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digitally submitted to: commentletters@waterboards.ca.gov

RE: SWRCB Proposed Inland Surface Waters, Enclosed Bays & Estuaries Plan for Tribal, Tribal Cultural & Subsistence Fishing Beneficial Uses and Statewide Mercury Water Quality Objectives

Dear Jeanine Townsend, SWRCB Chair Felicia Marcus, esteemed Board Members and Staff to the Board,

On behalf of the Elem Indian Colony. We thank you for this opportunity to comment on the **SWRCB Proposed Inland Surface Waters, Enclosed Bays & Estuaries Plan for Tribal, Tribal Cultural & Subsistence Fishing Beneficial Uses and Statewide Mercury Water Quality Objectives.** For ease of reference we subsequently refer to it, the Draft Staff Report, the Substitute Environmental Documentation and the Provisions within it as the Plan.

We wish to extend our gratitude to the SWRCB staff for their detailed analysis and dedication in the completion of this Plan and for guidance on consistency language of the beneficial uses categories pertaining to tribal traditional and cultural uses, tribal subsistence fishing, and subsistence fishing by other cultures or individuals.

It is encouraging that the SWRCB recognizes these uses explicitly at this time as this action will allow the Board to consider the uses of California Tribes and non-Tribal subsistence fishing communities when guiding water quality in the state of California. This is especially important while setting these Statewide Mercury Water Quality Objectives and will be in future SWRCB programs and regulatory efforts.

The legacy of Mercury in California land and waters a reminder of the genocidal policies promulgated and carried out during the Gold Rush by local state and federal governments. The continuance of California Indian Peoples is a testimony to their strength, resiliency and their inherent responsibility to protect the environment that that sustains their Peoples and all living things. When addressing the toxicity that persists from this era it is only fitting that the health and cultural continuance of California Indian Tribes and Tribal members be upheld. We thank the Board for including Tribal beneficial uses in the Provisions.

In order to assist in the success of this Plan and efforts that will stem from it we respectfully submit the following comments and recommendations to 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, including the Staff Report the SED and the Provisions within, referred to as the Plan throughout this document:

Continued inclusion of CUL, T-SUB and SUB

As you know Porter Cologne requires consideration of several factors, including: past, present, and probable future beneficial uses of water, environmental characteristics of the hydrographic unit at issue, water quality conditions that could reasonably be achieved, and economic considerations. ((Wat. Code § 13241, subds. (a)- (d).) Tribal Cultural and Subsistence Fishing beneficial uses predate the United States Government, the State of California, the Clean Water Act and the Porter-Cologne Water Quality Control Act. It is fitting that these be recognized and that they be part of current and future regional and state Water Board considerations.

Because the presence of mercury in California Waters negatively affects the ability of California Indian Tribes to practice culture and to eat traditional foods it is clear that the inclusion of Tribal considerations in this Plan is appropriate. Without such inclusion any Water Quality Objectives or resulting actions to reduce toxicity would be incomplete.

The SWRCB staff are to be commended in their assistance to CA Tribes and the environmental justice community in the creation of the three proposed beneficial use definitions. Staff provided input in order to maintain clarity and provide consistency with other state adopted beneficial use definitions.

Over a four year period CIEA worked with over 20 California Tribes to develop and seek consensus on the beneficial use definitions for California Tribes namely “tribal traditional and cultural uses” and “tribal subsistence fishing” in order that they could be applied statewide. Definition development began with the language first adopted by Region 1 and for four years we worked to revise these with Tribal representatives and staff at Tribal meetings in North, Central and Southern California. California Tribes provided Tribal Resolutions in support of two reiterations of these definitions. SWRCB staff made additional changes in the Provisions which unfortunately changed these definitions as follows:

In the definition of Tribal Tradition and Culture (CUL) the intent is that California Tribes will affirm that cultural activities are eligible under this definition, with each Tribe speaking on their own behalf to reveal culturally sensitive information by choice. Historically, Tribal cultures have been misappropriated and misinterpreted by outside entities. The removed phrase "as affirmed by California Native American Tribe(s)," was originally included by Tribes to ensure that the Tribes retain and share knowledge as it is appropriate and that misinformation is not provided by outside entities.

In the Provisions staff revised definition of Tribal Subsistence Fishing (T-Sub) to include a qualifying standard of "minimal," which we note may be interpreted to mean that only the minimum amount of sustenance will be protected. Tribes instead previously chose the word "fundamental" purposely to mean that sustenance is essential and necessary to the health and continuance of the Tribe.

