extent, ceremonial and spiritual activities, are similar to existing beneficial uses which have not required the development of flow objectives. For example, the Navigation Beneficial Use (“Uses of water for shipping, travel, or other transportation by private, military, or commercial vessels”) (NAV) has been designated to numerous waterbodies throughout the State, and no flow objective has been established for NAV.

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.) Finally, 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 during the term of the permit.

*3. Question – Why is staff developing two separate definitions for subsistence fishing? Is there a difference in application or health risk?*

Answer – The Tribal Subsistence Fishing Beneficial Use is being developed to account for specific waterbodies where tribes fish at a high consumption rate. The general Subsistence Fishing use is for waters where other groups practice subsistence fishing. The two uses may differ significantly in the consumption rates and the species of fish being consumed. One study (Schilling et al., 2014) showed a fairly consistent consumption pattern for tribal subsistence fishing throughout the state. For other groups, there is a lot of variation in the amounts and types of fish consumed. Also, development of the Tribal Subsistence Fishing category respects tribal sovereignty and acknowledges that tribes have unique traditions in connection with the State's waters.

## **T.2 Why are the new beneficial uses needed?**

*4. Question – Are these proposed beneficial uses already being protected through other beneficial uses like sports fishing and water contact recreation and through waste discharge requirements and national pollutant discharge elimination system (NPDES) permit requirements?*

Answer – Not necessarily. The Tribal Traditional and Cultural Beneficial Use would protect activities specific to the Native American Culture and their historic uses of California's waters, including practices not covered by existing beneficial uses. Both of the proposed subsistence fishing uses are related to the amount of fish consumed, which is a higher rate than is currently protected under the sports fishing beneficial use (COMM). In some cases, the current discharge requirements in waste discharge requirements and national pollutant discharge elimination system permits may protect the proposed beneficial uses. In those cases, designation of waters with the proposed new beneficial uses will not have any effect on the discharge requirements. (See question 2.) In some cases, however, current discharge requirements may not adequately protect these proposed beneficial uses. Examples include the timing of the application of aquatic herbicides so that they do not interfere with cultural practices, and reducing bioaccumulative pollutants to levels that are protective of a high rate of fish consumption.

*5. Question – Is it possible to protect these uses through a total maximum daily loads (TMDL) or other means rather than through designating new beneficial uses?*

Answer – Beneficial uses are the cornerstone of water quality protection. A water quality objective specifies the level of protection reasonably necessary to protect a beneficial use. Total maximum daily loads and implementation programs are typically developed to achieve water quality objectives after a waterbody is listed as impaired on the Clean Water Act section 303(d) list.

*6. Question – Does the State Water Board's adoption of beneficial uses into a statewide water quality control plan streamline the incorporation into the Regional Board basin plans?*

Answer – Yes. Adoption of the beneficial uses in a statewide plan will make them readily available for subsequent designation by the Regional Water Boards without the Regional Water Boards having to separately considering adopting the beneficial use definitions. However, the Regional Water Boards

would still need to go through the public process to amend their basin plans to designate specific waterbodies, which includes a notice of a hearing and the opportunity to comment, adoption meeting, and approval by the State Water Board.

### **T.3 Specific language used in the new uses.**

*7. Question – What is “lifeways?” Can you make the definition and source available? Does it mean “way of life” and does it mean anything in addition to the spiritual, ceremonial, and traditional practices referenced in the definition?*

Answer – The American Heritage Dictionary defines lifeways as, “1. A customary manner of living; a way of life 2. A custom, practice, or art: the traditional lifeways of a tribal society.” If the proposed definition contains the term “lifeways,” staff will propose to adding include a definition of “lifeways” to the glossary of the water quality control plan that will contain the beneficial uses (Inland Surface Waters, Enclosed Bays and Estuaries plan). The term “lifeways” has been advocated by tribes as being the term most commonly understood by tribes.

*8. Question – Could the specific consumption rate for subsistence fishing be set forth in the beneficial use definition itself?*

Answer – Consumption rates vary among tribes and ethnic groups, across geographic locations, and between types of fish. As a result, consumption rates typically comprise one component of the evidence required to develop a site specific water quality objective to protect humans that eat fish at a subsistence rate. A statewide tribal consumption study (Schilling et al., 2014) captures some consumption rate and percent ages of the different trophic levels being consumed by some tribal members. That study may be used when setting different objectives to protect the tribal subsistence fishing use. As noted above, however, consumption rates and patterns vary and need to be taken into consideration during the developments of an objective.

