

21 July 2010

Jeanine Townsend, Clerk of the Board
State Water Resources Control Board
1001 "I" Street, 11th Floor
Sacramento, CA 95812-2000 0002

Re: **COMMENT LETTER 8/3/10 BOARD MEETING: OROVILLE DRAFT WATER QUALITY CERTIFICATION**
Formal Response to the State Water Resources Control Board's 2 July 2010 Public Notice of Draft Water Quality Certification for the Department of Water Resources' State Water Project Oroville Facilities – FERC Project #2100 and of the Board's Ongoing Collusion and Duplicitous to Enforce the Law When Violated by Department Officials

Attention: Chairman Charles Hoppin and ALL Members of the State Water Resources Control Board
Camilla Williams, Chief, Water Quality Certification Program, Division of Water Rights ckwilliams@waterboards.ca.gov

Submittal of comments and concerns germane to the State Water Resources Control Board's (Board's) Public Notice of Draft Water Quality Certification (WQC) for the State Water Project's (SWP) Oroville Facilities, Federal Energy Regulatory Commission (FERC) Project License #2100 issued to the California Department of Water Resources (Department); wherein, the Notice notes that comments regarding the subject matter are due on or before 12 Noon, 23 July 2010.¹ In the Board's notice it states, that although public comments were not required, yet it provided the public with an opportunity to do so.

Please be advised that I am submitting the following comments, not as a consultant or for personal or private gain, but as a servant of God. As such, I am compelled, in good conscience, to apprise you of the "truth" and the "facts" relevant to the proposed draft WQC and the unlikelihood the Board will enforce the provisions contained therein when violated by the Department.

Also be advised, although it is recognized that the WQC is a mandatory part of the FERC relicensing process; in this case, based on the Board's historical "actions", just as was the case with the Department's FERC relicensing process, which P&A pointed out from the onset was an orchestrated side show, the WQC is also viewed as purely perfunctory. Neither time, nor space permits a comprehensive response to the litany of inherent shortcomings pertinent to the content, scope, and context of the WQC, and/or the unlikely probability that any adopted provisions therein will ever be enforced by the Board, when violated by Department officials. On that note, it is my intention to review the Board's "enforcement" track-record in this comment letter to corroborate my concerns.

PORGANS & ASSOCIATES WAS A PARTY TO THE DEPARTMENT'S FERC RELICENSING REQUEST, WHICH INCLUDES THE WQC, HOWEVER, IT OPTED OUT OF THE ALP PROCESS DUE TO THE DEPARTMENT'S DISENGENUOUS ACTIONS:
Unlike the Board, P&A was a "party" to the DWR's Alternative Licensing Process (ALP) used during the renewal of its FERC relicensing (#2100) SWP Oroville Facilities, which has yet to be approved, pending the approval of the WQC. However, after five years of "participating" in the so-called collaborative ALP "transparent" process, P&A was left with no other conscionable choice but to discontinue its involvement in the due to the fact that there was a "breakdown" in the process. The record attests to the fact that the "breakdown" was directly attributable to DWR's dishonest, disingenuous, and misleading actions that provoked a "vote of no confidence" prompting many of the non-SWP participants to walk out in protest, which, at one point, included the federal agencies involved in the ALP. Please refer to P&A's comments to FERC and All Members of the Plenary Group, February 2004, Exhibit A.²

ONGOING INTEREST IN WQC: P&A expressed its interest and ongoing concern relative to the WQC, in previous correspondences to Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission (FERC), Michael A. Swiger, Counsel to California Department of Water Resources (DWR), provided notice to the Commission that DWR has withdrawn its application for water quality certification pursuant to Section 401(a)(1) of the Federal Clean Water Act (33 USC §1341 et seq.) for the relicensing of the Oroville Facilities as of August 5, 2009. (A copy of that correspondence was sent to the Board.)

Please be advised that Patrick Porgans & Associates (P&A), Inc., have an expressed interest in DWR's application for water quality certification, and shares some of the concerns raised by the California Salmon and Steelhead Association, in its letter to Camilla Williams, Chief, Water Quality Certification Programs, Division of Water Rights, State Water Resources Control Board (SWRCB), dated 6 August 2009, relative to potential conflicts of interest between DWR and SWRCB.³

WQC IS FUNDAMENTALLY FLAWED: In regards to the WQC, it is obvious that it is inherently flawed, simply because the basis upon which it is premised and the scope of the related water quality, water quantity, and the cumulative adverse impacts associated directly with the SWP Oroville facilities were intentionally limited in scope by the Department and its water contractors. They took this action in order to confine the scope of the impact assessment and required mitigation to a limited geographical area, just below Oroville. Albeit, hydroelectric power production, water releases, deliveries, and Delta exports are inexplicitly tied together as an integral part of the SWP operation. The Board's draft WQC states: "The Oroville facilities (Project) were developed as part of the State Water Project, which includes water storage, water deliveries, and hydroelectric systems. As part of the SWP the project is operated for flood control, power generation, recreation, fish and wildlife, and to meet regulatory requirements in the Sacramento-San Joaquin Delta."⁴ The Department and its contractors also used a similar tactic to avoid the need to consider the direct and/or indirect yet-to-be mitigated impacts associated with SWP water conveyance, Delta regulatory requirements, fishery impacts at the SWP Delta pumps, power production, buying and selling peak power, use of base-load power for pumping of project water via the SWP Banks Delta Pumping facilities, which are known to accelerate the "take" of endangered species at the Clifton Court Forebay. Furthermore, the direct and indirect impacts attributable to power production, water supply deliveries, and degradation of surface and groundwater throughout the SWP service area, exacerbated by DWR's failure to build the mandated drainage facilities as prescribed by the enabling legislation; California Water Resources Development Bond Act, 1960; §12934.

The following excerpts are from the Board's Draft WQC:

The Federal Clean Water Act (33 U.S.C. §1341) was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a).) Section 101 of the Clean Water Act 33 U.S.C. § 1251 (g) requires federal agencies to "co-operate with the State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."

Section 401 of the Clean Water Act 33 U.S.C. §1341 requires every applicant for a federal license or permit which may result in discharge into navigable waters to provide licensing or permitting federal agencies with certification that the project will be in compliance with specified provisions of the Clean Water Act, including water quality standards and implementation plans promulgated pursuant to section 303 of the Clean Water Act 33 U.S.C. §1313. Clean Water Act section 401 directs the agency responsible for certification to prescribe effluent limitations and other limitations necessary to ensure compliance with the Clean Water Act and with any other appropriate state law. Section 401 further provides that state certification become conditions of any federal license or permit for the project.⁵ [Emphasis added.]

