



Gregory A. Thomas
President

Natural Heritage Institute

114 SANSOME STREET, SUITE 1200
SAN FRANCISCO, CA 94104
TEL: (415) 288-0550/FAX: (415) 288-0555
e-mail: nhi@igc.apc.org

Non-Profit Law and Consulting in Conservation of Natural Resources and the Global Environment

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Mr. John Caffrey, Chairman
Mr. James M. Stubchaer, Vice Chairman
Mr. Marc Del Piero, Member
Mr. John W. Brown, Member
Ms. Mary Jane Forster

**Re: Supplementary Comments of the Natural Heritage Institute on the draft
Water Quality Control Plan for the Bay-Delta Estuary**

Dear Chairman Caffrey and Members of the Board:

NHI's comments on the draft water quality control plan (WQCP) for the Bay-Delta estuary which were presented on February 23 evoked questions from some water users as to our position on the extent to which CVPIA Restoration monies may be counted toward the \$60 million per year financial commitment toward "Category III measures" under the December 15, 1994 Principles for Agreement (the "Delta Agreement"). We wish to respond on the record by submitting this supplemental statement to the Board for its consideration in finalizing the WQCP, with copies to interested parties.

First, we must reiterate that we regard the "implementation and financing of Category III measures as an essential part" of the deal, in the words of the Delta Agreement (at Attachment C: Principles for Implementation of Category III). That is to say, the ecosystem protection plan for the Bay-Delta Estuary, as embodied in the WQCP, does not provide equivalent protections to, and cannot result in the withdrawal of, the December 15 EPA water quality standards unless it contains adequate assurances regarding the Category III funding. NHI will vigorously oppose approval of the WQCP and withdrawal of the federal standards if that part of the Delta Agreement commitment is breached.

As to the permissible sources of funding for the Category III commitment, the language of Attachment C to the Delta Agreement is controlling:

"It is anticipated that new sources of funds will be required to adequately finance Category III activities. A process for evaluating existing funding and possible reprioritization will be used to finance a portion of the Category III activities. Additional funds will be secured through a combination of Federal and State appropriations, user fees, and other sources as required."

The section contemplates that primarily new sources of funding (Federal and State appropriations, user fees, etc.) will be provided for Category III measures, with some portion provided through "reprioritization" of existing funds. The evident meaning is that funds not now "prioritized", earmarked or well-employed for habitat improvements affecting delta obligations can be redirected for this purpose.

In considering what existing funds are already "prioritized" or earmarked to actions covered by the Delta Agreement, we note that the delta fishery obligations in the Agreement are of two types, improvements in anadromous fish populations and improvements in certain (listed) delta native fish populations. The CVPIA Restoration Fund is already dedicated to the doubling of anadromous fish populations throughout the Central Valley water system. Since the greatest single cause of declines of anadromous fish stocks is losses in the delta, the doubling plan will necessarily involve improvements in delta conditions. Thus, the CVPIA Restoration Fund is neither new money nor an existing fund that can be "reprioritized" from some other purpose to delta habitat improvements.

The decision as to which funds now earmarked for delta habitat improvements could be better employed for that purpose if counted as Category III funding we believe is best left to the expert judgment of the federal and state fish and wildlife agencies rather than to the water users, some of whom seem more committed to the water supply benefits than to the reciprocal obligations of the Delta Agreement.

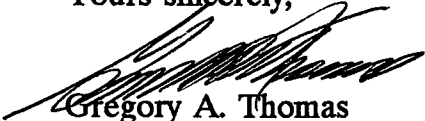
In short, the types of existing funds that the parties contemplated as subject to "reprioritizing" for Category III activities are funds not now being used to finance habitat improvements in the delta, such as the portion of the Four Pumps Agreement Article 7 funding that is not now being used for habitat restoration, or the fund that supported BDOC or funds that are not otherwise obligated. The key concept is that, to count toward the Category III commitment, existing funds must be pulled away from some other use into delta and anadromous habitat restoration.

This logic reinforces NHI's understanding as a party to the accord that the Category III funding is meant to be additive to and not duplicative of the CVPIA funding. That is also the common sense interpretation in that it is improbable that the parties to the Delta Agreement would have devoted so much effort to negotiating funding that is already available for delta habitat improvements. The negotiations were about new commitments,

not about maintaining the status quo.

This interpretation of the operative Delta Agreement language means that the \$180 million committed by the agencies and water users for Category III activities is in addition to the \$150 million available under the CVPIA Restoration Fund for anadromous fishery improvements in the same water system, for a three year total of \$330 million. This does not mean that the funds should not be merged. Indeed, in the interest of coordination and efficiency, we believe this is well worth exploring. Nor does it mean that those water users who are already contributing to the CVPIA Restoration Fund should not receive a credit for those payments against their Category III funding obligation--we believe they should. But that credit must not reduce the overall size of the Category III fund or detract from the joint obligation of the public agencies and water users under the Delta Agreement to provide that funding. We reiterate that the Category III fund in its entirety is *a sine qua non* of the approval of the WCQP and the withdrawal of the federal standards. NHI is prepared to insist upon this commitment as an essential part of the accord.

Yours sincerely,



Gregory A. Thomas
President, Natural Heritage Institute

c.c. Interested parties