*9. Question – These Beneficial Use definitions have changed a couple of times. Are they going to change again?*

Answer – Staff may revise the definitions in accordance with input received during the public participation/comment process, the hearing, or during the adoption meeting at which the State Water Board will consider adopting the proposed beneficial uses.

### **T.4 Will guidance be developed regarding the designation of waterbodies?**

*10. Question – Will the State Board develop any guidance on the manner in which Regional Water Board would designate and use the new beneficial uses?*

Answer – The staff report being developed to support the adoption of the new beneficial uses contains some examples and descriptions of activities that fall within the scope of the beneficial uses (e.g. emersion in water for ceremonies, basket weaving). However, staff is not developing a guidance document for the State Water Board to consider adopting to aid the Regional Water Boards with respect to designating waterbodies with the new beneficial uses. The Regional Water Boards may consider whether the beneficial use is existing or is a probable future use to determine when to designate a beneficial use during a basin planning process. Designation of uses occurs through the basin planning process and includes a public process, including a hearing.

11. Question – *Would examples of traditional and cultural uses be provided that cover the differences in regions and how they may be applied during the waterbody specific designation process? Would examples be provided for the differences throughout the state?*

Answer – The tribes have provided staff with some examples, which will be discussed in the underlying staff report (see question/answer no. 10). Traditional and cultural practices vary among the tribes throughout the State, so it is not possible to have a comprehensive list. The Regional Water Boards and local tribes will work together to determine which waters would appropriately be designated and if uses are being adequately protected. Any designations will include a public process and a board hearing.

## **T.5 Designating waterbodies with the new uses.**

12. Question –*In what instances would the Regional Water Board designate one of more of these Beneficial Uses to a water body in its Basin Plan? What are the criteria needed to designate a water body?*

Answer – The Regional Water Board generally considers prioritizing designation of waters during their triennial review process. In addition, the Regional Water Board could consider designation during another basin planning activity such as the development of a total maximum daily load. The need for a designation may be brought to the attention of the Regional Water Board with a request that a beneficial use be designated to a water body. If the Regional Water Board declines to designate a water body, tribes or others may request the State Water Board to consider the designation. The Regional Water Boards may consider whether the beneficial use is existing or a probable future use to determine whether to designate.

13. Question – *Is there a way to designate waters without needing to reveal the specific locations and tribal practices related to the beneficial uses?*

Answer – In general, the Regional Water Boards do not designate specific locations but instead designate stretches of rivers or creeks or whole water bodies. There is no need to specify the exact location of the practice or activity. For traditional and cultural uses, information would need to be established about the practice to get an understanding of the risk involved and the nexus to water quality so the appropriate water body or water body segment may be designated. Such information would be public information and not confidential.

## **T.6 How would the new uses apply?**

14. Question – Are the proposed tribal beneficial uses restricted to “tribal” or “sovereign” lands, or waters where tribes are located, or are they linked to treaty rights?

Answer –The designation could identify a waterbody on tribal lands, a waterbody that is on historic tribal lands or a water body that is or could be used by tribes. The specific waterbody will be identified during a public process.

15. Question – *What is the timeframe of the practices and activities that would be protected under the proposed Tribal Traditional & Cultural use? Does it protect all historical cultural uses made on a waterbody, even if they are not actually occurring on that water today?*

Answer – The Regional Water Boards do not designate waters with beneficial uses that occurred solely in the past (i.e., where the beneficial use is not a present or probable future use of the water). The

proposed use is designed to reflect all tribal traditional and cultural uses. If tribes are striving to restore a traditional or cultural use to a water body, then the past beneficial use would be useful insofar as it informs a present or probable future use.

*16. Question – Besides mercury, what other substances may require water quality objectives to protect subsistence fishing that could be applied statewide?*

Answer – The subsistence fishing beneficial uses are designed to protect people from consuming bioaccumulatives or other harmful substances, in fish or shellfish at harmful levels. Besides mercury, other bioaccumulatives include polychlorinated biphenyls (PCBs) dioxins/furans, benzo(a)pyrene (BaP), hexachlorobenzene (HCB), alky-led, and a variety of pesticides. Other harmful substances include toxins produced by cyanobacteria present in some algae blooms.

## **T.7 Potential effects of designation.**

*17. Question – When the Tribal Traditional and Cultural beneficial use is designated to a water body, will information be available to the public identifying the specific tribal activity(ies) that justifies the designation? How can dischargers and water managers accomplish planning and meet goals to protect the use designation if specific information concerning such activities is not disclosed to the public?*

Answer – Information concerning the specific activities that comprise the use designation would be available to the public.