DUPLICITY and COLLUSION A BOARD OPERATING PREREQUISITE WHEN IT INVOLVES THE DEPARTMENT: The comments contained herein, are prefaced solely on the hypocritical, collusion, abysmal duplicity of the Board's "enforcement-track record". The official records, contained in the Board's files, attest to the fact that over the course of the past two decades, it has repeatedly disregarded valid factual input and legitimate issues raised by concerned citizens, aggrieved parties, and its own staff, regarding the Department's and the Bureau of Reclamation's (Bureau) willful failure and disregard to comply with the terms and conditions of their respective water right permits and/or licenses issued by the Board to protect the "dying" Sacramento-San Joaquin Delta. Nevertheless, the Board and its predecessors continued to assuage, ignore, and/or simply watered down their legitimate concerns. For example, during the 1991-1992 water years, the Department and the Bureau violated the terms and conditions of their respective permits on no less than 250 occasions. In so doing they impaired the waters of the San Francisco Bay and Sacramento-San Joaquin Delta, to the detriment of Public Trust resources and other water right users and uses. These unlawful actions were also inconsistent with the Board's Anti-Degradation Policy. After being pressured to hold a "hearing" on the violations,⁶ wherein Board, Department, and Bureau exhibits attested that such violation did occur, and that the Department and the Bureau illegally impounded and/or diverted between 300,000 to 500,000 acre-feet of water, worth an estimated \$29 million,^{7 8} albeit, the Board opted not to take an enforcement action, as stated in its 2 August 1993 correspondence to Patrick Porgans & Associates:

As the Board indicated in earlier correspondences, our deliberations on the subject have been concluded. The reconsideration procedure is not available. No enforcement action was taken by the Board. Consequently, no decision or order has been adopted. Finally, the Board does not intend to revisit this issue.⁹

MEMBERS OF STATE LEGISLATURE CRITICAL OF BOARD'S DECISION NOT TO ENFORCE THE LAW: Shortly after the Board's decision not to take an enforcement action against the Department and Bureau, more than a dozen State legislators, under a cover letter from Senator Milton Marks, advised the Board of its disdain and outrage not to enforce the law.¹⁰

DURING THE 1987-1992 DROUGHT DELTA WATER EXPORTS EXCEEDED HISTORICAL RECORDS: During the 1987-1992 drought cycle, the records attest to the fact that the Department and Bureau made record-breaking water exports at their respective Delta pumping plants. The following are excerpts from a *The Sacramento Bee* article:

During the longest drought in 50 years, fisheries dwindled, reservoirs dropped, Delta water got murkier, Northern Californians rationed, and something odd happened. More water than ever before was pumped from the Sacramento-San Joaquin Delta - the vast majority of it to farmers, and a growing percentage to southern cities. In the process, state and federal water agencies violated the government's own clean-water standards - regulations intended to protect Northern California fish and wildlife, residents and farmers. The State Water Resources Control Board admonished the water projects. But the watchdog agency, which is spending \$8.3 million in an effort to develop better Delta standards, opted not to enforce the law. "They are making the exports. The farmers in the Valley are making the profits. And we are paying the price", said Patrick Porgans. Porgans says if the state board even threatened to enforce the Delta standards, the dam operators would release more water and pump less south. "...Porgans asked the water board earlier this month [August 1990] on the latest Delta plan: "What is the purpose of making new standards if the current ones are not being enforced."¹¹

At the same time the Department and Bureau were emptying their storage reservoirs north of the Delta, leaving limited amounts of water to meet Board required Bay-Delta standards, the Department and some of its contractors were dumping the same water during the drought, exported south, because they wound up storing too much water in their reservoirs south of the Delta!

BOARD REWARDS VIOLATORS BY REDUCING DELTA WATER QUALITY STANDARDS: Even more astonishing was the Board's action to approve a petition by the Department and the Bureau to "relax" the Delta water quality standards, after they had drastically depleted supplies north of the Delta. The Board's actions occurred during a time when it was holding Bay-Delta Water Right Hearings purportedly to "strengthen" the then existing limited protections provided under a previous Board water right decision D-1485, which it acknowledged as being insufficient. If that action was not egregious enough, in the 10th and/or 11th year of the "Bay-Delta Water Rights Hearings", at a cost in excess of \$11million to the taxpayers, and the submittal of reams of scientific

data, and a recommendation by Board staff to approve draft Water Right Decision 1630, which actually provided some real protection for the Bay-Delta Estuary, the Board capitulated to the political pressures of former Governor Pete Wilson, aborting a much hailed and protective draft Bay-Delta Water Right Decision 1630, for a subsequent "watered-down" version, Water Right Decision 1641.¹² The Board's actions, and its unwillingness to enforce the provisions of Water Right Decision 1485, predecessor of D-1641, when violated by the Department and Bureau officials, and its ongoing conduct and failure to enforce the provisions of D-1641, are without question the major factor contributing to the demise of the Delta and the "government-induced water management crisis" plaguing the Golden State. Also, the "base-case" exports used in D-1641 were over-inflated by one-million acre-feet. A fact that P&A and your staff brought to the Board's attention, nevertheless, the Board proceeded with its pre-scripted agenda. Ironically, subsequent to the implementation of D-1641, the Bay-Delta Estuary water quality and quantity issues worsened; along with the disastrous decline in anadromous fisheries is an indictment to the Board's dismal failure to perform its duties.

BOARD'S 2006 CEASE and DESIST ORDER AGAINST the DEPARTMENT and BUREAU: In 2006 the Board issued WR 2006-0006, Cease and Desist Order Issued against the Department and the Bureau in response to the threatened violation of the Board's D-1641 and provisions of the Department's water right permits for the SWP and the Bureau's water right license and permits for the Central Valley Project.¹³ P&A appeared at the initial meeting, wherein the Board discussed the issuance of a Cease and Desist Order (CDO). P&A expressed its position to the Board that even if it issued a CDO against the Department and the Bureau, based upon its "enforcement" track-record, in all probability it would not enforce its provisions for actual violations.¹⁴

On 5 January 2010 the SWRCB modified WR Order 2006-0006 and the related Cease and Desist Order (CDO) against DWR and USBR for threatened violation of their permit/license requirements to meet the 0.7 EC standard in the interior southern Delta. (WR Order 2006-0006). Under WR Order 2006-0006, the SWRCB had given DWR and USBR until July 1, 2009 to obviate the threat of violation.¹⁵

BOARD MODIFIED CDO, EXTENDED COMPLIANCE DATE and HAS YET TO TAKE ENFORCEMENT ACTION: The Board's modification of the CDO essentially sanctioned the Department and the Bureau's ongoing exceedances and violations of the law. The CDO requires that the Department and Bureau submit a quarterly compliance report to the Board when they are in violation. The information submitted is generated by and from the Department and the Bureau. According to preliminary contact with the designated Board compliance staff, and counsel, with the exception of issuing the CDO, no formal action has been taken by the Board to date for the actual violations of their respective permits and/or D-1641 violations. Furthermore, when asked, the Board's staff was not able to provide the number of times the Department and Bureau have violated the EC standards to date. A request for that information has been made and is forthcoming. Here again, in 2006, P&A forewarned that the Board would not take an enforcement action against the Department and Bureau for the violations of the standards - which came true. In addition, the record will also attest to the fact that the Department employed a similar recalcitrant compliance tactic back in the mid-1980s and mid-1990s by getting the Board to sanction noncompliance with the Suisun Marsh water quality requirements.¹⁶ P&A, also protested the Board's actions and sanctions; albeit, that did not deter the Board to continue its collusion and duplicity.

