

**Preliminary Draft
Delta Mercury Control Program
Stakeholder Group
Memorandum of Intent
Preliminary Text
Version - July 16, 2009**

The following Memorandum of Intent (MOI) memorializes shared objectives and agreements by members of the Delta Mercury Control Program Stakeholder Group (Stakeholder Group) regarding the management and implementation of the Delta Methylmercury (MeHg) Total Maximum Daily Load (Delta MeHg TMDL). This document is superceded by all descriptions of, and mandates described in the *Delta Mercury Control Program Basin Plan Amendment* (BPA) (approved XX, XXXX). This document has been mutually agreed to by Stakeholder Group consensus (consensus decision process described in the document titled "*Delta Mercury Control Program – Stakeholder Group Charter, dated XX, XXXX.*")

The MOI is the product of ongoing discussions and negotiations between directly affected stakeholders. The MOI combines and presents the products of the full Stakeholder Group and several related topic-specific Workgroups. Workgroups include:

- Adaptive Management Framework
- National Pollutant Discharge Elimination System (NPDES) Wastewater
- Non-Point Source Conditions
- Stakeholder Assurances
- OTHERS...

Section 1 – Guiding Principles

The following Guiding Principles were developed by the Principles Workgroup between February and May 2009. They were provided to the Stakeholder Group in May 2009 and ratified by the Stakeholder Group in XX, 2009. These Principles represent guiding perspectives that all Delta MeHg TMDL stakeholders (dischargers, affected consumers, interest advocates, public resource trustee agencies) should support. The Principles are in **bold** text. Several of the Principles include indented factual underpinnings to support the Principle. Phases 1 and 2 of the TMDL are referred to in the Principles. Descriptions of Phases 1 and 2 are presented in Section 2 of this MOI.

1. Phase 1 studies should address both inorganic mercury (inorganic Hg) and methylmercury (MeHg) from all sources. Reasonable control options should be implemented during Phase 1 for inorganic Hg and/or MeHg.

While many dischargers of MeHg have no control over the inorganic Hg sources underpinning MeHg production, there is common commitment among the stakeholders to address both MeHg and inorganic Hg given practical control options. MeHg is the threat and common concern. There are several potential methods to reducing MeHg concentrations in ambient water: reducing the inorganic mercury that supplies methylation sites (i.e., reduce the inorganic Hg levels in Delta sediments); and managing the methylation sources themselves to reduce MeHg discharges, either by reducing the overall volume of discharge from the methylation sites or by implementing management practices to reduce the MeHg concentration in the discharge.

2. Phase 1 control studies should develop knowledge for effectively controlling MeHg.

There is limited knowledge on how to control MeHg production and discharges.

3. The Basin Plan amendment (BPA) and staff report should state the current state of knowledge of the ability to control inorganic Hg and MeHg sources to attain their load and wasteload allocations and fish tissue objectives. The TMDL source control requirements should be based on that knowledge and the results of the Phase 1 studies, and be reasonable.

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1
2 The staff report should discuss how the Phase 1 studies and other information will be used to determine
3 control strategies for inorganic Hg and MeHg and their effectiveness.
4

5 Some stakeholders believe that we may not know if attainability of allocations and objectives will be feasible
6 at the end of Phase 1.
7

8 While reducing sources of inorganic Hg and controlling transport leads to reducing MeHg over the long term,
9 reducing local MeHg sources and ambient concentrations can have rapid, local benefits.
10

11 Some stakeholders believe that source control benefits may only be realized near discharges as MeHg may
12 not behave conservatively and that natural environmental factors may influence human efforts to control
13 MeHg in the Delta, thus that the net environment benefits of reducing MeHg in discharges needs to be
14 evaluated.
15

16 **4. The mercury control program should be adaptable.**
17

18 **5. The mercury control program should implement reasonable, feasible actions to address MeHg**
19 **loads/production and human/wildlife exposure in the near-term. The BPA should particularly address**
20 **public health impacts of mercury in Delta fish, including activities that reduce actual and potential**
21 **exposure of and mitigate health impacts to those people and communities most likely to be affected**
22 **by mercury in Delta-caught fish, such as subsistence fishers and their families.**
23

