

1 PATRICK PORGANS
2 PORGANS/ASSOCIATES
3 P.O. Box 60940
4 (916) 543-0780 or 833-8734
5 Email: pp@planetarysolutionaries.org
6 Principal, Patrick Porgans/Associates
7

8 **BEFORE THE**
9
10 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**
11

HEARING IN THE MATTER OF
CALIFORNIA DEPARTMENT OF
WATER RESOURCES AND UNITED
STATES BUREAU OF RECLAMATION
REQUEST FOR A CHANGE IN POINT
OF DIVERSION FOR CALIFORNIA
WATER FIX

**CLOSING BRIEF – PART-I EFFECTS OF
THE PETITION ON MUNICIPAL,
INDUSTRIAL AND AGRICULTURAL
USES OF WATER; LEGAL USERS OF
WATER
SUBMITTED BY PATRICK PORGANS
ON BEHALF OF PLANETARY
SOLUTIONARIES**

12 **CLOSING BRIEF: PART-I**

13 **Purpose:** PORGANS/ASSOCIATES' (P/A) Closing Brief provides an overview of our involvement,
14 purpose, and concerns regarding the status of the California WaterFix Hearing proceedings.

15 P/A acknowledges the effort put forth to date by the California WaterFix Co-Chairs and CWF
16 Team Members. Our comments should not be misconstrued as casting aspersions at the Hearing
17 officers or CWF Team Members. This is not a personal matter; it is about due process, the public
18 good, and the right to a fair and unbiased Hearing; wherein, the PETITIONERS provide the
19 evidence and factual documentation required to justify approval of their PETITION.

20 **In keeping with the purposes of the PART-I of the CWF Hearing objectives,¹ on behalf of**
21 **Planetary Solutionaries, and in the interest of the public good, and Public Trust Resources,**
22 **we will focus on four (4) basic issues:**

23 **1. Will the changes proposed in the Petition in effect initiate a new water right? (p. 2, line13)**

¹ State Water Resources Control Board's California WaterFix and Change Petition, Part I – Effects of the
Petition on Municipal, Industrial and Agricultural Uses of Water, Including Associated Legal Users of Water.

1 **2. Will the proposed changes cause injury to any municipal, industrial or agricultural uses**
2 **of water, including associated legal users of water?** (p. 3, lines 27 – 32, and p.4, line 1)

3
4 **3. Disturbing Pattern and Practices of PETITIONERS' Non-Compliance with Delta Water**
5 **Quality Standards, injurious to other water users.** (p.5, line 11)

6 **4. PORGANS' client have serious concerns that the PETITIONERS have yet to submit a**
7 **Comprehensive Contingency Plan in the event a major break in the fragile Delta levee**
8 **system was to occur, during Project construction, tentatively scheduled for completion in**
9 **the year 2026.** (p. 8, line 8)

10
11 **1. Will the changes proposed in the Petition in effect initiate a new water right?**

12
13 Based upon an extensive forensic accounting of the water right permits, inclusive in the Change
14 Petition, it appears that the Project, as currently proposed, would require a new water right. As
15 stated, in PORGANS MOTION TO DISMISS THE PETITION:

16 The Bureau of Reclamation is seeking to add three (3) new points of Direct Diversion to
17 Permit 12721, 12722. And 12723, which total 18,000 cfs. The source of these permits is the
18 Sacramento River and the Delta.

19
20 The information in the Bureau's existing diversion works clearly show that the California
21 WaterFix would create additional diversion capacity in exceedance of the permitted rates of
22 direct diversion authorized under existing permits. The Bureau failed to provide sufficient
23 information with the Change Petition to show that the Bureau's diversions would stay within
24 the permitted total of 18,000 cfs.