BOARD IS SANCTIONING TOXIC AGRICULTURAL DISCHARGES IN CONFLICT WITH ITS ANTI-DEGRADATION POLICY: P&A participated in and opposed the Board's and the Central Valley Regional Water Quality Control Board's approval of the Grasslands Bypass Project (GBP), wherein they sanctioned toxic agricultural discharges into the San Joaquin River and Delta, from lands irrigated by water from the Bureau's San Luis Unit of the CVP, on the Westside of the San Joaquin Valley. Drainage discharge from lands serviced in the San Luis Unit was the source water that caused the "Kesterson Wildlife Disaster" back in the early 1980's. P&A also opposed the subsequent decades of GBP extensions, wherein the Boards continue to sanction the ongoing degradation of the waters of the State, in a manner inconsistent with the Board's Anti-Degradation Policy.¹⁷ Although the Boards' agreed discharges were to cease from the GBP and a drainage solution be developed and implemented by 2009, the discharges continues and the drainage problem is yet to be resolve. In the interim \$100s of millions of taxpayer's money have been thrown down the drain, towards an agricultural drainage problem that is not only causing irreparable degradation to the waters of the state, but the Bureau estimate that it will cost an estimated \$2.4 billion to initiate actions to begin to address the government-induced toxic agricultural drainage dilemma. Furthermore, neither the congressionally authorized San Luis Master Drain nor the State authorized San Joaquin Master Drain has been completed.

According to data, published by the U.S. Environmental Protection Agency, the GBP, which is provided water by the Bureau's CVP-San Luis Unit, along with other CVP contractors in the San Joaquin Valley, are located in the single-largest contiguous "More Serious Water Quality Problems - High Vulnerability" area in the United States, caused by water deliveries-agricultural return flows from the CVP and SWP.¹⁸ The Boards' ongoing actions have and continue to contribute to the degradation of the waters of the State, in a manner inconsistent with the Board's Anti-Degradation Policy.¹⁹

BOARD'S ACTIONS MAJOR FACTOR CONTRIBUTING TO CALIFORNIA'S GOVERNMENT-INDUCED WATER CRISIS: The Board's actions and/or lack of action in conjunction with its blatant unwillingness to enforce the provisions of its water right decisions, its regulatory, statutory, and public trust mandates, and its ongoing egregious conduct, is without question, the major factor contributing to the demise of the Bay-Delta Estuary and the "government-induced water management crisis" plaguing the Golden State.²⁰ Albeit, the only way this perilous and unconscionable behavior and acts of collusion and duplicity will be reconciled is when the Board members, and certain "upper- echelon" staff members, are held accountable for their "actions" and/or failure to act in the interest of and on the behalf of the public.

CLOSING STATEMENT: In conclusion, please remain mindful of the fact that although public servants are entrusted with enforcing the law, that does not give them the right to circumvent and/or sanction violations, over-appropriate the public's water or contribute to the degradation of the waters of the State. As indicated in P&A's Sixty-Day Notice to the California Environmental Protection

Agency *et al*, the only obstacle preventing its pursuit of judicial relief to compel the Board to fulfill its public trust, statutory, and regulatory mandates, and to hold it accountable for aiding and abetting the "take" of endangered species, resulting from Board sanctioned water exports, at the Department's and Bureau's Delta pumping plants, was finding a non-compromising, ethical, and hardworking attorney; which, in and by itself is a rare and endangered species.²¹ Please post these comments accordingly.

cc: Public Policy Insights – Diocese of Sacramento – California Catholic Conference "Catholic Legislative Network
leginfo@cacatholic.org

Members of the Media

Members of the Legislature

FERC

ENDNOTES:

- ¹ SWRCB to FERC Project #2100 Interested Parties, *Draft Certification for the Oroville Facilities*, FERC #2100, 2 July 2010.
- ² Porgans & Associates, Inc., correspondence e-filing with the FERC and All Members of the Plenary Group, Project: *Department of Water Resources Relicensing of the State Water Project's Oroville Hydroelectric Facilities – FERC Project #2100*; Subject: *Notification to Plenary Group of Porgans & Associates Decision to Suspend Participation in the Alternative Licensing Procedures (ALP) and of Our Intention to Inform FERC and the Public of the ALP's Inherent Shortcomings, which are Diametric to Meaningful Public Input, Government's Trust Responsibilities and the Department of Water Resources' Written Assurances to the Public*, Feb. 2004.
- ³ Porgans & Associates, Inc., correspondence e-filing to the SWRCB's Clerk of the Board Re: **California Department of Water Resources' Oroville Facilities, FERC Project No. 2100; Notice of Withdrawal of Water Quality Certification and Intent to Resubmit a New Application for Water Quality Certification no Later Than August 31, 2009**, 6 August 2009.
- ⁴ State Water Resources Control's *Water Quality Certification for the Department of Water Resources Oroville Facilities, Federal Energy Regulatory Commission Project No. 2100*, 2 July 2010, p. 1.
- ⁵ State Water Resources Control's *Water Quality Certification for the Department of Water Resources Oroville Facilities, Federal Energy Regulatory Commission Project No. 2100, State Water Quality Standards*, 2 July 2010, p. 2.
- ⁶ State Water Resources Control Board's Public Meeting; *Consideration of Compliance with Water Right Requirements for the Sacramento-San Joaquin Delta and the Suisun Marsh*, 19 November 1992.
- ⁷ Department and Bureau's Exhibit 10, Estimated Water Quantities to Meet D-1485 Standards (Water Year 1991 and Water Year 1992), submitted to the State Water Resources Control Board during *Consideration of Compliance with Water Right Requirements for the Sacramento-San Joaquin Delta and the Suisun Marsh*, 19 November 1992.
- ⁸ State Water Resources Control Board's Public Meeting; *Consideration of Compliance with Water Right Requirements for the Sacramento-San Joaquin Delta and the Suisun Marsh*, Staff Exhibit 19: Summary of Recent Decision 1485 Violations and Staff Exhibit 20: Enforcement Options 19 November 1992.
- ⁹ State Water Resources Control Board response letter to Patrick Porgans, *Re; Your Request for Additional Information and Petition for Reconsideration: Exceedance of Delta Standards*, 2 August 1993.
- ¹⁰ Senator Milton Marks' et al letter to the John McCaffrey, Chairman, State Water Resources Control Board, 12 July 1993.
- ¹¹ Jim Mayer, Reporter, The Sacramento Bee, *In drought, water export breaks record*, State News, Section B, p. 1.
- ¹² Comment and Dialogue between State Water Resources Control Board members and Patrick Porgans & Associates...
- ¹³ State Water Resources Control Board's *Cease and Desist Order WR 2006-0006, Issued to the Department of Water Resources and the Bureau of Reclamation*, 15 February 2006.
- ¹⁴ Patrick Porgans & Associates, Inc., Oral and Written Comments to the SWRCB at its 2006 meeting; refer to Board's DVD recording
- ¹⁵ http://www.swrcb.ca.gov/waterrights/water_issues/programs/hearings/wr2006_0006/docs/mod_reconsiderationpetition_cwincspa.pdf
- ¹⁶ Patrick Porgans & Associates, Inc., *Preliminary Assessment: Department of Water Resources' State Water Project Operations – Water Quality and Quantity Issues Impacting Suisun Marsh*, 1993.
- ¹⁷ State Water Resources Control Board's *Resolution No. 68-16, Statement of Policy with Respect to Maintain High Quality of Waters in California*, 28 October 1968, p. 1.
- ¹⁸ U.S. Environmental Protection Agency, National Watershed Characterizations, Index of Watersheds, 30 June 1997.
- ¹⁹ State Water Resources Control Board's *Resolution No. 68-16, Statement of Policy with Respect to Maintain High Quality of Waters in California*, 28 October 1968, p. 1.
- ²⁰ Patrick Porgans & Associates, Inc., *CRACKING CALIFORNIA'S WATER CODE: Water Crisis – Result of Natural Phenomenon or Government-Induced Management Fiasco?*
- ²¹ Law Office of Joel C. Baiocchi, on behalf of Patrick Porgans & Associates, to Joseph P. Russoniello, United States Department of Justice, Edmund G. Brown Jr., Attorney General, California Department of Justice, Secretary Linda S. Adams, California Env'l Protection Agency, RE: *Sixty-day Notice of Intent to Sue for Violations of Federal Endangered Species Act (16 U.S.C. § 1531): "TAKE" of a Listed Species, Steelhead Trout, (Onchorynchus Mykiss), Coho Salmon (Oncorhynchus Kisutch), and Chinook Salmon (O.Tshawytscha); Failure to Comply with California Water Code Section 1825 Et Seq., Water Code Section 1825 Et Seq.*, May 27, 2009.