24 State Board Resolution 2005-0060 directs the Central Valley Board to do this.
25

26 **6. The mercury control program should incorporate long-term stakeholder involvement in the control**
27 **studies, Technical Advisory Committee, and upstream TMDLs.**
28

29 "Involvement" means development, implementation, and review.
30

31 **7. The control program should create strategies, including incentives to encourage innovative actions,**
32 **to address the accumulation of MeHg in fish tissue and to reduce MeHg exposure, including**
33 **watershed approaches, offsets projects, and short and long-term actions that result in reducing**
34 **inorganic Hg and MeHg. Innovative and creative solutions such as offsets should not substitute for**
35 **reasonable actions to address local impacts.**
36

37 MeHg contamination of fish is a common concern and causes disproportionate harm to some vulnerable
38 communities.
39

40 **8. The linkage analysis and fish tissue objectives and the attainability of the allocations should be re-**
41 **evaluated based on the findings of Phase 1 control studies and other information. The linkage**
42 **analysis, fish tissue objectives and allocations should be adjusted in Phase 2, if appropriate.**
43

44 The Regional Board will develop a Phase 2 TMDL staff report (peer-reviewed, open to public comment)
45 based on the Phase 1 study results. This report would consider new information and if appropriate
46 recommend revisions to the allocations, linkages, and fish tissue objectives. This staff report would be open
47 to public comment and a decision on it would be made by the Board before moving forward with Phase 2.
48
49
50

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- 1 **9. The implementation plan should include methods to assess the relative magnitudes and other factors**
2 **of different MeHg and inorganic Hg sources, and prioritize study and control actions, if and when it is**
3 **not feasible to pursue those actions simultaneously.**
- 4
- 5 **10. The methylmercury characterization and control studies should be subject to independent review.**
- 6
- 7 **11. The geographic scope of the Phase 1 mercury control studies and allocations should be downstream**
8 **of major dams. Allocations for the Delta TMDL will apply to all point and non-point methylmercury**
9 **sources in the legal Delta and Yolo Bypass, including open waters.**

10 "Major dam" refers to the most downstream dam that has a significant effect on impeding flood flow and
11 retaining sediment.

12

13 The Basin Plan Amendment should clearly write out how the sum of allocations will meet the TMDL.

14

15 Regional Board staff will be developing TMDLs for Delta tributaries during Phase 1. Regional Board staff will
16 continue to develop TMDLs upstream of the dams.

17 It is not the intent of this Principle to limit upstream beneficial studies and projects.

18

19 The State of CA (State Lands Commission and DWR) owns and manages lands and waters of the state that
20 contribute to MeHg loads.

21

22 The Basin Plan Amendment should provide guidance on how to write interim limits for NPDES permittees
23 tributary to the Delta.

- 24
- 25 **12. The mercury control program should recognize the multiple competing and conflicting interests and**
26 **projects in the Delta, such as habitat restoration, flood protection, water supply, and human and**
27 **wildlife consumption of fish.**

28

29 The "exemptions" list has been started and may need to be reviewed as discussions with various
30 stakeholders continue.

31

32 The intent of the control program is not to prevent otherwise beneficial actions such as wetlands
33 development.

- 34
- 35 **13. Efforts should be taken to ensure all stakeholder interests are represented in developing mercury**
36 **control programs.**

37

38

39 **Section 2 – Delta Methylmercury TMDL Phased Approach**

40

41 The mercury control program is comprised of two phases.

42

43 Phase 1: During Phase 1 ([the effective date of the BPA] through [eight years after the effective date of this
44 amendment]), dischargers and State agencies will conduct mercury and methylmercury characterization and
45 control studies. Phase 1 includes:

- 46
- actions to minimize increases in mercury and methylmercury discharged to the Delta.
 - development of a program to reduce mercury related risks to humans.
- 47

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- development of mercury control programs for tributaries to the Delta.

Phase 2: Phase 2 starts after the Regional Water Board reviews and considers amendments to the Delta Mercury Control Program and upstream control programs are adopted. Phase 2 requires discharger implementation of the mercury and methylmercury controls developed in Phase 1. Prior to implementing Phase 2, the Regional Water Board will consider the technical and economic feasibility of potential total mercury and methylmercury control methods and to minimize or avoid significant negative impacts to the environment that may results from control methods. Phase 2 is (from [eight years after the effective date of this amendment] through 2030).