25
26 According to the [Board's 2009](#) ruling on reconsideration of the City of Santa Cruz Change
27 Petition,

28 "The common feature among the changes that have been found to constitute the creation of
29 a new right, as opposed to a change in an existing right, is that the changes that initiate a
30 new right *increase the amount of water taken from a water source at a given time.* (See
31 Johnson Rancho County Water District v. State Water Rights Board, supra, 235 Cal.App.2d
32 at 879 [approving as "commonsense" the granting of a change in a water right application
33 that did not increase the amount of water appropriated or its source]; State Water Board
34 Decision 940 (1959) ["a direct diversion right can be converted to a storage right only to the
35 extent there is *no change in rate of diversion from the stream ...*"]; George A. Gould, Water
36 Rights Transfers and Third-Party Effects, 23 Land and Water Law Review 1 (1988) p. 9 ["To

1 paraphrase Mead, ‘the later comers had an equal claim to protection from the enlargement
2 of prior uses which reduced the flow available to satisfy their appropriations’ ...
3 consequently, *a rate of diversion ... limits the ‘flow’ to which each appropriator may claim a*
4 *priority....* Some states later added a volume (“quantity”) limitation.”] referencing E. Mead,
5 Irrigation Institutions 66, 67 (1903).) (p. 6, emphasis added.)
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7 In Decision 990, which granted the permits 12721, 12722, and 12723 the Board did not carefully
8 examine the rates of direct diversion in the applications, but stated:

9 In fixing the rates of direct diversion to be allowed, the Board is inclined to greater liberality
10 than usual because of the magnitude of the Project and the complexities involved in
11 determining at this time the direct diversion as distinguished from rediversions of stored
12 water. However, notwithstanding these considerations, we would require greater
13 particularity in proof of direct diversion requirements were we not assured that no prejudice
14 to others will result from failure of applicant to produce such proof. This assurance is
15 provided by conditions which will be imposed in the permits subjecting exports of water from
16 the Delta to use within the Sacramento River Basin and Delta so that there can be no
17 interference with future development of these areas. (p. 40.)
18

19 PORGANS appreciated the fact that concerns regarding the need to consider if a new water right
20 would be required were not didactic from our testimony. However, exception was noted regarding
21 the BOARD’s ruling to delete a number of PORGANS exhibits.²
22

23 **2. Will the proposed changes cause injury to any municipal, industrial or agricultural uses**
24 **of water, including associated legal users of water?**

25 This is also a very important question and needs to be answered. In the event the
26 PETITIONERS’ proposed Project increase the rate and volume of diversions, absence of
27 issuing a new water right permit for the Project, has a real potential to cause injury to other
28 water users and uses.
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² California Waterfix Hearing – Ruling Denying Mr. Porgans’ Request For Reconsideration of Ruling
Concerning His Rebuttal Testimony and Exhibits, Via Electronic Mail To Current Service List, 22 May 2017
CLOSING BRIEF – PART-I EFFECTS OF THE PETITION ON MUNICIPAL, INDUSTRIAL AND AGRICULTURAL USES OF
WATER; LEGAL USERS OF WATER, SUBMITTED BY PATRICK PORGANS ON BEHALF OF PLANETARY SOLUTIONARIES

1 | **INJURY CAUSED BY SWP AND CVP OPERATION ON DELTA WATER USERS**

2 | As in Sherman Island and other related injuries, it was at the expense and to the demise of
3 | non SWP-CVP contractors. Delta water quality requirements in the 1981 North Delta Water
4 | Agency's contract, insurance policy, to meet the Emmaton standard that in theory insured farmers
5 | with a suitable supply of useable water, it take 49 acre-feet of water per one acre-foot of usable
6 | water at Emmaton; resulting in hundreds of thousands of acre-feet of water of carriage water.

7 | Sherman Island Irreparable Injury was due to SWP-CVP Project operators' non-compliance, and
8 | the BOARD's failure to enforce the law.

9 | If the historical record is any indication as to what may occur, the documents indicate
10 | that previous changes in CVP-SWP points of diversion were problematic; especially in
11 | drought years.