Recommendations:

- Issue D. 6.4.3, We are in support of Option 2. Yes, the beneficial uses for tribal traditional and cultural, tribal subsistence fishing, and subsistence fishing be established as beneficial uses
- That the Plan continue to include the three proposed beneficial use definitions: Tribal Tradition and Culture (CUL), Tribal Subsistence Fishing (T-SUB), and Subsistence Fishing by other communities or individuals (SUB), and that the adoption of the Plan not be delayed unnecessarily.
- We recommend the following revisions to these definitions in order to return them to their original meaning and intent:

  Tribal Tradition and Culture (CUL): Uses of water that support the cultural, spiritual, ceremonial, or traditional rights or lifeways of California Native American Tribes, including, but not limited to: navigation, ceremonies, ~~or~~ fishing, gathering, or consumption of natural aquatic resources, including fish, shellfish, vegetation, and materials, [as affirmed by California Native American Tribe(s).]

  Tribal Subsistence Fishing (T-SUB): Uses of water involving the non-commercial catching or gathering of natural aquatic resources, including fish and shellfish, for consumption by individuals, households, or communities of California Native American Tribes to meet ~~minimal~~ [fundamental] needs for sustenance.

<u>Bioavailability of Mercury</u>

We appreciate the level of detail that SWRCB has provided regarding the fate, transport and bioaccumulative nature of mercury in the Staff Report and provide the following recommendation to strengthen and provide clarity to this information in section 4.4.8.

Recommendation:

- That the Plan include contemporary human activities that affect the included Water Quality Objectives. These include dredging for increased reservoirs storage capacity, for navigation and as part of mining operations, including small scale gold mining operations.

Current and Future Use of the Beneficial Use Provisions:

Page xvii of the Executive Summary states that "the implementation provisions do not apply to discharges to receiving waters for which a mercury total maximum daily load is established." This sentence appears to lead to the future application of the Water Quality Objectives (WQOs) established by this Plan and applicability of the Provisions to currently established TMDLs by use of the word "is."

Page xviii states that associated mercury WQOs related to subsistence beneficial uses (T-SUB and SUB) should not be limited to the pollutant mercury. We thank SWRCB staff for their recognition that additional WQOs for other pollutants could be adopted as they are needed to protect these beneficial uses.

Recommendations:

- That the WQOs established within the Provisions of this Plan be used as a baseline to not only update existing mercury TMDLs, but also to create future mercury TMDLs and to complete associated regional basin plan amendments.
- That the Plan reiterate the adaptive nature of TMDLs, basin plan amendments and other applicable regulatory programs, early and often beginning in the Executive Summary and throughout the Plan so that so that as new information and technologies are available each region can attain more protective standards to bring the WQOs closer to protecting CA Tribal members at preferred historical rates.
- We recommend that this forward thinking sentiment also be extended explicitly in the Plan to the continued application of Tribal Cultural beneficial use.

Strengthening of the T-SUB Water Quality Objectives

This staff report contains the recommendation that the statewide fish tissue target resulting in relative cleanup standards should be: 0.04 mg/kg in 70% trophic level 3 fish (TL3) and 30% trophic level 4 fish (TL4), 150-500 mm. This corresponds to a fish consumption rate of 142 grams per day or approximately 4.5 8 oz. meals per week and per Appendix H: Calculation of

the Human Health Objectives. The text notes that this is "the same as the U.S. EPA nationally recommended subsistence rate."

The SWRCB-UC Davis study recognized that the current consumption rates of 142 grams per day are repressed rates and that Tribal members have had to change their consumption patterns to temporarily respond to the shift in available species until the proper balance can be restored through improved water quality. Our concern is that by setting a WQO using the contemporary repressed rate we are codifying the repressed rate and ignoring the heritage rate so that water quality cannot get any better than the current inhibited rate.

Another way to state our concern is that the decision to accept a WQO based on the contemporary repressed fish consumption rate of 142 grams per day or 4.5 8 oz. meals per week merely maintains a lowered status quo in many waterbodies and does not go far enough towards the advancement of water quality. Our goal and objectives should be such that California Tribal members will be able to safely eat fish at the historical consumption rates of 223 grams per day or 7-8 oz. meals per week, the rate which is needed by Tribal members to maintain a healthful and culturally acceptable subsistence fishing diet in California.