Section 3 - Delta Methylmercury TMDL Adaptive Management

The Delta Mercury Control Program will follow an Adaptive Management (AM) approach throughout its duration, including program initiation, data collection, technical studies, technical review, and Program revisions. The Regional Board will work with stakeholders to collaboratively design and evaluate the studies. Study results and other information will be utilized to assess methylmercury conditions in the Delta; implement mercury and methylmercury reduction requirements, and potentially revise the Basin Plan Amendment. Adaptive management is a method by which uncertainty can be managed through a formal process that iteratively gains understanding through scientific evaluation, and collaboration between stakeholders, regulated and regulatory parties. Uncertainty in this case includes uncertainty of control factors (and the degree of their efficacy, under which conditions) that increase or decrease methylmercury in process water and natural systems. It also includes uncertainty in the ability to reduce methylmercury in a human health and biologically significant amount, and uncertainty over the time frame and the cost to achieve that reduction. The following groups will be involved in the adaptive management approach.

Section 3.1 - Coordination and Communication Methods for Point Source Dischargers

NOTE: This section is expected to include a description of any methods that point source dischargers (principally NPDES permittees will coordinate as a set of affected dischargers. This section MAY NOT be necessary but is included at this time to create balance with the next section describing similar methods for non-point source dischargers.

Section 3.2 - Coordination and Communication Methods for Non-Point Source Dischargers

NOTE: This section will ultimately memorialize the specific approach that NPS dischargers will take to coordinate the vast number of affected dischargers. As already discussed bb the Stakeholder Group and the initial discussion of the NPS Workgroup, this approach may be embedded in, or be similar to the coalition process used in the Irrigated Lands Regulatory Program

This section MAY also describe any mutual agreements about proportional responsibilities if NPS dischargers. Alternatively, discussion of proportional responsibility may be included in Section 4 regarding the Implementation Program.

Section 3.3 - Scientific Review and Integration Methods

The Delta MeHg TMDL implementation process relies on a robust scientific approach to identify potential problems, design and review studies to characterize / validate problems, design potential solutions, identify appropriate implementing parties to support studies and solutions. The following describes the related groups that support scientific review and the integration between technical specialists and affected stakeholders.

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1 Stakeholder Group is comprised of representatives of each of the major classes of regulated entities, and other
2 affected parties. The Regional Board will involve this group in the selection of the Technical Advisory Committee
3 (TAC), review of studies, program evaluation, and development of possible revisions. *POTENTIAL: The
4 Stakeholder Group will have a Science Committee of specialists affiliated with respective Stakeholder interests
5 that will act as direct advisories to the Stakeholder Group and will work with the TAC (described below as being an
6 independent set of experts convened to advise the Regional Board*

- 8 • Stakeholder Science Committee comprised of technical experts to advise the Stakeholder Group and
9 sub-groups on technical issues, and assist on the development of the research questions to submit to the
10 TAC/Board for approval. *The Delta Tributaries DTMC group could provide this function, as it already has
11 the experienced, application-side experts in place. Responsible for: coordinating outside of particular
12 program, looking at other relevant programs Would be funded by the stakeholder group: the participants,
13 dischargers, all stakeholders (EJ?) affected by the TMDL. THIS NEEDS MORE REVIEW. Don't
14 necessarily need to go out and hire outside expert; could have internal people who know about MeHg.
15 Cost could just be staff time for in house expertise. CONCERN: Not all shops have in-house experts
16 (most NPS groups don't have MeHg "experts"). Committee should be representative group of
17 stakeholders, the scientific committee could consist of people with specialized training but not necessarily
18 "experts".*

19
20 Technical Advisory Committee (TAC) is comprised of independent experts that would convene as needed to
21 provide technical peer review. They will advise the Board on technical issues and provide recommendations for
22 additional studies and implementation alternatives. The TAC will review Phase 1 study designs, evaluate results,
23 propose follow-up experiments, and make recommendations on whether sufficient information is available to
24 implement methylmercury management practices. The Board will form and manage the TAC with selection
25 criteria guidance and recommendations from the Stakeholder Group.