12 | A case in point occurred on Sherman Island, during the 1987-1992 drought years,
13 | when the water the Projects provided was laden with salts. Evidence retained at the SWB's
14 | office, exhibits submitted by DWR and Bureau officials documenting hundreds of violations,
15 | where submitted at a BOARD hearing on the illegal diversions and violations of the Delta
16 | water protections requirements.

17 | During the drought, the Bureau and DWR unilaterally decided to illegally impound
18 | and export water not surplus to the Delta, and not permitted in the terms and conditions of
19 | their Permits. The water was intended for Delta water users and uses to dilute the levels of
20 | salts to insure that their soils would not be impaired from the saline water, which has made it
21 | difficult even to grow drought resistant crops.

22 | Sherman Island water rights were theoretically protected by the terms and conditions
23 | embedded in the initial water right filings by the State Department of Finance; Area of Origin

1 Laws, Delta Protection Act, BOARD's Water Right Decisions, and an insurance policy it
2 signed via a 1981 North Delta Agency Water Contract. The evidence in the Public Record
3 indicates that previous approved points of diversions did cause significant and irreparable
4 injury to Delta water users, especially agriculturalist, and Public Trust resources (aquatic,
5 terrestrial and avian species), a number of which are listed on the federal Endangered
6 Species Act (ESA).

7 The Public Record also attests that the SWB predecessors' apparent decision not to
8 enforce the hundreds of violations of the terms and conditions of the Project operators
9 permits appears to have contributed to the injury sustained by Delta water users.

10
11 **3. Disturbing Pattern and Practices of Non-Compliance with Delta Water Quality Standards,**
12 **Injurious to other Water Users and Uses.**

13 Public records indicate that a very disconcerting pattern and practice employed by the
14 PETITIONERS, at the onset of below normal and dry years, prove to be extremely
15 problematic, exacerbating injury to other water users, and public trust resources.

16 PETITIONERS, in this Hearing promised that they would not violate the provisions
17 contained in the State Water Board's Water Right Decision 1641 (D-1641) in the event the
18 Petition receives the Board's approval.

19 While the PETITIONERS' promises of compliance may appear to be reassuring, there is
20 a question as to how much faith one could place on their promises.

21 **Litany of Broken Promises**

22 Since 1960, Petitioners have made endless promises of their intent to improve the Delta;
23 provide protections for Delta levees, and to comply with the terms and conditions of their
24 respective water right permits and licenses, double anadromous fish populations; all, according to

1 government document, failed. Countless billions-of-dollars have been expended on a myriad of
2 plans, and a plethora of studies have been conducted, the end result is that the Delta is in worse
3 condition now than ever before.

4 **PETITIONER's Track-Record of Broken Promises Raise Doubts of Their Ability to Perform**

5 PETITIONERS' promises that they intend to be compliant with the requirements of the
6 BOARD's Water Right Decision 1641, is inconsistent with their previous commitments to be
7 compliant. PORGANS provided records from the PETITIONERS that documented hundreds of
8 violations of D-1485, D-1422, and D-1641. The BOARD accepted some of PORGANS exhibits
9 illustrating the extents of some of the violations, but it also denied other exhibits that documented
10 hundreds of other Delta water quality violations.

11 An extensive review of the PETITIONERS' compliance track-record, available in the Public
12 Record, documents and evidence contained therein, attest that during below normal, dry and
13 critically dry periods, Project operators' committed hundreds of violations of the Terms and
14 Conditions inclusive in their water right permits, issued by this BOARD.

15 "Only in extraordinary circumstance have we exceeded the water quality standards
16 you set. And rarely if ever do we use our full capacity to divert water. None of that
17 would change with the California WaterFix. Porgans Exhibit-1, DWR, Director Mark
18 Cowin's Policy Statement 29 July, 2016; is in the previous Index Description³

19 PORGANS provided exhibits that documented hundreds of violations annually of the
20 PETITIONERS' water rights during the 1987-1992 droughts.