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ORIGINAL

February 27, 2004

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FEDERAL ENERGY
REGULATORY COMMISSION

Magalie Salas, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

PROJECT: FEDERAL ENERGY REGULATORY COMMISSION (FERC) PROJECT 2100 — CALIFORNIA DEPARTMENT OF WATER RESOURCES' RELICENSING OF OROVILLE HYDROELECTRIC FACILITIES —

SUBJECT: PORGANS & ASSOCIATES, INC., COMMENTS TO FERC — NOTIFICATION TO PLENARY GROUP TO SUSPEND PARTICIPATION IN THE ALTERNATIVE LICENSING PROCEDURE (ALP) AND OF OUR INTENT TO INFORM FERC AND THE PUBLIC OF THE ALP'S INHERENT SHORTCOMINGS, WHICH ARE DIAMETRIC TO MEANINGFUL PUBLIC INPUT, GOVERNMENT'S TRUST RESPONSIBILITIES AND THE CALIFORNIA DEPARTMENT OF WATER RESOURCES' (DWR) WRITTEN ASSURANCES

Secretary Salas:

Enclosed are eight (8) copies of Porgans & Associates' (P&A) *Summary Report* that serve as formal notification to the Commission, as to our intent to suspend participation in the California Department of Water Resources' (DWR) relicensing effort - FERC Project 2100 — due to the inherent shortcomings in the Alternative Licensing Procedure (ALP), as employed by the Department, which are diametric to meaningful public input, government's trust responsibilities and DWR's written assurances to participants in the ALP. Also enclosed is a CD that contains a copy of the comments, in a WordPerfect9 format, which P&A respectfully request that the Commission post on its' designated website for Project 2100.

P&A believes that the comments should be of interest to the Commission, as they illustrate how a licensee can effectively manipulate, misuse and abuse the ALP to the disadvantage of public participants. P&A respectfully suggests that the inherent shortcomings of the ALP need to be revisited by the Commission and modified accordingly, if the procedure is to be useful to all of the those participating in future ALP efforts. P&A would appreciate feedback from the Commission, after it has had the opportunity to review and discuss the comments contained in P&A's *Summary Report*. P&A also would like to be advised as to what other administrative remedies are available through FERC pertinent to our concerns with DWR's relicensing effort. P&A awaits a reply from you. Thank you for your time and interest.

Respectfully,

Patrick Porgans

PP:sp fnl: 1 1 tercnllfca@ndwr

Enclosures

PATRICK PORGANS & ASSOCIATES, INC.

OFFICE OF THE
SECRETARY

REGULATORY INTERVENTIONS

HOLISTIC RESOURCE CONSERVATION

Telephone: (916) 241-8187 Fax: 372-7878

P.O. Box 1713, W. Sacramento, CA 95691

2004 MAR 10
FEDERAL ENERGY REGULATORY COMMISSION

REVISED SUMMARY REPORT

February 2004

To: The Federal Energy Regulatory Commission and All Members of the Plenary Group

Project: California Department of Water Resources' (DWR) Relicensing of the State Water Project's Oroville Facilities -- Federal Energy Regulatory Commission (FERC) Project 2100
Subject: Notification to Plenary Group of Porgans & Associates Decision to Suspend Participation in the Alternative Licensing Procedure (ALP) and of Our Intent to Inform FERC and the Public of the ALP's Inherent Shortcomings, which are Diametric To Meaningful Public Input, Government's Trust Responsibilities and the California Department of Water Resources' (DWR) Written Assurances

1 Notification: Porgans & Associates (P&A),
2 Inc., is compelled to formally notify the
3 Plenary Group and the Federal Energy
4 Regulatory Commission (FERC) of our intent to
5 suspend participation in the Plenary Group due
6 to the inherent shortcomings of the ALP that
7 are diametric to meaningful public input and
8 government's trust responsibilities. In good
9 conscience we cannot be a party to a process
10 that for all intent and purpose is perfunctory,
11 disingenuous and in conflict with the public's
12 interest and DWR's written assurances to the
13 Plenary Group. On numerous occasions, P&A
14 and other participants requested DWR to
15 address longstanding concerns and issues
16 regarding the inherent shortcomings of the
17 ALP; i.e., who and what constitutes consensus
18 (who should be involved in consensus decisions), collaborative/cooperation, trust, transparency, cumulative impacts
19 study plan, DWR's failure to adhere to written assurances, and its evasive and combative tactics that lack a
20 collaborative spirit. To DWR's credit, it did attempt to address some of the issues; however, it failed to reconcile
21 the majority of the critical issues and concerns raised consistently over a three-year period.¹

DWR's Actions in Conflict with Assurances to Plenary: The tactics employed by DWR's management-level personnel were inconsistent with the assurances that they agreed to from the onset of the process: i.e., cooperation/collaboration, trust, consensus, transparency, and above all DWR's written assurances that the Plenary Group was to serve as the forum in which to ultimately decide the terms of the settlement agreement. Conversely, the records will attest to the fact that in matters of critical importance to the local participants and several federal agencies, DWR was less than cooperative, recalcitrant, and in some instances non responsive. Furthermore, as was pointed out by an objective observer (a skilled facilitator familiar with FERC relicensing procedures), who inform P&A and others, that the department's demeanor at the Plenary meetings which he had attended was combative and not collaborative.

