



January 20, 2017

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

The Honorable Felicia Marcus, Chair and
Members of the State Water Resources Control Board
c/o Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Delivered by email: Commentletters@waterboards.ca.gov

Subject: Comment Letter – Beneficial Uses and Mercury Objectives

Dear Chair Marcus and Members of the Board:

The Association of California Water Agencies, the California Water Association and the California Municipal Utilities Association thank you for the opportunity to provide comments on 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* (Provisions) released for public review on January 3, 2017. We also sincerely appreciated, and in some cases, despite short notice, were able to have representatives attend the Staff Workshop conducted on January 9, 2017 to brief the public regarding the Provisions, information in the Staff Report and Substitute Environmental Documentation (Staff Report) and to address preliminary questions from the regulated community regarding this information. For the reasons discussed below and so that we may provide complete, comprehensive, and informed comments to the State Water Resources Control Board (State Water Board) on the Provisions and the 700-page, and very complex Staff Report, we are requesting that:

- The State Water Board should work with U.S. Environmental Protection Agency EPA to obtain the *automatic* extension afforded by Section XI.A. of the *Consent Decree: Our Children's Earth Foundation v. U.S. EPA*, No. 3:13 cv-2857-JSW (N.D. Cal. Aug. 25, 2014) (requiring EPA's promulgation of mercury water quality criteria for the protection of aquatic life)(Consent Decree);
- The State Water Board hearing scheduled for February 7, 2017 should be converted to a second workshop for the Board and staff to consider the Staff Report and answer stakeholder

questions, which will allow sufficient time for the public to review the voluminous Staff Report and pose important questions for staff to answer and the Board to consider;¹

- A 60-day extension of the written comment due date (from February 17, 2017 to at least April 17, 2017) should be granted to allow full review of, and preparation of informed comments on, the Staff Report by stakeholders and technical experts;
- The State Water Board hearing for consideration of the Provisions should be postponed until May 2017 to assure that the Board has an opportunity to actually consider written as well as verbal comments of the public on the proposed Provisions;
- An additional opportunity for submission of written public comments on any revisions to the proposed Provisions and Staff Report should be provided prior to a final State Water Board hearing to consider adoption of the Provisions; and
- The State Water Board hearing to consider adoption of the Provisions should be postponed to September 2017 to accommodate an informed, transparent, and robust public process regarding the Proposed Provisions.

As you are aware, not only does the Staff Report exceed 700 pages in length, containing 21 technical appendices, it also introduces, develops, explains, analyzes, and evaluates the water quality effects, environmental effects, and economic impacts of a new far-reaching statewide regulatory program, comprised of three new beneficial use designations, five new mercury water quality objectives, and an implementation program. The implementation program includes, among other things, new requirements for MS4 and Industrial stormwater NPDES permits, and an amendment of the State Implementation Plan requiring incorporation of new, very stringent mercury numeric effluent limits into NPDES permits for POTWs and other non-stormwater discharges. These NPDES permit requirements and effluent limits will be enforceable by water boards and third party citizen suits, creating significant risk of enforcement liability for dischargers, but the Staff Report and Provisions do not set forth a clear path for compliance. Development of each of the components of the Provisions evaluated in the Staff Report involves analysis and application of highly technical data and information sources – a fact readily acknowledged by the State Water Board staff at, and cited as the very reason for holding, the January 9, 2017 workshop. Indeed, in the workshop State Water Board staff noted on several occasions the length of the Staff Report, the complexity of the technical arguments and analysis in the Staff Report, the “jigsaw puzzle” character of the proposed Provisions, and the very short amount of time available to review the Staff Report. In light of these facts, the expedited rulemaking schedule does not provide sufficient opportunity for public participation by interested parties.

¹ Interested parties and stakeholders had only three working days to review the 700+ page Staff Report in advance of the Jan. 9 workshop, as a practical matter making it impossible to read and digest, much less formulate coherent, informed, and incisive questions.