We do recognize that Porter-Cologne Water Quality Control Act (Wat. Code § 13000 et seq.) requires the establishment of a program of implementation to achieve water quality objectives. We therefore acknowledge that objectives related to a fish consumption rate of 175 grams per day may be a more realistic balanced consideration of all California's beneficial use needs and would still us move us closer to protecting Tribal subsistence fishing in California. This would also be consistent with the fish consumption rate of 175 grams per day that was promulgated by U.S. EPA for Washington State (81 FR 85417, November 28, 2016) and in Oregon by the Oregon Department of Environmental Quality (175 5-6 0.04, 2011). It would simultaneously create consistency in WQOs for TL3 and TL4 anadromous fish that traverse rivers that span West Coast states bordering our shared Pacific Ocean and river systems.

The 142 grams per day rate and the corresponding WQO was derived from staff interpretation of the SWRCB/USEPA-supported "CA Tribal Fish Consumption Study" (SWRCB- UC Davis, 2016), which reported that a mixture of TL4 and trophic TL3 fish are currently consumed by CA Tribal members throughout the state. The report however, also stated that this mixture is not always reflected by a 70% TL3/30% TL4 mixture, and that all Tribes do not consume the same fish species.

Before and following the release of the SWRCB-UC Davis study CA Tribes have cited cases where tribal members, or specific subsets within tribes, are currently consuming more than 30% of either native or a non-native species TL4 fish either because the fish were historically consumed at greater rates, or as in the case of non-native species the TL3 fish is no longer available. When the TL3 fish is not available the prevalent fish often has been replaced by an invasive TL4 species, such as large-mouth bass. The SWRCB-UC Davis study reported that two generations ago Tribal members had begun to supplement traditional fish consumption with

non-native species which are now a higher trophic level and are therefore higher in toxins. We are concerned that these Tribes and Tribal members will not be protected under the currently proposed T-SUB fish tissue objective of 142 grams per day.

We are in support of the findings and recommendations in the SWRCB-UC Davis study which recommended that while this study provides an overview of CA Tribal fish consumption patterns it is not exhaustive and it can be used as a baseline from which Tribes may choose to submit local information and evidence, including historical records and fish consumption studies at the regional board level to support increased WQOs to support higher consumption rates.

We note that there are some waterbodies that may already have mercury levels that support SUB, CUL and T-SUB or that are very close to achieving related objectives. We also recognize that anti-backsliding or anti-degradation provisions can be applied by the Water Board in California regulatory efforts and programs.

Recommendations: 6.5 Issues E: Yes**,** Option 2/amended as follows

- That the Water Board adopt a numeric water quality objective for tribal subsistence fishing (T-SUB) based on a fish consumption rate of 175 grams per day, allowing safe consumption of fish at 5-6 meals per week,
- That the Plan affirm that this WQO is a minimum statewide standard,
- That Water Board staff provide a clear articulation of the process by which Tribes may designate waters for T-SUB so that Regional Water Boards can consistently and quickly designate such uses and where necessary to apply a stricter WQO at the regional board level
- That the Plan include measures to increase the availability of traditional TL3 fish through a mechanism for funding through an exposure reduction program specifically for the enhancement and restoration of fish habitat, and
- That the Plan include language regarding the applicable state and federal anti-degradation or anti-backsliding provisions
- It would also be helpful to see the associated fish consumption rates added to Table i. Summary of Mercury WQOs, to see how the Objective Type, Beneficial Uses and WQO are related to meals per week.

CUL Water Quality Objective Considerations

We note that the Provision of Tribal Cultural CUL designation uses a lower fish consumption rate (FCR) but there may be other pathways and media for exposure to mercury other than fish consumption for cultural purposes, as opposed to subsistence fish consumption rates. Cultural uses including fish procurement and consumption during ceremonies vary widely. Some ceremonies require fish consumption for a single day and other ceremonies are a month long. Therefore, an objective based on one meal per week may not be protective of all ceremonial

consumption patterns. However we also note that in the case of longer ceremonies T-Sub may be the applicable protected FCR.

Additionally, not all information regarding exposure to cultural uses has been established. For example we do not know how all aquatic plants utilized by California Tribes take up mercury or how Tribal exposure routes may exacerbate this exposure.

Recommendation: 6.6 Issue F. – Yes, Option 3/amended as follows

- We tentatively accept the one meal per week WQO, which is similar to the COMM WQO, but recommend that the Plan clearly recommend that Tribes work regionally with their Water Board to amend this criterion should it not be protective of their uses.
- That Water Board staff provide a clear process by which Tribes may designate waters for CUL so that Regional Water Boards can consistently and quickly designate such uses.

Revisit the RFC

The "relative source contribution" (RSC) used to develop Human Fish consumption rates in the equation on Page 41 is a separate consideration for methylmercury exposure from commercially-bought fish as represented by the RSC and is the one used in the U.S. EPA's criterion (U.S. EPA 2001).