¹ Porgans & Associates' communication to Plenary Group, Project: Department of Water Resources Oroville Facilities Relicensing -- Plenary Meeting. Subject: P&A's Perspective, Concerns and Suggestions Regarding the ALP, May 1, 2001.
P&A's written communication to All Members of the Plenary Group, Project: California Department of Water Resources Relicensing of the SWP's Oroville Facilities, Subject: *Issues of Concern and in Need of Clarification and Interpretation*, Preliminary Draft, Oct. 22, 2002.
P&A's written communication to Patti Kroen (Facilitator) and All Members of the Plenary Group, Project: California Department of Water Resources Relicensing of the SWP's Oroville Facilities, Subject: *Issues of Concern and in Need of Clarification and Interpretation at the Plenary Level*, Final, Jan. 17, 2003.
P&A's Meeting with DWR Officials, Resources Building, 1416 Ninth Street, Rm. 1603, Sacramento, California, Subject: Oroville Facilities Relicensing: Plenary Action Item Meeting Agenda (Off-Line Discussion), Sept. 12, 2003.
P&A's Fax to Mary Nichols, Secretary of Resources and Mike Spears, Interim Director, California DWR, RE: *Department's Solicitation for Solutions to an Apparent Breakdown in Its FERC Alternative Relicensing Process for the Oroville Facilities: Resolution of Issues Concerning Fairness, Trust and Confidence*, Oct. 15, 2003.

Project: California Department of Water Resources (DWR) Relicensing of the State Water Project's Oroville Facilities — Federal Energy Regulatory Commission (FERC) License 2100

DWR Host Plenary Kick-Off

The Department of Water Resources hosted the kick-off Plenary Group meeting on November 16, 2000 in Oroville. The intent of the kick-off meeting was to set up the organization, structure, and method by which the Plenary Group will work with DWR in the Oroville Facilities relicensing process using the Federal Energy Regulatory Commission's Alternative Licensing Procedure (ALP). DWR will engage a collaborative process to consult with Federal and State resource agencies, Indian Tribes, local governments, non-government organizations (NGOs), and other interested parties.²

Overview of ALP as a Relatively New Procedure

It is important to note, that when DWR initiated its relicensing effort in June 2000, the ALP was a relatively new procedure that had not been tried or tested; therefore, its relative degree of effectiveness would only be revealed via application and experience; nevertheless, as a good-faith gesture, P&A sent a letter of support for DWR's request to FERC.³ Suffice it to say, as is the case with newly adopted procedures, it is important to acknowledge that it is a dynamic process, which contains a "learn as you go" variable component and necessitated an adaptive and flexible attitude of ALP participants. Notwithstanding, the precepts upon which the ALP are predicated: i.e., cooperation, collaboration, consensus, transparency, trust and disclosure and/or written assurances, should be consistent and reflective in and throughout the procedure.

There is no question that the ALP does provide the opportunity for greater public participation, and, in a sense, DWR is to be commended for the countless numbers of meetings it has held; however, the resounding concerns raised by many of the ALP participants was that DWR was not genuinely responding to fundamental concerns raised by the public throughout the initial three years of the process. Many participants repeatedly informed DWR that it was evident that public involvement was essentially a perfunctory exercise. Furthermore, DWR and its water contractors' actions throughout the process were primarily non-collaborative, disingenuous, combative, divisive, condescending and evasive.

Support for the ALP Premised on Consensus-Based Collaborative Participation, Transparency, Full Disclosure of Impacts and/or Actions, Trust, and, Most Important, Plenary Groups' Authority to Decide Terms of Settlement Agreement:

It was made clear from the onset of the ALP that the Plenary Group would have the authority to decide the terms of the settlement agreement. This authority of the Plenary Group is affirmed on page 7 of DWR's Initial Information Package, which clearly states: "The Plenary Group will serve as the forum in which to ultimately decide the terms of the settlement agreement."

Roles in Negotiation - Plenary

- Establish policy/settlement protocols
- Prepare for negotiations based on policy
- Negotiate PM&E package
- Consider/resolve across resource impacts
- Plenary Group Approves settlement⁴

² DWR's Draft Summary of Plenary Group Meeting, Oroville Facilities Relicensing (FERC Project No. 2100), Nov. 16, 2000, p. 1.

³ P&A's written communication to David P. Boegers, Secretary, Federal Energy Commission (Certified Mail), Re: P&A's Response to the California Department of Water Resources' Request to Use Alternative Procedures in Preparing a License Application to the Federal Energy Commission, Dec. 22, 2000.

⁴ DWR's Summary of the Plenary Group Meeting, Oroville Facilities Relicensing (FERC Project No. 2100) Oct. 22, 2002 - http://oroville_relicensing.water.ca.gov/pdf_doc/22Oct02_plenary_att12.pdf.

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Moving Target Tactics and False Assurances

Mid-way through the ALP, the members of the Plenary learned that DWR had the final say as to what it would or would not agree to do throughout the process, and thereon, told participants that they should not be overly concerned about the process, rather the focus should be on the ultimate settlement. Needless to say, these and other issues raised fundamental concerns among many of the participants, which was negated to a limited degree by the fact that DWR assured the members of the Plenary Group that they would ultimately decide the terms of the settlement agreement.

In addition, the established protocols provided some relief if members of the Plenary Group came to an impasse and/or breakdown, they could ultimately call on FERC's dispute resolution designed to assist in resolving the conflict. As stated later in this letter, DWR refused to enter into the alternative dispute resolution, and successfully influenced a fundamental change in the Process Protocols that usurped the Plenary's authority to decide the ultimate terms of the settlement agreement. Because of the myriad of tactical and inherent shortcomings evidenced in the process, in the interest of time, P&A will only provide a synopsis of the issues and shortcomings, and suggest that all of the detailed information is supported by the record — providing DWR maintained an accurate and unbiased record.

DWR's Moving Target Tactic to Circumvent Consensus and to Usurp Plenary Group's Authority

For nearly two-and-one half years, a number of the ALP participants (designated tribal members, P&A, private and public members from the local community) repeatedly asked the responsible department officials, to define consensus and, more importantly, to identify who in the APL was actually to be involved in determining consensus. In the Spring of 2003, DWR finally defined who is allowed to be involved in consensus within the Plenary Group. As stated in the Process Protocols, consensus is determined by "negative polling." During that time period, when consensus was requested by the ALP members, with few exceptions, it always was "weighted" in favor of DWR and its State Water Project (SWP) contractors and their respective consultants, because they had the largest number of people present in the room. P&A, the tribes and the local participants finally prevailed in establishing the fact that DWR, as an ALP participant, had only person that could weight-in during a call for consensus, which also applied to others that had multiple consultant present during consensus.⁹ This determination finally provided, what appeared to be a level-playing field that enabled substantive input by the tribes and other local participants. Albeit, shortly thereafter, when consensus did not favor the actions or directives of DWR and its water contractors, they initiated action that successfully usurped all meaningful authority/decision making from the Plenary Group: i.e., for example the Plenary Group no longer "approves" settlement agreement(s) or Negotiates PM&E (Resource Actions) package. P&A, and others, raised their respective concerns and opposition to the changes in the revised Process Protocols, as being in conflict with the originally stated purposes and authority of the Plenary, and such actions were inconsistent with the public interest.