At the January 9 workshop, staff presented the following schedule for State Water Board adoption of the Provisions:

Public comment period:	January 3 – February 17, 2017
Public workshop:	January 9, 2017
State Water Board hearing:	February 7, 2017
State Water Board meeting/ considered for adoption	May 2017
Consent Decree deadline for EPA to propose mercury criteria	June 30, 2017

The schedule is deficient in the following respects: (a) The schedule allows for only one workshop, which was scheduled only 3 working days after release of the 700-page Staff Report, depriving the public of a reasonable period of time to complete preliminary review of the document and formulate questions prior to the workshop; (b) It allows for only one public comment period; there is no opportunity for written comments on revised proposed Provisions after receiving initial public comments, but prior to State Water Board consideration of adoption; (c) A total of only five weeks following the workshop are available to the public to review and prepare written comments on the voluminous, highly technical, and complex Staff Report analysis, which requires multi-discipline technical review (including review by, among others, water quality, toxicology, and economic experts) ; and (d) The schedule includes only one Board hearing, which appears to be insufficient to assure that the State Water Board is apprised of technical, legal and policy issues that the public is likely to raise regarding the Provisions, including the stringency versus the likely effectiveness of proposed implementation program measures and controls.

We understand that the State Water Board has scheduled the adoption of the proposed Provisions for May 2017 in order to meet the June 30, 2017 deadline for the U.S. Environmental Protection Agency (EPA) to propose or approve the State Water Board's numeric water quality criteria (objectives) for mercury to protect aquatic life and aquatic-dependent wildlife. *See, Consent Decree: Our Children's Earth Foundation v. U.S. EPA*, No. 3:13 cv-2857-JSW (N.D. Cal. Aug. 25, 2014) (hereinafter, Consent Decree). However, there are at least two other ways for EPA to comply with the Consent Decree without the State Water Board's adoption of the proposed Provisions in the spring of 2017 according to its current schedule:

- EPA can file a motion requesting an extension of the June 30, 2017 date under section XI.A. of the Consent Decree, which provides for one automatic extension where the requested extension period is at least 30 days and the requisite notice provisions are met. *See, Consent Decree*, ¶ 35.

- EPA may promulgate aquatic life mercury water quality criteria by June 30, 2017 as contemplated in the Consent Decree. The State Water Board could then follow up that action with adoption of an implementation program for aquatic life criteria and with new human health related mercury water quality objectives, implementation measures, and definitions of proposed beneficial uses after those proposals have been properly vetted in public hearings and commented upon by interested parties.

We appreciate that it is the State Water Board's preference, as indicated by staff at the workshop, to promulgate the mercury water quality objectives, instead of EPA, so that it can develop concurrently a program of implementation. We generally support the State Water Board's preference, and recognize the potential advantages in designing a comprehensive mercury program versus a piecemealed approach that would require multiple rulemakings. For this reason, we recommend working with EPA to request a minimum 3-month automatic extension of the June 30, 2017 Consent Decree due date, and the adjustments to the schedule for the public rulemaking process set forth above. To show the feasibility of our request to revise the rulemaking schedule to provide a robust and transparent rulemaking process, we provide an alternative conceptual schedule for the process in Attachment A of this letter.

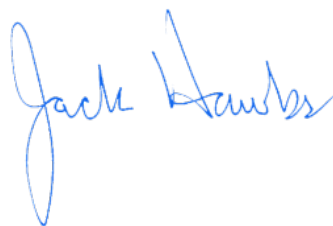
A rulemaking of this magnitude, scope, complexity, and technical nature – not to mention the regulatory implications of the program which will likely extend far beyond regulation of mercury in light of the new beneficial use categories proposed – surely warrants more than five and a half weeks total of public review and comment, and more than a single workshop and Board hearing.

We appreciate your consideration of this request for an extension of the State Water Board's comment period and adoption of the proposed Provisions. If you have any questions, please contact Rebecca Franklin at (916) 441-4545, Jack Hawks at (415) 561-9650, or Danielle Blacet at (916) 326-5800.

Sincerely,



Rebecca Franklin
Regulatory Advocate
Association of California Water
Agencies



Jack Hawks
Executive Director
California Water Association



Danielle Blacet
Director for Water
California Municipal Utilities
Association

Attachment A

Example Alternative Rulemaking Schedule

Jan. 2017 – Work with EPA to prepare motion for an extension of mercury water quality criteria due date to Sept. 29, 2017 (3 month extension)

Feb. 7, 2017 – State Water Board workshop to answer questions about the proposed Provisions

Apr. 17, 2017 – Public comments due

May 2017 – State Water Board hearing to accept comments on the proposed Provisions

Jun. 9, 2017 – Publish revised proposed Provisions for public comment (30-day review cycle)

Jul. 10, 2017 – Public comments due

Sept. 2017 – State Water Board meeting/consider for adoption

Sept. 29, 2017 – Revised Consent Decree due date for EPA to approve mercury water quality objectives protective of aquatic life and aquatic-dependent wildlife