The calculation for the Mercury WQOs to protect human health describes the RSC as follows:

RSC = relative source contribution, estimated at 2.7 x 10-5 mg MeHg/kg body weight-day.

Is this accurate in coastal areas of Northern CA where populations eat more locally caught fish and the fish that is purchased is also locally sourced?

Recommendation:

- That SWRCB staff review the RSC to determine if this variable reflects the commercial fish consumption patterns of California communities and California Tribes. California Tribes, CIEA and our colleagues who work closely with communities may be able to assist this evaluation.

Evidence in Designating Beneficial Uses

On Pg. 111 the Plan text states that *"The Water Boards should not rely soley upon anecdotal evidence in designating beneficial uses."* The State of California has precedence for including Traditional Ecological Knowledge as an admissible form of written or oral testimony. This information has been successfully and accurately provided by Tribal cultural practitioners

including information that has been received from Tribal elders, Tribal Historic Preservation Officers, Environmental Directors or by Tribal Councils.

We are also concerned that the following statement violates tenants of treaty rights and aboriginal law: *"However, it may not be reasonable to designate a beneficial use, and by extension apply applicable water quality objectives, if only one individual is using the water in a way that would meet the beneficial use definition."* There are some cases in when there is one practitioner from a Tribe responsible for carrying out cultural activities that may place them at risk from exposure to mercury. Their safety should be protected since these individuals are culturally important to the Tribe as a whole and their well-being is paramount to the cultural continuance of the People.

Recommendation:

- That SWRCB staff work with California Tribes to create a guidance document at the state level to for Regional Water Boards on the process required and what evidence will be required in order for California Tribes to designate beneficial uses at the regional board level.
- That the Plan text either strike the statement as to the number of cultural practitioners that must be completing activities of a use or qualify it with California Tribal guidance and Consultation related to cultural use.

Expand Examples of Trophic Level 4 Fish

We note that in the definition of TL4 fish sturgeon is not included in the definition of TL4. Sturgeon is actually mentioned only once in the entire Plan. This particular species and other TL4 traditional fish that are not listed are important to many Northern California Tribes for subsistence and for additional cultural uses.

Recommendation:

- Include sturgeon in the definition section of the Plan text as follows:

  TROPHIC LEVEL 4 FISH (TL4): Fish that consume TROPHIC LEVEL 3 fish and other aquatic organisms. [Examples of these s]pieces include largemouth, smallmouth, spotted, and striped bass; brown and lake trout; white and green sturgeon; catfish, and Sacramento pikeminnow. Examples are shown in Attachment C.

Include information regarding Tribal Consultation

We note that in several places in the Plan and appendices information is provided regarding Early Public Consultation per CEQA. For example related to section 2.6.3 the Plan text states that:

> "Early Public Consultation/Scoping CEQA requires the State Water Board to seek early public consultation with public agencies and members of the public prior to circulating the draft SED. (Cal. Code Regs., tit. 23, § 3775.5, subd. (a).) The consultation may include one or more scoping meetings to engage the stakeholders and public agencies early in the planning and formulation stages of the project to scope the range of actions, alternatives, reasonably foreseeable methods of compliance, significant impacts, and cumulative impacts, if any, that should be analyzed in the study and mitigation measures that will reduce impacts to a less than significant level, and to eliminate from the project any elements found not to be important (Cal. Code Regs., tit. 23, § 3775.5, subd. (b))"

This is one of example of the many opportunities that the Water Board has to include CEQA requirements for Tribal Consultation under AB52, SB18 and Executive Order B10-11.

Recommendation:

- That information regarding Tribal Consultation be including adjacent to or within the above paragraph and in other appropriate locations the Plan text and that the Plan clearly cite federal Executive Order 13175, Executive Order B-10-11, SB18 and information on AB52 to better assist agencies and stakeholders regarding their responsibilities regarding Consultation with California Indian Tribes. The following is recommended text to include:

  Executive Order 13175 reaffirms the Federal government's commitment to Tribal sovereignty, self-determination, and self-government. Its purpose is to ensure that all Executive departments and agencies consult with Indian Tribes and respect Tribal sovereignty as they develop policy on issues that impact Indian communities. This federal EO is in keeping with the Federal Trust Responsibility and treaties entered into by the federal government with Native American Tribes and affects all federal agencies as well as state agencies, programs or projects that receive federal funds.