21 Furthermore, during dry periods, while PETITIONERS made record-break water
22 deliveries, in the early years of the drought, drawing down the reservoirs, north of the Delta,

³ I certify Patrick Porgans Exhibit-1 is a true and correct copy of verbatim excerpts from DWR's Director Mark Cowin's Policy Statement 29 July, 2016.

1 then they would Petition the BOARD to relax the Delta water quality standards. Relaxation
2 of the standards reduced the number of violations.

3 In all of the previous droughts, the Project operators Petitions were approved by the
4 BOARD to relax Bay-Delta standards and related requirements, allowing the PETITIONERS
5 to store more water for their respective contractors.

6 Documents contained in the Public Record attest that existing SWP/CVP Delta operations
7 have and continue to cause significant injury to Delta water users. Failure by the Project operators
8 to be compliant with Delta water standards and related requirements contained within the Terms
9 and Conditions of their State Water Board issued permits caused farmers to sell thousands of
10 acres of land to the PETITIONERS' failure to provide a supply of usable supply of water for Delta
11 users. This injury led to the acquisition of nearly the entire 10,000 acres of Sherman Island, which,
12 coincidentally, provides a potential windfall of hundreds-of-thousands of acre-feet of water for the
13 Projects future water needs and intrinsic contractual shortcoming.

14 The damages in the Sherman Island injuries were also attributable to the BOARD's failure to
15 exercise its enforcement authority, and by the BOARD's repeated approval of DWR and the
16 Bureau of Reclamation's Petition to relax Delta water quality standards and related regulatory
17 requirements.

18 The Record also will also reveal that during every major drought since 1977 to present the
19 Project operators delivered record-breaking amounts of water to their State Water Project and
20 federal Central Valley (CVP) contractors, in the early years of each drought.

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1 **PETITIONERS' Are a Major Factor in the Decline of the Delta:**

2 Exhibits submitted by PORGANS, all from government sources, clearly indicate that the
3 deplorable conditions of the Delta, is the result of the PETITIONERS' failure to fulfill their
4 respective regulatory duties, statutory requirements, compliance with the terms and conditions of
5 their water right permits and licenses, issued by the BOARD, selective-enforcement tactic, and
6 negating their Legislative, Voter, and Public Trust Mandates.

7
8 **4. PORGANS' client have serious concerns that the PETITIONERS have yet to submit a**
9 **Comprehensive Contingency Plan in the event a major break in the fragile Delta levee**
10 **system was to occur, during Project construction, tentatively scheduled for completion in**
11 **the year 2026.** A Plan that would provide emergency protection that would minimize injury, in the
12 event of a major levee break. If you will, a dual system of providing palatable water that protects
13 the public's good, ensures a usable supply of water for Project contractors, water right permittees,
14 and property owners from injury. This type of system should be in place, during the construction
15 period, tentatively scheduled for completion in the year 2026. The dual system could be provided
16 by strengthening levees that convey the majority of water to in-Delta users and Project contractors.

17
18 **Key Hearing Issues Narrowly Focused and Myopic in Scope:**

19 PORGANS repeatedly expressed concerns that the "key" hearing issues, which are narrowly
20 focused on the changes in point of diversion proposed for the WaterFix project, rules out any
21 semblance of the broader and more substantive issues associates with the PETITIONERS'
22 Project. The myopic scope of the Hearing proceedings, negate the fact that the proposed project
23 present serious implications to the future economic and ecological sustainability of the

1 Sacramento-San Joaquin Delta, which, according to water officials has been brought to the brink of
2 collapse.

3 **A Healthier Delta Fact Sheet**

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5 After 10 years of analysis, dialogue and scientific inquiry, the California WaterFix
6 remains the most feasible approach to not only securing water supplies but also
7 protecting native fish in the Delta. For fish, this means lessening the impact of
8 pumping water solely from the southern part of the Delta estuary and restoring
9 more natural flow conditions.

