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**COMMENTS TO THE STATE WATER RESOURCES CONTROL BOARD  
ON THE DECEMBER 1994 DRAFT  
WATER QUALITY CONTROL PLAN FOR THE  
SAN FRANCISCO BAY-DELTA ESTUARY**

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The Natural Heritage Institute (NHI) is a party to the Principles for Agreement on Bay-Delta Standards Between the State of California and the Federal Government (hereinafter the "Delta Agreement") of December 15, 1995. We are pleased to present these comments on the draft water quality control plan (WQCP) which emanates from that agreement. We may also submit additional comments before the close of the comment period.

**Introduction**

NHI views the draft WQCP and the Delta Agreement upon which it is based as a significant step forward in our efforts to protect the Bay-Delta environment and to put California water management back on a stable footing. The Agreement, in concert with other ongoing efforts, will not only help to stabilize the Bay-Delta ecosystem, but opens the door to much more significant reform of the California water management system via the state-federal long-term planning process. For these reasons, we appreciate the State Board's willingness to work in close cooperation with other state and federal agencies and with the stakeholder groups to craft a WQCP that is supportable by all concerned.

We hasten to add, however, that our support for the Agreement will not preclude us from seeking the protection of the state and federal ESAs for any species, such as spring run salmon, splittail or longfin smelt, if such protection appears necessary over this interim period.

Our comments today are intended to assist the State Board in crafting the WQCP

so that it supports and implements the letter and spirit of the Agreement, is legally defensible, and promotes good public policy. Our specific recommendations follow.

**Relationship of the Water Quality Control Plan to the Delta Agreement, the CVPIA Anadromous Fishery Restoration Program, the Long-term Delta Planning Process, etc.**

Under the Delta Agreement, the State Board's WQCP is intended to provide interim protection to the public trust values of the estuary, pending the outcome of a planning process for long-term delta solutions. The interim arrangement is intended to remain in effect for only three years. The long-term planning process is expected to yield, inter alia, longer-term standards and other measures that would provide a higher level of protection. The WQCP should recognize the interim nature of the Agreement and the commitment to promulgation of long-term standards fully protective of delta-dependent species. Whereas the interim protections are predicated on the current facilities and physical configuration of the delta, the long-term protections will presumably reflect more optimal facilities and water management institutions.

The WQCP promulgates the water quality standard aspects of the Delta Agreement. However, the Board's responsibilities under the Agreement extend beyond traditional water quality standard setting. The state's commitment to the broader program of activities contemplated by the Agreement should be clearly reflected in the final WQCP. EPA's commitment to withdrawal of the federal proposal is contingent not merely on promulgation of state water quality standards, but the State's adoption of a "Bay-Delta protection plan" consistent with the Agreement. For this reason, the WQCP should address the implementation processes set in motion by the Agreement as discussed in the following sections of these comments.

At the same time, the WQCP must recognize that the Delta Agreement does not establish the ceiling for Delta protections. To the contrary, the Agreement was acknowledged to contain compromises on species protection in various respects, most significantly for unlisted but highly stressed species such as spring run salmon. The signatories appreciated that the Agreement is only part of a constellation of regulatory and planning initiatives that will bear upon, and improve habitat conditions, in the estuary. Thus, the WQCP standards should not be viewed as pre-empting or subsuming other Bay-Delta protection efforts. In fact, the flow, water quality, and operational recommendations in the Agreement and the corresponding standards in the draft WQCP will not, in and of themselves, meet the interim environmental objectives set forth in the Agreement. Rather, the protections in the WQCP, together with the Bay-Delta environmental enhancements produced by other ongoing mechanisms, are intended to stabilize a weakened system over the next three years and allow long-term water management and environmental restoration planning to take place. Other actions that will provide environmental improvements beyond the WQCP and the Delta Agreement include:

- o The anadromous fish doubling plan under the CVPIA, and other flow related

enhancements.

- o Environmental water purchases under the CVPIA and other authorities.
- o Measures taken by regulatory and management agencies to avoid the need to list spring run salmon or other species as threatened or endangered.

The Delta Agreement does not in any way render unnecessary or preclude these other activities. Accordingly, the final WQCP should acknowledge that the flow, water quality, and operational standards contained therein are not intended to preclude the implementation of other supplementary flow, water quality, and operational measures for the Bay-Delta over the interim period through other processes.