26
27 *NOTE: It is expected that this section will be significantly expanded to describe shared mutually shared
28 expectations of how science integration, review, and decision making will be conducted.*

30 **Section 4 - Implementation Program**

31
32 *NOTE: The following PRELIMINARY DRAFT text requires significant review and discussion by the Stakeholder
33 Group*

34
35 Dischargers do not have to begin implementation of methylmercury management practices until the Regional
36 Water Board has reevaluated the allocations and the costs, environmental impacts, and efficacy of methylmercury
37 management practices at the end of Phase 1 and until the Regional Water Board has developed mercury control
38 programs for major tributaries to the Delta.

39 Phase 1 of the control program **requires** dischargers to conduct mercury and methylmercury **Control Studies**
40 and **encourages** dischargers to conduct **Characterization Studies**.

41
42 Characterization Studies shall evaluate methylmercury and/or mercury concentrations and loads in source waters,
43 receiving waters, and discharges. Control Studies shall develop methylmercury and/or mercury control methods;
44 evaluate the effectiveness, costs, and potential environmental effects of identified control actions; and propose
45 implementation schedules to comply with methylmercury allocations. Dischargers may work individually or may
46 collaborate with other entities to develop and participate in comprehensive studies. The comprehensive studies
47 may encompass multiple Delta subareas and tributaries and may include multiple source categories. Regional

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1 Water Board staff shall be involved with any discharger and stakeholder groups and science committees formed
2 to conduct the studies.

3
4 **Phase 1 Characterization and Control Studies**

5 Phase 1 Study Objectives and Options:

6 1. Studies' Objectives:

- 7 a. Develop and evaluate management practices and control methods to reduce methylmercury from
8 various sources, including but not limited to managed wetlands, irrigated agriculture, urban runoff,
9 wastewater treatment plants, and within-channel sediments. Studies should evaluate the
10 effectiveness, costs, and potential environmental impacts of the possible methylmercury
11 management and control measures.
- 12 b. Identify methylmercury sources that can be feasibly controlled by addressing methylmercury, total
13 mercury, or both.

14
15 Develop watershed- and/or source-specific implementation plans that identify methylmercury and inorganic
16 mercury source reductions to meet allocations.

17
18 New wetland and wetland restoration projects scheduled for construction anywhere in the Delta or Yolo Bypass 3
19 years after Phase 1 commences. *TNC does not necessarily agree with that wetlands in all subareas should be
20 studied. Based on Table A, the Central Delta and West Delta either have a high capacity for absorbing MeHg
21 loads and/or the ag/wetland loading estimates are not accurate. It is not evident that these site-specific studies
22 are necessary; we are concerned over delaying these restoration projects and adding costs unnecessarily.
23 Leveraging off of studies of different wetland types in other subareas may be sufficient. [Comment from Janis: is
24 this concern adequately addressed by having TAC and Stakeholder Group ensure that studies are not
25 duplicative? To share the responsibility, seems fair for new projects to join Phase 1 studies, but projects shouldn't
26 have to study their property in particular if other studies are applicable]*

27 New flood conveyance, water management, and salinity control projects implemented during or after Year ##(3)
28 of Phase 1 that have the potential to increase ambient mercury and/or methylmercury levels in the Delta or Yolo
29 Bypass.

30 At the end of Phase 1, the Regional Water Board will evaluate the completed studies, the effectiveness and costs
31 of identified methylmercury controls, preferred management practices, implementation schedules, environmental
32 effects of potential methylmercury control actions, and whether methylmercury allocations can be attained. The
33 Regional Water Board will consider: modification of methylmercury allocations; adoption of management practices
34 and implementation schedules for methylmercury controls; and adoption of a Mercury Offset Program to
35 compensate for loads in excess of the methylmercury allocations.