What's in a Settlement Agreement?

"There is no regulatory requirements for Settlement Agreement Structure, however 18 C.F.R. 385.602 (Rule 602) states that Settlement Agreements 'must be fair, reasonable and in the public interest'"

Source: DWR's Plenary Group Meeting Summary, Oct. 22, 2002 - http://oroville.relicensing.water.ca.gov/pdf_doc/22Oct02_plenary_s

ALP Collaborative Process: The following are statements published by DWR pertinent to cooperation, collaboration, trust and confidence.

The relicensing process proposed is based on cooperation and collaboration with federal and state resources agencies, Indian Tribes, local governments, non-government organizations (NGOs), and interested

⁹DWR's Oroville Facilities Relicensing Program, Plenary Group Meeting Summary - Draft - Feb. 25, 2003.

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1 *members of the public. This process is referred to as the Alternative Relicensing Procedures (ALP), as*
2 *described in more detail in Section 1.7 of this IIP [Initial Information Package].⁶ [emphasis added.]*

3 *DWR plans to use the ALP to prepare its license application, DWR will engage a collaborative process*
4 *to consult with federal and state governments, Indian Tribes, local organizations, non-governmental*
5 *organizations, and other interested parties. DWR believes that the ALP offers the best opportunity to*
6 *obtain input and feedback from a broad array of interests in an atmosphere of cooperation and trust.*
7 *The ALP alternative under consideration by DWR is the APEA process.⁷ [emphasis added.]*

8 *The issues of cooperation/consensus, trust, confidence, disclosure and DWR's failure to address ALP participants'*
9 *concerns relative to cumulative impacts, which were of concern from the onset of the process and during the ensuing*
10 *three-year period, came to a crescendo at the September 2003 Plenary meeting wherein consensus could not be*
11 *reached to take an action to remedy the impasse. At that meeting, it became evident that the process had reached*
12 *a breakdown (Process Protocols, 4.5.3, Identifying Collaborative Process Breakdown, p. 20) as defined by the Process*
13 *Protocols. [Please Refer to September 2003 Plenary Meeting Summary.]*

14 *DWR Declined to Participate in Alternative Dispute Resolution: Subsequent to that meeting, and in accordance*
15 *with the Process Protocols [4.4.3, Dispute Resolution], P&A in conjunction with other ALP participants requested the*
16 *assistance of FERC's Dispute Resolution Services⁸ director to arrange a meeting with DWR and the participants to*
17 *resolve these and other issues that were at an impasse.⁹ To FERC's credit, Richard Miles, Director, Dispute Resolution*
18 *Services, assured P&A and others that he would discuss the matter with DWR personnel and report back to us.*
19 *Several months elapsed before Mr. Miles reported to us that DWR management personnel had finally informed him*
20 *that they were not prepared to enter into the alternative dispute resolution. Mr. Miles also stated that it was not*
21 *mandatory for DWR to participate in such a meeting. Mr. Miles asked DWR to send a letter stating the reasons for*
22 *its decision, which he would provide to P&A et al; however, as of the date of this correspondence, Mr. Miles stated*
23 *he had not received such a letter.¹⁰ Here again, DWR's lack of meaningful cooperation/collaboration and its decision*
24 *not to use all of the available tools to resolve the impasse was inconsistent with its stated intentions and the*
25 *provisions contained in the Process Protocols. P&A requested written confirmation from Mr. Miles as to his discussion*
26 *with DWR officials and P&A. Mr. Miles declined to provide a written response. P&A informed Mr. Miles that we would*
27 *send him a letter/fax reiterating his comments, and requested that he review it, and if the contents of the fax/letter*
28 *are consistent with what was discussed, then, P&A would respectfully request that he sign and date it and fax us back*
29 *a copy. The fax was sent on Jan. 15, 2004, and we are still awaiting Mr. Miles' response.¹¹*

⁶California Department of Water Resources, *Initial Information Package, Relicensing of the Oroville Facilities, Federal Regulatory Commission License Project No. 2100*, Jan. 2001, p. 1.

⁷*Ibid.*, pp. 2 and 3.

⁸FERC, Dispute Resolution Service, *Introduction to Alternative Dispute Resolution*, Mar. 18, 2003.

⁹P&A's fax communication to Richard Miles, FERC, Dispute Resolution Services, Re: FERC License 2100 — Transmission of DWR's Response to List of Issues in Need of Resolution/Solution [Includes Porgans & Associates' (P&A) Recent Submitta], Oct. 10, 2003.

¹⁰Richard Miles telephone message of Jan. 9, 2004, which he left on P&A's Answering Service.

¹¹P&A's fax communication to Richard Miles, FERC, P&A's fax communication to Richard Miles, Director, FERC, Dispute Resolution Services, Re: Confirmation of Issues Discussed During Our Telephone Conversation of Jan. 12, 2004, FERC Project No. 2100 — Porgans & Associates' (P&A) Request for FERC's Assistance in Alternative Dispute Resolution with California Department of Water Resources, Jan. 15, 2004.

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1
2 **Confidentiality Is Not A FERC Mandate, Rule**
3 **or Statutory Requirement in the ALP**
4
5

Over a period of several months, P&A raised concerns and opposition to the "confidentially" proviso that was fiercely debated during the amendment to the Process Protocols. We discussed the issue of whether or not "confidentially" in the Alternative Licensing Procedure (ALP) was a FERC requirement -- by a rule or by some regulatory statute. During that period P&A had been in contact with Richard Miles and Jim Fargo and other FERC staff, to ascertain information that supports the contention that FERC requires participants in the ALP to adhere to confidential provisions. Based on those discussions, both Mr. Miles and Mr. Fargo stated that to their knowledge there is no requirement in FERC's ALP procedures that requires the parties to keep their discussions confidential. Mr. Miles said that the issue of confidentiality is a matter that the participants establish on their own volition when negotiations occur.¹²

12 Although, P&A does not subscribe or sanction the use of confidentiality as a tool in negotiating settlements, it
13 acknowledges that in matter of litigation, confidentiality is a tactic that is employed, even if it is at the expense of
14 unsuspecting victims; i.e., child abuse, government fraud, banking scams, etc. P&A strongly objects to its use in the
15 ALP because, with the exception of J.E.M. Farms, all of the other participants are public entities, including the SWP
16 contractors. Additionally, the Oroville facilities are publicly owned, the water belongs to the people as does the fish
17 and wildlife and related trust resources, the money is from public sources, and the government has a trust
18 responsibility to promote and protect the public. Therefore, the issue of confidentiality in this type of a setting is
19 disingenuous and diametric to the public interest. P&A informed the Plenary Group at the December 2003 meeting
20 that it had requested its client to hire another person for that phase of the project, because P&A has no intention
21 of supporting or participating in such a shenanigan.