**Recommendations regarding the charter of the Operations Coordination Group (the "Ops Group"):**

Pervading the Delta Agreement is the concept of real time, hands-on, finely-tuned management of the facilities in the delta to optimize fishery protection and water exports simultaneously. An "Operations Coordination Group" (Ops Group) is to be constituted to make the operational decisions in the first instance, with ultimate authority vested in the California Water Policy Council and the Federal Ecosystem Directorate (CALFED). This arrangement effectively delegates to the Ops Group a large degree of control over the operation of delta facilities because of the necessity that operational adjustments respond instantaneously as conditions change in the delta.

Because the success of the State Board's WQCP will depend to a large extent on how well this Ops Group performs, we deem it essential that the WQCP specify in appropriate detail the charter under which the Ops Group will operate, including its authority and procedures. We have several recommendations regarding that charter:

- o The Delta Agreement introduced the environmental and water user stakeholders into the Ops Group along with the responsible agencies. If the Ops Group is to play the central role that the Delta Agreement envisions, its charter must reflect the balance of interests that produced the Agreement. Thus, the WQCP should charter the Ops Groups at a minimum to include as voting members at least the signatories to the Agreement and the commercial and sport fishermen (who are stakeholders who should have been included). The charter should specify the voting members, the voting rules, the rules for the convening and conduct of meetings, and the criteria and process for referring disputes to CALFED.
- o To assure the viability of its decisions, the Ops Group should be constituted in conformance with the Federal Advisory Committee Act (FACA) and California's Brown Open Meeting Act. We recommend that the State Board immediately request a formal opinion of the Attorney General and that the Department of Interior agencies immediately request a formal opinion of the Regional Solicitor as to how to constitute the Ops Group so as to assure maximum procedural flexibility

while conforming with, respectively, FACA and the Brown Open Meeting Act (Gov. Code § 54950 *et seq.*). NHI is of the view that the constraints of FACA can be satisfied by constituting the Ops Group as a formal FACA committee, but then allowing interim decision-making, where immediate responses are required, to be made on an intercessional basis by subcommittees, subject to ratification by the plenary committee. We suggest that the advisory opinions specifically address this proposal.

- o The charter also must establish the limits to the Ops Group's (and CALFED's) authority. Specifically, to be consistent with the Delta Agreement, the charter should provide explicitly that the Ops Group and CALFED are not empowered to constrain the state and federal resource agencies with respect to decisions on allowable "take" under the Endangered Species Acts.

Finally, we believe the State Board has authority, and indeed the duty, to prescribe the charter for the Ops Group if it is to rely upon it to satisfy the levels of protection of a legally adequate WQCP under the Porter Cologne Water Quality Control Act and the Clean Water Act.

### **Category III initiatives and funding:**

The State Board must appreciate that the commitments in the Delta Agreement by the public agencies and water users to establish a \$180 million mitigation and enhancement fund were an integral part of the bargain<sup>1</sup> and the basis on which the environmental parties agreed to accept suboptimal flow and other protections. If the fund proves to be a mirage, then the Agreement is as well, for the environmental parties will regard the fund's failure as a material breach of the Agreement. At this point, we are aware only of a commitment of \$10 million per year by the Metropolitan Water District, which we applaud. However, additional sources of funding must be secured if the Delta Agreement is to be fulfilled.

The Delta Agreement anticipates that "new sources of funds will be required to adequately finance Category III activities." The stakeholders are meeting regularly in an effort to arrive at a consensus regarding the sources of funding, the responsibilities of the public agencies and water users for providing it, the scope of activities eligible for funding, and related matters. This is a continuation of the process that succeeded in producing the Delta Agreement in December, and it deserves a chance to succeed now in producing a mitigation and enhancement plan.

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<sup>1</sup> The Principles for Agreement unequivocally states:

"The State [and other stakeholders] are committed to the implementation and financing of 'Category III' measures as an essential part of a comprehensive ecosystem protection plan for the Bay-Delta estuary."

However, while voluntary initiative is much to be encouraged, it should not be relied upon naively. We believe that the WQCP must create the conditions under which the fund will be likely to emerge and be used effectively. The most important role for the State Board to play is to include in the WQCP default requirements that will apply if the parties fail to present a consensus program by a date certain. That date should be specified in the WQCP. We have the following specific recommendations as to the content of the default program that should be mandated in the WQCP:

- o In default of a consensus proposal by the parties, the WQCP must apportion the responsibility for contributing to the fund as between the state and federal agencies and the water users, all of whom were signatories of the pledge. Until the specific responsibilities for contribution are affixed, either through the agreement of the parties or in the WQCP, it is likely that the pledgers continue to point their fingers at one another and the pledges will remain hollow. Like any other regulatory liability, the duty to contribute will remain unenforceable and merely theoretical until it is particularized. If the parties default, the State Board will have to take responsibility for securing Category III funding in the WQCP.
- o As a backup mechanism in the event the parties do not come up with the \$180 million by a specified date, the WQCP should establish a water user fee program and commit to implement it. NHP's legal research discloses that it is permissible for the State Board to assess water users for such a mitigation fund. However, the State Board would not be authorized to expend the fund for Category III purposes without a specific legislative enactment. These funds could not be paid to the State Board, or to any other governmental entity, because they would then be lost to the general fund. In the absence of such an authorization, we recommend that the WQCP provide for the payment of the assessments to a non-governmental, non-profit entity which would be empowered to finance the Category III activities. The State Board could enter into an agreement with an existing non-governmental entity to provide this service or, ideally, the stakeholder interests may create a special purpose entity that they could govern and control.

In crafting a default mitigation and enhancement fund, the Board should be conscious that it was the intent of the parties to the Delta Agreement that the Category III funding would consist largely of new monies--that is, funds not otherwise available for habitat improvements in the estuary. The commitment to Category III actions would be hollow if it amounts to double-counting the CVPIA Restoration Fund, for instance. We do agree, however, that contributions to the Restoration Fund should be taken into account in apportioning the obligations to contribute to the Category III fund. However, these credits should not reduce the total amount of new money committed for the Category III activities.

- o Apparently, some water users wish to initiate their own "Category III activities" and have them qualify as meeting the funding obligation. Unsupervised, the danger of

this approach is that the Category III fund may be dissipated by expenditures only tangentially related to the restoration of the Bay-Delta estuary. Moreover, uncoordinated initiatives may be duplicative or at least fail to actualize the most cost-effective opportunities for fishery improvements. In any event, the Category III initiatives should be coordinated with the restoration activities under the CVPIA Restoration Fund. In default of a consensus proposal acceptable to the State Board, the WQCP should set forth criteria governing the types of non-monetary contributions that would qualify as Category III fund contributions. We recommend that the water users' proposals be reviewed by the fish and wildlife protection agencies (U.S. Fish and Wildlife Service, National Marine Fisheries Service and California Department of Fish and Game) which should be empowered by the WQCP to certify those activities that conform to the agency's restoration priorities.

- o In default of a timely consensus by the parties, the WQCP should specify the types of activities that qualify for funding under the Category III fund. In so doing, the Board should recognize the utility of water purchases in achieving the objectives of the Delta Agreement and, more importantly, in actually stabilizing the biological resources of the estuary. In at least two respects, it is likely that water will have to be purchased to achieve the goals of the Agreement.

First, the Agreement limits its use of water to protection of currently listed threatened and endangered species. At the same time, it encompasses the express goal of creating "conditions in the Bay-Delta estuary that avoid the need for any additional listings during the next three years," which will require improved conditions for at least spring run salmon, the Sacramento Splittail and the Longfin Smelt. Improving those conditions may well require additional delta inflows or pumping curtailments. The Category III fund should be available to serve the Agreement's objectives in this regard.

Second, the San Joaquin fall run salmon protections in the Delta Agreement are limited in the near term (before the water rights order is finalized) to flows that can be released from New Melones. The flow needs of this race are unlikely to be adequately met under this constrain absent water purchases in the San Joaquin basin.

These water purchase needs may well prove to be much more essential to the success of the Delta Agreement than some of the other types of actions contemplated under Category III funding. The Delta Agreement is ambiguous as to the scope of actions that qualify for Category III funding. It would be a grave mistake for this issue to remain unresolved. We recommend that, in the absence of stakeholder consensus, the WQCP specifically authorize use of the Category III fund for the purchase of water that would not otherwise be required to be relinquished for the estuary.

## **The State Board should accommodate consensus refinements to the Agreement**

The proposals in the Delta Agreement for flow, water quality, and operational standards were written in considerable haste with a broad brush. Several provisions which were agreed to orally by the coalition were inadvertently left out of the final draft. Moreover, since the Agreement was signed, the coalition has discussed possible refinements to the proposed standards. We expect that the coalition will be ready to recommend some refinements to the standards in the Delta Agreement before the close of the comment period. Other refinements may take longer to resolve.

The refinements which we hope will be ready for submission in the near future include refinements of the coalition recommendations for:

- o Suisun Marsh standards
- o Striped bass spawning standards
- o Starting gate for X2 at Collinsville
- o San Joaquin runoff forecasts
- o San Joaquin export limits during the San Joaquin pulse flows.

