



NCWA
Northern California Water Association



*To advance the economic, social and environmental sustainability of Northern California
by enhancing and preserving the water rights, supplies and water quality.*

February 11, 2016

Ms. Felicia Marcus, Chair
Members of the Board
State Water Resources Control Board
1001 I Street
Sacramento, California 95814

Re: Agenda Item 7 for February 16 meeting: proposed resolution directing staff to develop beneficial uses pertaining to tribal traditional and cultural subsistence fishing, and subsistence fishing

Dear Chair Marcus and Members of the Board:

The Northern California Water Association (NCWA) submits the following comments on the February 4 draft of the above resolution. NCWA is working with many of our partners to advance the economic, social, and environmental sustainability of the Sacramento Valley by enhancing and preserving its water rights, supplies, and water quality for multiple beneficial uses, including the rich mosaic of farmlands, cities and rural communities, refuges and managed wetlands, and meandering rivers that support fisheries and wildlife.

Recital 7 of this draft resolution discusses the State Water Board's uniform list of beneficial uses and the additional beneficial uses that have been developed by some of the Regional Water Boards to be applied to waters within their respective regions.

Recital 8 states that, of the nine Regional Water Quality Control Boards, only the North Coast Regional Water Board's basin plan explicitly lists a beneficial use that pertains to the cultural and traditional rights of indigenous people. As stated in your October 1, 2013 letter to the Tribal Ad Hoc Beneficial Use Group, that basin plan defines Commercial and Sport Fishing (COMM) beneficial uses to include uses of water involving organisms intended for human consumption, and it defines Native American Culture (CUL) beneficial uses to include uses of water that support various cultural and traditional rights of indigenous people.

Recitals 10 through 12 of the draft resolution describe various outreach activities that State Water Board members and staff have conducted with the Tribal Ad Hoc Beneficial Use Group, additional representatives of tribal interests and environmental justice groups.

If adopted, the resolution would direct State Water Board staff to develop proposed beneficial use categories and definitions, including those listed in the resolution's Attachment A, pertaining to tribal traditional and culture use, tribal subsistence fishing use, and subsistence fishing use by other cultures or individuals. The State Water Board then would consider adopting these proposed beneficial use categories and definitions as part of the Mercury Amendment to the statewide Water Quality Control Plan for Inland Surface Waters, Enclosed Bays and Estuaries.

Although the resolution would direct State Water Board staff to utilize the applicable public participation process when developing the beneficial use categories, we are very concerned that, if the State Water Board adopts the resolution, then State Water Board staff probably will conclude that the State Water Board already has implicitly decided that new definitions within these general beneficial use categories should be added to the State Water Board's uniform list of beneficial uses, and that staff therefore would limit its stakeholder engagement process to refining these categories.

This would be an unfortunate and inappropriate result, because there has not been any public process to consider the fundamental question of whether, in lieu of these general categories, the State Water Board and the Regional Water Boards instead should develop, on a plan-by-plan and region-by-region basis, appropriate beneficial use designations when they are amending statewide plans or basin plans (as the North Coast Regional Water Board already has done for its basin plan).

The State Water Board's uniform list of beneficial uses already includes cold and warm freshwater habitat, commercial and sport fishing, migration of aquatic organisms, navigation, recreation, shellfish harvesting and spawning, reproduction and/or early development (of fish). Thus, although we do not oppose the consideration of tribal and subsistence beneficial uses that are listed in Attachment A, it is uncertain whether it is necessary or appropriate to add such additional beneficial use categories to this list. To the contrary, the existing beneficial use definitions that protect the fish, navigation, recreation and other instream beneficial uses in these waters may be sufficient to provide the necessary water quality protections.

We also are concerned that, although this proposed resolution is intended to address issues concerning accumulations of mercury in fish tissues, it could have unintended effects in other areas, including water rights and Clean Water Act section 401 certifications.

For these reasons, we request that the State Water Board amend the the draft resolution as follows before adopting the final resolution:

Amend recital 9 as follows:

9. The State Water Board believes ~~recognizes that State Water Board staff should~~ consider potential amendments to the uniform list of beneficial uses to recognize the importance of identifying and describing beneficial uses unique to California Native American tribes, in addition to subsistence fishing by other cultures or individuals.

Add the following new recital 14:

14. This resolution is intended to address issues concerning accumulation of mercury in fish tissues and will not affect water rights or be used in Clean Water Act section 401 proceedings.

Renumber old recital 14 as recital 15.

Amend the ðbe it resolvedð part of the draft resolution as follows:

THEREFORE BE IT RESOLVED THAT:

The State Water Board:

- ~~1. Directs State Water Board staff to develop proposed beneficial use categories, including definitions, pertaining to tribal traditional and cultural use, tribal subsistence fishing use, and subsistence fishing use by other cultures or individuals.~~
- ~~2. Directs State Water Board staff to consider the beneficial uses presented in Attachment A when developing the aforementioned beneficial use categories.~~
1. Directs State Water Board staff to utilize the applicable public participation process to determine whether or not to develop proposed beneficial use categories, including definitions, pertaining to tribal traditional and cultural use, tribal subsistence fishing use, and subsistence fishing use by other cultures or individuals, and including the potential beneficial use categories presented in Attachment A. State Water Board staff should when developing the beneficial use categories and seek input from representatives of tribes, environmental justice organizations, the regulated community, and all other interested entities and individuals during this public participation process.
2. Will consider adopting any the beneficial use categories and definitions proposed by staff as part of the Mercury Amendment to the statewide Water Quality Control Plan for Inland Surface Waters, Enclosed Bays and Estuaries, no later than April 2017, to create a consistent set of beneficial uses to be used by the Water Boards.
3. Affirms that specific waters are not designated with beneficial uses unless the State Water Board or a Regional Water Board does so through the process applicable to amending a statewide plan or basin plan, respectively.

Amend the title of the draft resolution as follows:

DIRECTING STAFF TO UTILIZE THE APPLICABLE PUBLIC PARTICIPATION PROCESS TO DETERMINE WHETHER OR NOT TO DEVELOP BENEFICIAL USES DEFINITIONS PERTAINING TO TRIBAL TRADITIONAL AND CULTURAL, TRIBAL SUBSISTENCE FISHING, AND SUBSISTENCE FISHING.

Thank you for your consideration of these comments.

Sincerely yours,

A handwritten signature in black ink, appearing to read "David J. Guy". The signature is stylized with a large, looping initial "D" and a trailing flourish.

David J. Guy
President