*18. Question – How will this impact existing total maximum daily loads?*

Answer – There would be no immediate or automatic impact on existing total maximum daily loads. However, a Regional Water Board may need to reevaluate a total maximum daily load or establish a new total maximum daily load if necessary to reflect the allowable maximum amount of a pollutant that can occur in a water body to protect the newly designated beneficial use?

*19. Question – The outreach document states that no water quality objectives have been established specifically to protect the proposed beneficial uses. In the absence of objectives, how are these uses going to be protected?*

Answer – If the new beneficial uses are adopted by the State Water Board, the next step will be the designation of waterbodies with those uses where appropriate. Contemporaneous with or following such beneficial use designations, water quality objectives may be developed to protect the new beneficial uses. It is also possible that existing water quality objectives established to protect other uses could be utilized to protect the new uses, if appropriate. Staff has not developed water quality objectives to protect these uses and, generally, such objectives would be developed by the Regional Water Boards. (But see Question no. 21.) Existing water quality objectives that protect human health could be utilized to protect the new beneficial uses.

*20. Question – Will water quality objectives or total maximum daily loads more stringent than those established to protect the recreation and/or drinking water beneficial uses have to be established to protect the activities identified in the Tribal Traditional and Cultural Beneficial Use definition?*

Answer – A water quality objective established for one beneficial use may be sufficiently protective of other beneficial uses. As a result, the designation of new beneficial uses for a waterbody does not necessarily mean that additional water quality objectives, total maximum daily loads, restrictions on waste

discharges, or other new or different actions will be necessary to protect the new beneficial uses. For example, water quality objectives that protect recreational activities (REC-1 or REC-2), including bacteria, chemical constituents, or color, and those that protect drinking water, including biostimulatory substances or odor, may be sufficient to protect some activities supported by the Tribal Traditional and Cultural Beneficial Use, such as navigation, ceremonial activities, and/or collection or gathering of aquatic resources. If, however, a water quality objective established for an existing beneficial use is not sufficient to protect the proposed new beneficial use, then new water quality objectives may need to be developed specifically to protect the activity or activities supported by the Tribal Traditional and Cultural Beneficial Use.

## **T.8 Water quality objectives.**

*21. Question – Will the State Water Board adopt water quality objectives for the proposed beneficial uses at the same time the board adopts those uses?*

Answer – Staff are developing water quality objectives for mercury to support both of the subsistence fishing beneficial uses. Such water quality objectives may be proposed for adoption along with the proposed beneficial uses. No other water quality objectives are currently being developed for the proposed beneficial uses.

*22. Question – In order to list a water body as “impaired” on the Clean Water Act section 303(d) list for one of the new beneficial uses, would a water quality objective first need to be established?*

Answer –A waterbody would have to be designated with the new beneficial use before such waterbody could be assessed. (The North Coast Regional Board’s water quality control plan has one waterbody currently designated with a tribal beneficial use.) Typically, Regional Water Boards designate waterbodies with beneficial uses—and that would generally occur after the State Water Board adopts the new beneficial uses. But a new water quality objective would not necessarily also have to first be established for a new beneficial use to be assessed as impaired. A waterbody designated with a new use could be assessed using a peer-reviewed guidance document to evaluate whether the water quality supports the use. For example, staff has assessed whether consumption of fish beneficial use was impaired by mercury by using peer-reviewed information from Office of Environmental Health Hazard Assessment OEHHA and US Environmental Protection Agency (EPA). In the absence of an appropriate guidance document, a water quality objective would need to be adopted to support a new beneficial use before the waterbody could be assessed for 303(d) purposes.

## **T.9 There additional opportunities to comment.**

*23. Question – Aside from the focus group meetings staff has coordinated with interested parties between February and August 2016 regarding the developing beneficial uses, will there be additional opportunities for interested parties to submit feedback?*

Answer – Yes, there will be numerous additional opportunities to submit comments on the developing beneficial uses. First, staff brought an item to the State Water Board to provide an update on the input received during the focus group meetings that occurred between February and August 2016 regarding the developing beneficial uses. That item occurred at the September 20, 2016 State Water Board meeting. In addition, it is anticipated that the proposed beneficial uses will be included within the draft statewide water quality control plan amendment that will establish mercury water quality objectives (Mercury Objectives Amendment). The draft Mercury Objectives Amendment and draft staff report will be distributed to the public for a formal written comment period in January

2017. A public workshop will occur on January 9, 2017, and a public hearing will occur on February 7, 2017. An adoption meeting necessary for the State Water Board to consider adopting the Mercury Objectives Amendment (including the proposed beneficial uses) is anticipated to occur in spring 2017, which will provide additional opportunities for oral comment.