DWR's Circumvention of Producing a Cumulative Impacts Study Plan

22 Throughout the Process, P&A, NOAA Fisheries, the U.S. Fish & Wildlife Service, and Others, Have
23 Repeatedly Confronted DWR Officials With Their Failure to Produce a Cumulative Impacts Study Plan:

24 *Eric Theiss [NOAA Fisheries] asked whether DWR intends to produce a cumulative effects study plan. Rick*
25 *Ramirez [DWR] suggested that the question be deferred until after the meeting with NOAA.¹³*

26 *Patrick Porgans reminded the Plenary Group that he continues to have issue with the process for cumulative*
27 *impact analysis and stated that NOAA is considering dropping out of the process over the issue. Eric Theiss,*
28 *representing NOAA, confirmed the potential for the cumulative impacts issue to trigger their withdrawal*
29 *from the collaborative process and added that he is has other issues with the process. The Plenary Group*
30 *discuss the potential for issues that are unresolved within the collaborative moving to the alternative*
31 *dispute resolution process that is included in the existing Process Protocols and Mike Meitz asked for*
32 *clarification on who would go to dispute: NOAA and DWR or NOAA and the ALP. He added that DFG does*
33 *not agree with NOAA on the cumulative impact issue. Rick Ramirez asked Eric Theiss to clarify NOAA's*
34 *position with regard to the ALP. Eric replied that NOAA has some concerns sympathetic to the local*
35 *stakeholders but probably would not withdraw due to those concerns alone. The cumulative impact issue*
36 *is what would trigger NOAA to withdraw from the process.¹⁴ [Emphasis Added.]*

¹² *Ibid.*, P&A's fax communication to Richard Miles, FERC, Jan. 15, 2004.

¹³ Department of Water Resources -- Oroville Facilities Relicensing Program, Oct. 28, 2003 Plenary Group Meeting Draft Summary, P. 7.

¹⁴ Information sent by DWR's Sue Larson to P&A, Jan. 13, 2004. Oroville Facilities Relicensing, FERC Project No. 2100, Draft Summary of the Plenary Group Meeting, Sept. 23, 2000, p. 5.

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NOAA Fisheries Calls DWR for Its Failure to Provide Cumulative Impact Study Plan, It Assured to ALP:

1 To date, DWR has presented study plans for consideration by NOAA Fisheries and the collaborative intended
2 to address direct impact only, while omitting impacts that DWR deems indirect or cumulative. DWR's
3 distinction between types of impacts and the separation of study plans appears arbitrary and inconsistent
4 with FERC regulations. Regardless, DWR confirmed that it would introduce a separate study plan
5 addressing cumulative impacts (see Action Item #E39 from the September 26, 2001 Environmental Working
6 Group Meeting, 3 as well as the 'Draft Guidance' dated 6/21/02, page 3, Step 1). However, on May 14, 2003,
7 after approval of the initial study plans (SP-F1 through SP-F21), DWR announced its intention ~~not~~ to
8 produce a cumulative impact study plan. This change has significant ramifications which hinder our
9 ability to fulfill our trust resource obligations. During this relicensing process, at least 18 months have
10 elapsed from the time at which the cumulative impacts study was assured until the present time. Our
11 concern is that the Preliminary Draft Environmental Assessment will be inadequate, and there will be an
12 insufficient amount of time to address our requirements. [Emphasis Added.]

13 NOAA Fisheries and other ALP participants have participated in good faith in this collaborative relicensing
14 process, however we believe that the process outlined by Scoping Document 2 and the Draft Guidance
15 document is inadequate for developing an administrative record which satisfies the provisions of the ESA,
16 NEPA, EFH and the FPA. Scoping Document 2 does not define the scope of the analysis, therefore, the intent
17 of this document is not satisfied. Instead, it refers to a document in draft which does not provide time lines
18 or phasing triggers for its proposed progressive analysis, which may have otherwise satisfied our
19 requirements.¹⁵

20 P&A also shared NOAA Fisheries concerns regarding DWR's Cumulative Impacts Guidance Assessment Document,
21 which it outlined in its Dec. 5, 2002 letter to Rick Ramirez, it states:

22 Page 1, para 2: "NOAA Fisheries reviewed DWR's Guidance Document and found the DWR's purpose and
23 intent in advancing an alternative scoping document unclear. The DWR's document defines and restricts
24 what information the Services will need to administer their prescriptive and consultive authorities."

25 Page 2, para 1: "Regarding cumulative impact assessment, the DWR's Guidance Document incorrectly
26 combines NEPA, ESA, and CEQA definitions of cumulative impacts."

27 Page 2, para 3: Regarding the geographic scope of impacts, the DWR's Guidance Document arbitrarily
28 designates the limits of impacts to listed species (action area) without technical or scientific basis. In doing
29 so, DWR attempts to predestine the outcome of studies. This implies limits on the depth and thoroughness
30 of the analyses, making a scientific assessment of the impacts impractical.

31 Page 2, para 4. Our concern is that DWR develop an adequate administrative record upon which to base
32 our prescriptions and recommendations within statutory filing deadlines.

33 In essence, neither P&A nor NOAA Fisheries would sign off on the Cumulative Impact Assessment Document. As
34 of the December 2003 Plenary Group meeting, those and other fundamental issues have not been resolved to the
35 satisfaction of the concerned participants.

¹⁵ National Marine Fisheries Services comments on Scoping Document 2 for the Oroville facilities relicensing under P-2100, sent to Kim Koto, California Department of Water Resources and Magalie Salas, Secretary, Federal Energy Regulatory Commission, May 28, 2003; at <http://ferris.ferc.gov/idmws/search/results> [submittal No. 20030603-0119]

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DWR's Inherent Conflict of Interest:

DWR has a conflicting role as a public trustee and a water purveyor. DWR receives about 85% of its annual funding from SWP contractors via water and power revenues (\$6.75 billion from energy). Conversely, its stated mission is: "To manage the water resources of California in cooperation with other agencies, to benefit the State's people, and to protect, restore, and enhance the natural and human environments." Source: <http://www.dwr.water.ca.gov>

DWR's Past Practices and Major Water Project Proposals Failed Under the Weight of Public Scrutiny

Despite the massive expenditure of hundreds-of-millions of dollars, since the 1970's, every major water project and/or related proposal that DWR has promoted failed under the weight of public scrutiny and/or legitimate opposition: i.e., the Glenn Complex, Los Banos Grande Reservoir, Peripheral Canal and its Supplemental Water Supply Program proposal (exportation of up to 400,000 acre-feet of water from northern California). P&A was involved in each of those efforts, representing clients and/or conducting *pro bono* work in the public interest. In each of those projects, P&A used all possible means to assist and/or compel DWR to fully comply with disclosure and environmental requirements. In the case of the Oroville relicensing project, DWR knows that it will not be denied a new license, no matter what the circumstances; therefore, it and the SWP contractors are in a "win-win" situation.