Refinements which may take longer to resolve through consensus include:

- o Conferring discretion on the Ops Group to close the Delta Cross Channel for more than 45 days during November, December, and January to benefit spring run salmon. The need for this improvement is discussed in the next section of these comments. See below.
- o Conferring discretion on the Ops Group to approve water transfers through the Delta which do not comply with the nominal export limits. This is a change in the Delta Agreement apparently is desired by the water users.

We recommend that the State Board incorporate into the final WQCP the refinements in the standards which are submitted as consensus recommendations by the coalition. However, the State Board should not delay promulgation of the final WQCP in the expectation that additional consensus refinements will be forthcoming. Rather, the State Board should regard the WQCP as a dynamic document and expedite amendments to it when proposed as consensus recommendations by the stakeholder coalition and CALFED.

## **Protection for the Spring Run Chinook**

One of the most important issues for potential refinement of the Delta Agreement is the need for protection of spring run chinook salmon. This summer, the NHI presented a comprehensive proposal for establishing protections for spring run chinook in the delta during the State Board's most recent Bay-Delta water quality standard proceeding. See NHI, Comments and Recommendations to the State Water Resources Control Board Regarding

*Review of Standards for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* (July 13, 1994 Workshop). This submission contained compelling evidence that the spring run is almost certainly eligible for listing under federal and state endangered species statutes, and that credible biologists in academia and government believe the altered hydrodynamics of the delta to be the primary cause of recent population declines in the dwindling wild stocks of this race. The paper also set forth a set of recommended standards to aid in the recovery of the spring run.

Nevertheless, spring run received short shrift in the Delta Agreement, and in the draft WQCP as well. The only measure likely to directly benefit out-migrating spring run smolts in the November through January period is the provision for up to 45 days of (discretionary) Delta Cross Channel gate closure. Some biologists feel that even this measure is of limited utility to the species without concomitant limits on reverse flows in the south Delta.

Protection of the spring run should be a goal of the water quality standards not only to avoid the need for additional ESA listings, but because the beneficial uses sought to be accomplished by the WQCP include preservation of rare species, fish migration and estuarine habitat. To the extent that the plan fails to provide these beneficial uses for spring run, it will frustrate these goals.

As set forth in our prior spring run submission to the State Board, there is agreement among many of the experts that Cross Channel gate closure may provide significant protections for outmigrating spring run smolts during the fall months. As currently drafted, the plan would allow for a maximum of 45 days of closure during this 90 day period. NHI is urging the coalition of stakeholders to concur in allowing the Ops Group to allow additional days of closure when spring or other salmon runs are moving into the Delta, and it can be shown that there would be no adverse impacts to other species, and minimal if any water costs. This would be consistent with the "operational flexibility" provision of the Delta Agreement, which expressly allows for increases or decreases in water supplies in any month for purposes of biological protection. If we can achieve concurrence, this is one matter on which the State Board may be asked to modify the WQCP to provide additional protection.

#### Legal Analysis of the Inclusion of Flow Measures in a Water Quality Control Plan

Finally, we agree with the view of some of the water users that the WQCP should be based on the full range of the Board's water management authorities under California law, including, but not limited to, the public trust doctrine and the reasonable and beneficial use doctrine. However, we take a different view of the Environmental Protection Agency's authority to approve water quality standards under section 303 of the Clean Water Act. Water quality standards may encompass "physical attributes" of water pertaining to water flow and water project operations. See PUD No. 1 of Jefferson County



**v. Washington Dep't of Ecology, 114 S. Ct. 1900, 1912-13 (1994). A contrary conclusion would perpetuate an "artificial distinction" between water quality and water quantity, a distinction expressly disclaimed in PUD No. 1, 114 S. Ct. at 1912.**

**In PUD No. 1, the United States Supreme Court wisely recognized that, in many cases, "water quantity is closely related to water quality" and that "a sufficient lowering of water quantity in a body of water could destroy all of its designated uses." Id. at 1912-13. The Court further noted that the type of pollution regulated by the Clean Water Act encompasses changes in the "movement, flow[,] or circulation of any navigable waters . . . including changes caused by construction of dams." Id. at 1913. In other words, flow depletion is a man-made, physical alteration of the integrity of the water body that is regulated under the Clean Water Act. This is precisely the situation in the Bay-Delta region: significant reductions in historic Bay-Delta outflows due to man-made dams and diversion works have resulted in increased salinity, temperature, and other pollutants that have caused the designated fish uses of that water body to decline. Therefore, the EPA has the authority to approve water quality standards pertaining to flow and water project operations.**

**SUBMITTED: 23 FEBRUARY 95**