  Executive Order B-10-11: Requires that, "Every state agency and department subject to executive control is to encourage communication and Consultation with California Native American Tribes." Per this order, it is the policy of the State to work with Native American Tribes (federally and non-federally recognized) on a government-to-government basis to address issues concerning Native American Tribal self-government and Tribal trust resources. Because the IRWM program is administered by state agencies and involves other agencies that are funded by state and/or federal funds the RWMG, whether a county, a water agency or other eligible lead agency, shall communicate and consult with federally and non-federally recognized

Tribes within the IRWM region, or those that have historical use areas or cultural resources within the IRWM Region. In keeping with this EO, the policy of the state of California, the RWMG will uphold the right of Native American Tribes to self-govern and exercise inherent sovereign powers over their members, aboriginal territory, and resources.

SB 18: Requires cities and counties to notify and consult with California Native American Tribes about proposed land use planning decisions for the purpose of protecting Traditional Tribal Cultural Places at the earliest possible point in the planning process to avoid potential conflicts.

AB 52: Requirement amending Public Resources Code §21080.3.1 to require the CEQA lead agency to consider project effects on Tribal cultural resources and to conduct Consultation with California Native American Tribes at the earliest possible point in the planning process. Additional information on Tribal Consultation and AB 52

We recommend that Tribally developed Consultation policies also be included as an appendix or as a URL link to those polices. One example is the policy developed by the Karuk Tribe.

Table 2-2. Focus Group Meetings for the Beneficial Uses Group Location,

We noted that in Table 2-2 the meeting in July 2016 with Northern California Tribal Representatives states that the location was in "Loleta (Eureka)." This should be revised since Loleta and Eureka are distinct cities.

Recommendation:

- The meeting took place in *Loleta not Eureka.* We recommend simply removing Eureka from that location descriptor.

Statement of Necessity for Beneficial Uses

In section 3.2: Statement of Necessity for Beneficial Uses, the Water Board includes information as the purpose, intent ad reasoning behind State Water Board Resolution No. 2016-0011, which formally directs staff to develop and define proposed beneficial use definitions that pertain "to tribal traditional and cultural use, tribal subsistence fishing use, and subsistence fishing use by other cultures or individuals." (Resolve Clause No. 1).

Subsequently, the SWRCB has heard statements by Tribal representatives and Tribal staff as to why these beneficial uses are necessary. Some of the information provided on the differences

between COMM, REC1, CUL and T-SUB may be of use in this document. Specifically, we noted clear testimony to the differences related to timing and location of activities wherein Tribal uses cannot be moved to another location and/or where it is inappropriate to adjust the timing of activities.

Recommendation:

- That the Plan text in 3.2 be revised to include the following bracketed text as follows:

  these beneficial uses are necessary because existing beneficial uses do not take into account the greater consumption of finfish and shellfish by some cultures or [individuals or the spatial or temporal distribution of such activities. The State Water Board will consider adopting the beneficial use] definitions proposed by staff as part of the Provisions in order "to create a consistent set of beneficial uses to be used" (State Water Board Resolution No. 2016-0011, Resolve Clause 4) by the Regional Water Boards to the extent a Regional Water Board defines such activities in a water quality control plan…

Inclusion of Clear Fish Consumption Messaging

In Appendix U, section 1 the Plan text states that messaging is difficult. CIEA has provided fish consumption advice to California Indian and low-income families since 2003 and there are simple ways to convey fish consumption advice utilizing studies already cited in this document (Oken 2008), which may be helpful to include in this document.

Also in the same paragraph the Plan text includes fisheries considerations as the source of fish. In California Wild-caught fish are not always related to fisheries and therefore its use is confusing in the final sentence.

Recommendation:

- Amend this paragraph to include the following bracketed Plan text:

  At the same time, these studies also show a beneficial effect of eating fish. Oken and colleagues discusses the wide range of trade-offs facing fish consumers and the difficulties in evaluating current fish consumption advice (Oken et al. 2008). [However, the study by Emily Oken et.al. does provide clear information that can be summarized clearly for patients as follows: mothers who eat 3 meals per week of a low mercury fish during pregnancy provide their babies with measurable neurological benefits, while those who eat even 1 meal per week of fish high in mercury put the developing fetus at-risk to neurological impairments. (Oken et al. 2008, CIEA 2012)] Consumers need to

consider not only the contaminant concentrations in fish but also their nutritional value, the sustainability of the fish they choose, [the habitat that supports the fish ~~fishery~~,] and the cost of different fish choices.

Thank you!

We look forward to assisting the Mercury Program and in implementing the Plan in the future. If you have any questions or would like any information on our comments and recommendations we are very happy to assist.

Sincerely,

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