36
37 Characterization Studies: Examples of characterization studies that may be of interest to Point source and NPS
38 dischargers may include:

- 39
- 40 • Open water fate and transport
 - 41 • Recycling / reclamation, conservation, and storage options re concentrations
 - 42 • Wetland treatment systems
 - 43 • Pilot scale field studies
 - 44 • Control studies to evaluate the removal of MeHg
 - 45 • mineral springs, soil erosion, atmospheric deposition, contaminated mine site runoff and stream bank
46 erosion
- 47
48
49
50

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1
2 Characterization and Control Study Exemptions
3

4 The following activities or projects are exempt from the **Characterization and Control Studies**:

- 5 • Wetland creation or restoration projects less than 5 acres,
- 6 • Projects for critical habitat restoration areas where monitoring demonstrates water and/or fish
- 7 methylmercury levels will not be impaired and California Environmental Quality Act environmental
- 8 impacts assessments indicate the project would not have significant potential to increase fish
- 9 methylmercury levels above the fish tissue objectives;
- 10 • Passively managed wetlands;
- 11 • Flood control projects in response to declared emergencies;
- 12 • Emergency flood control projects, such as when the Governor declares an applicable state of
- 13 emergency, or when there is immediate or threatened failure;
- 14 • Critical levee repairs if agencies take reasonable and appropriate measures to minimize mercury and
- 15 methylmercury releases;
- 16 • Areas affected by failed levees that are not repaired;
- 17 • Dry-side levee work;
- 18 • Coring and test pits on levees or other areas in floodplains;
- 19 • Ordinary levee maintenance activities (i.e., vegetation management or levee erosion protection);
- 20 • Levee improvement projects less than 5 acres where the earthwork is completed in the dry season
- 21 and the site is stabilized from erosion prior to the wet season;
- 22 • Cumulative changes in floodplain management that result in less than 5% increase in inundation
- 23 (area or frequency?) [CEQA requires a review of cumulative effects, so need to know what floodplain
- 24 projects are planned for the next 30 years or so?]

25 If project proponents propose and conduct a comprehensive plan to evaluate management practices to minimize

26 mercury and methylmercury discharges from similar types of projects, the Executive Officer will consider granting

27 exemptions for those projects that are part of the larger comprehensive characterization and control study plan.

28

29 **Discharger-Specific Study Requirements and Other Specifications**
30

31 The following sections include discharger-specific requirements for methylmercury Characterization and Control

32 Studies, total mercury load reductions and other conditions that must be met during Phase 1.

33 For this section, annual average concentrations and annual loads for methylmercury and total mercury are

34 defined as the average concentration or load for a calendar year (January through December).

35

36 Agricultural Lands and Wetlands

37 Methylmercury allocations listed in Table A apply to agricultural lands and wetlands in the Delta and Yolo Bypass

38 (Figure A43-4). The allocations for each subarea apply to the sum of annual methylmercury loads produced by

39 agricultural lands and wetlands in each subarea. The subarea allocations apply to agricultural and wetland

40 discharges that existed since [the effective date of this amendment] and new discharges that began after [the

41 effective date of this amendment]. The methylmercury allocations shall be achieved no later than 2030.

42

43 **Characterization Studies** are advised for those irrigated agricultural lands and managed wetlands that discharge

44 to the subareas of the Delta that require methylmercury source reductions (Yolo Bypass, Sacramento,

45 Mokelumne/Cosumnes, San Joaquin, and Marsh Creek subareas; Figure A43-4). Irrigated agricultural lands and

46 managed wetlands that discharge to the Central Delta and West Delta subareas (Figure A43-4) shall conduct

47 Characterization Studies only if changes are made to existing land uses that have the potential to increase

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1 ambient methylmercury levels (e.g., restoration activities that convert agricultural lands to wetlands). A
2 comprehensive, coordinated study plan should be designed and implemented that will provide a characterization
3 of discharges within the subarea. For instance, by requiring a coordinated study plan, we will ensure
4 characterization and control studies address the range of project wetlands types: flooded agricultural land –
5 seasonal, seasonal wetland, permanent wetland, open water habitat, and in the different Delta subareas to define
6 ranges of methylation rates within acceptable bounds of uncertainty for the different management types and
7 subareas.