DWR's Primary Objective in ALP Relicensing is to Limit Mitigation Costs to Project Contractors

DWR and its SWP contractors primary objective is to limit the amount of funds they will have to expend to mitigate for those project impacts (FERC related) associated with the relicensing project, while the project beneficiaries (water and power users) are the major recipients of hundreds of billions of dollars annually. According to a report that the SWP contractors provided to the California State Legislature in 1994: "Economically, the M&I (municipal and industrial) Contractors provide water supplies for the vast majority of the California economy. The SWP service area generates more than 400 billion dollars in production annually and provides more than 9 million jobs for Californians." (Please refer to Figure 1.)¹⁶ Between 1969 and 1991, the agricultural area serviced by the SWP, in the San Joaquin Valley, generated over \$6.65 billion in gross revenues.¹⁷ This area was historically dry farmed.

Neither DWR Nor SWP Contractors Paid for Recreation, Fish and Wildlife Cost for the Project

Since the approval of the SWP in 1959, more than \$250,000,000 had been spent on recreation, and fish and wildlife enhancement. Those expenditures were not paid for by the SWP contractors, because they are classified as a non-reimbursable cost - they were paid for by the taxpayers. [Source: DWR Bulletin 132 series.]¹⁸ Furthermore, although DWR uses the Feather River as the conduit to move water from Oroville to its contractors south of the Sacramento-San Joaquin Delta, they do not pay one penny for the maintenance of the channel or damages sustained by private property owners downstream from the Oroville facilities¹⁹ and/or the related loss of revenues to the county.

¹⁶State Water Project Urban Contractors, Briefing, State Senate Agricultural and Water Resources Committee Hearing, Aug. 1, 1994.

¹⁷ Department of Water Resources' Bull. 132 series, Management of the California State Water Project-Appendix F - San Joaquin Valley Post-Project Impacts, 1969 through 1992.

¹⁸ Department of Water Resources' Bull. 132 series, Management of the California State Water Project-Appendix D, Cost of Recreation and Fish and Wildlife Enhancement, Annual Report.

¹⁹Letter to Patrick Porgans, Red Tape Abatement, Ltd., from the California Department of Water Resources, RE: Flood Maintenance Responsibility, July 27, 1984..

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Closing Statement

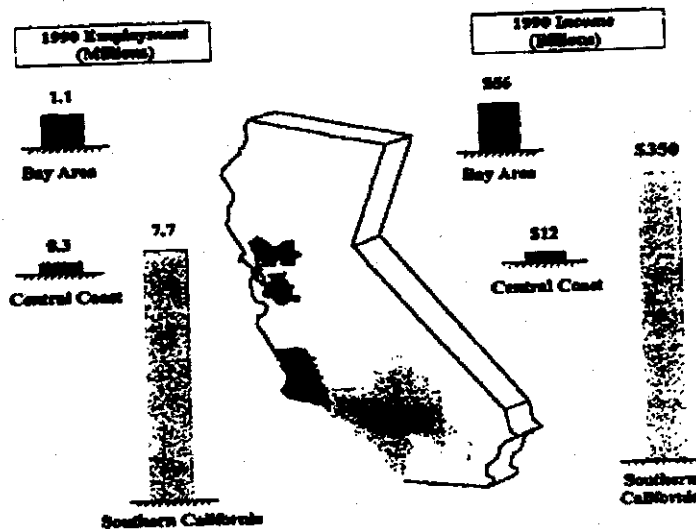
Contrary to DWR's written statement, in the IIP, it does not

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5 "own" the State Water Project. It does not own
6 the water that it sells to its water contractors,
7 the water is a trust resource that belongs to
8 ALL of the people of California. DWR does have
9 permits for the water it provides from the
10 SWP, which have terms and conditions that
11 "regulate" how the water is to be used; however,
12 the record indicates that it has on hundreds of
13 occasions violated the terms and conditions of
14 its respective water rights permits (between
15 1991 - 1992 the SWRCB documented 289
16 violations,²⁰ and has never been held
17 accountable/fined for its violations.²¹ The
18 SWRCB staff estimated the total amount of
19 water attributed to those violations was in
20 excess of 300,000 acre-feet, with an estimated
21 market value of \$29 million, which both DWR
22 and its SWP water contractors were the major
23 beneficiaries/recipients. Conversely, DWR's
24 operational tactics, and resulting water right
25 permit violations were detrimental to the County
26 of Butte, the Sacramento-San Joaquin Delta,
27 and the public's fish and wildlife resources. In
28 fact, 13 members of the California State Legislature, jointly co-authored a letter to the SWRCB stating their
29 objections to the Board's decision not to hold DWR accountable for the violations.²² P&A also filed a lawsuit against
30 DWR and the Interior Department to stop the illegal water exports attributable to the permit violations (*Porgans,*
31 *et al, v. Babbitt, et al.*) Although the SWP contractors have stated at the Plenary meeting that they have water
32 rights to SWP water — that is simply not true. In fact, all they have is a contract to obtain water from the SWP.
33 It is also important to note, that although SWP contractors are required to pay certain costs for the water they
34 receive from the Project, there is NO charge for the water itself — it is FREE.

Figure 1

Income & Employment
Urban State Water Contractors

Economically, the M&I Contractors provide water supplies to the vast majority of the California economy. The SWP service area generates more than 400 billion dollars in production annually and provides more than 9 million jobs for Californians.



Based on data from DWR California Statistical Abstract 1992.

35 Even under the conditions of its existing FERC license (Project 2100), the local citizens have had to take action
36 through FERC to require DWR to comply with the terms and conditions of the license, and there are no assurances
37 that DWR will voluntarily comply with the terms and conditions of a new license. In the final analysis, ALP participants
38 will be at the mercy of DWR and its water contractors and some highly paid and skilled advocates, all of whom are
39 using revenues derived from the public's water and energy resources to promote their interests. Albeit, it is difficult
40 to say what the outcome of the settlement agreement will contain; however, if their past actions are any indication,
41 then, one can surmise what to expect when the dust finally settles.

²⁰ State Water Resources Control Board, Public Meeting, Consideration of Compliance with Water Right Requirements for the Sacramento-San Joaquin Delta and Suisun Marsh, Staff Exhibit 19: Summary of Recent Decision 1485 Violations, Nov. 20, 1992.

²¹ State Water Resources Control Board, Public Meeting, Consideration of Compliance with Water Right Requirements for the Sacramento-San Joaquin Delta and Suisun Marsh, Staff Exhibit 20: Enforcement Options [Decision 1485 Violations], Nov. 20, 1992.

²² Senator Milton Marks', et al, letter to State Water Resources Control Board Chairman John Caffrey, July 12, 1993.