8 Those irrigated agricultural lands and managed wetlands that both discharge to subareas that require
9 methylmercury source reductions and, per the results of completed Characterization Studies, act as a net source
10 of methylmercury to the Yolo Bypass or Delta, shall conduct **Control Studies**. Within a subarea, individual
11 dischargers do not need to complete individual studies if the Executive Officer approves a comprehensive,
12 coordinated study plan that will provide a characterization of discharges within the subarea and will propose a
13 coordinated plan for achieving subarea load allocations.

14
15 The Yolo Bypass is a significant source of methylmercury to the Delta. Water management agencies responsible
16 for flooding the Yolo Bypass and landowners within the Bypass shall develop and submit a comprehensive,
17 coordinated study plan that will provide a characterization of methylmercury production and discharge from lands
18 immersed by managed flood flows within the Bypass. The study plan should include a coordinated plan for
19 developing methylmercury control measures to achieve Bypass allocations.

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Appendix A

Definitions

- 1 **1. Delta Mercury Control Program Phase 1:** The Delta Mercury Control Program consists of two phases.
2 Phase 1 is the time period after the Board adopts this Basin Plan amendment, up until the time when the
3 Board reconsiders the entire Delta Mercury Control Program. Phase 1 contains the methylmercury study
4 period and interim requirements for specific dischargers and sources described below. Phase 1 will last
5 approximately 8 years from the effective date.
6
- 7 **2. Delta Mercury Control Program Phase 2:** Phase 2 is the time period after Board re-evaluates the TMDL
8 and this Basin Plan amendment and re-adopts a new Delta Mercury Control Program .Prior to beginning
9 Phase 2, the Board will reconsider the TMDL, allocations, and compliance time schedules, and revise the
10 implementation plan directing dischargers to implement mercury and/or methylmercury controls based on the
11 Phase 1 study results.
12
- 13 **3. Dischargers:** *In the context of various sources being assigned allocations to control methylmercury,*
14 *dischargers should be specifically defined. If it refers to point source discharges only, other definitions are*
15 *probably warranted to address the non-point source responsible parties as well.*
16
- 17 **4. Methylmercury source categories:** Methylmercury and mercury source categories and activities subject to
18 this regulation include: Irrigated agricultural lands and managed wetlands, NPDES permitted facilities, urban
19 runoff, dredging and dredge material disposal, legacy mining waste, and new flood conveyance, water
20 management, and salinity control projects, atmospheric deposition, open water, and tributaries. Not all
21 sources within each source category act as net sources of methylmercury. Entities that do not discharge
22 methylmercury or do not act as a net source, and projects identified in Section I, are exempt from the
23 methylmercury study requirements.
- 24 **5. Phase 1 Implementation Plan Elements:**
 - 25 a. Inorganic mercury load reductions to meet Region 2 allocation (110 kg/yr reduction)
 - 26 b. Methylmercury and inorganic mercury characterization and reduction studies focused on meeting
27 allocations
 - 28 c. Methylmercury and inorganic mercury reduction actions [e.g., Cache Creek Settling Basin improvements
29 and possibly other projects]
 - 30 d. Measures to reduce methylmercury exposure for people eating contaminated Delta fish
 - 31 e. Development of TMDLs for impaired waterways in the Delta's tributary watersheds
- 32 **6. Phase 1 Methylmercury Study Work Plan(s):** Specific plans developed by the Stakeholders to evaluate
33 controls for the various methylmercury sources.
- 34 **7. Stakeholder:** A stakeholder is a group or individual who has the responsibility for implementing a
35 management action, is affected by the action, or has the ability to aid or prevent its implementation.
36 Stakeholders include, but are not limited to, the following: land owners (e.g., irrigated agriculture and
37 wetlands); communities affected by elevated fish mercury levels; land managers where wildlife on those lands
38 are consuming fish with elevated mercury levels; NPDES facilities, urban storm water agencies, and local,
39 state and federal agencies whose water and/or land management activities may cause or contribute to
40 inorganic mercury or methylmercury discharges. Additionally, agencies such as the State Lands
41 Commission, USEPA, and USBLM are stakeholders that will have a role in addressing a portion of the
42 allocations. Stakeholder group(s) that form should include representatives from each of the above listed
43 groups.
- 44 **8. Stakeholder Group / Interested Parties {placeholder} CAN BE EXPANDED**