10 **A MODERN INFRASTRUCTURE UPGRADE Fact Sheet**

11 It has been clear to water experts and biologists over the past decade that the status
12 quo in the Delta is unacceptable. The water infrastructure in the Delta is outdated
13 and operations can be harmful to fish. The fragile levees and ecosystem are
14 vulnerable to earthquakes, severe storms, saltwater intrusion and further
15 environmental degradation. WaterFix protects water supply from natural disasters,
16 helps the state prepare for the effects of climate change, and reduces stressors on
17 native fish.⁴
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19
20 **BIG Picture:** The proposed PETITION is rife with short- and long-term uncertainties that present
21 real challenges and risks to the Sacramento-San Joaquin Delta-Estuary, which is the last
22 remaining Delta Estuary on the West Coast of the Americas. It is important to note that the
23 PETITIONERS successfully destroyed the largest Delta of the Colorado River, which was a thriving
24 ecosystem that emptied into the Sea of Cortez.
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⁴ California Natural Resources Agency, [A Healthier Delta Fact Sheet](https://www.californiawaterfix.com/wp-content/uploads/2017/10/CWF_FS_ProjectDelivery_Final1.pdf), 21 July 2017, p.1
https://www.californiawaterfix.com/wp-content/uploads/2017/10/CWF_FS_ProjectDelivery_Final1.pdf

1 **Conclusions:**

2 PETITIONERS have repeatedly failed to provide evidence to adequately describe and disclose
3 the scope of the proposed California WaterFix Project or final operating criteria. This type of
4 documentation fails to indicate whether there will be an increase in the amounts of water to be
5 diverted; over that number provided in their existing water right permits and licenses.

6 Albeit, early on in this process, PORGANS raised concerns regarding the narrow scope of the
7 Hearing and predicted that we would not receive a fair or impartial treatment in this Hearing.

8 The Petitioners request to modify the terms and conditions of their respective BOARD issued
9 permits are extremely myopic and difficult to challenge. As it stands now, the Fix is viewed as a
10 moving target, with crucial aspects of the proposed action, wafting in the ethos.

11
12 **Fix is Flawed:** The proposed “fix” presently scheduled for completion in the year 2026 does not
13 provide a contingency plan to ensure existing State Water Resources Control Board’s water rights
14 decisions will be met, with, or without a major break in the fragile levees.

15 On that note, PORGANS concurs with the comments made by attorney MICHEAL BRODSKY
16 for Save the Delta Alliances, which are as follow:

17 Publically available documents not submitted into evidence or made a part of DWR’s
18 application are not evidence in these proceedings. These are evidentiary hearings.
19 The purpose of an evidentiary hearing is to determine facts based on evidence
20 admitted into the record. Publicly available documents, available on the internet, or
21 elsewhere, play no role here.

22
23 At this point, since DWR withdrew any operating criteria contained in modeling that
24 has been submitted into evidence from their definition of the project—as stated in
25 their letter of September 8, 2017-- all we know about the project for purposes of
26 acting on DWR’s change petition is what is contained in the 5% engineering
27 description (twin 40 foot diameter tunnels with 3 intakes) and that DWR promises to
28 meet D-1641 in operating the project. Outside of these proceedings, all parties know
29 that a twin-tunnel three-intake project is dead and that the governor may or may not
30 try to move a scaled back one-tunnel one-intake project forward.

1 If DWR wants the parties to respond to, or the Board to consider, the project as
2 described in the documents listed in DWR's email of today (which describe the dead
3 three-intake twin-tunnel project), then DWR needs to amend their project application
4 to make those documents a part of the project description as contained in the
5 application.
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7 It is not up to the parties to describe DWR's dead project for DWR by submitting
8 publicly available documents into evidence.
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10 Sincerely,
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13 Patrick Porgans, Solutionist
14 Patrick Porgans/Associates
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STATEMENT OF SERVICE

**CALIFORNIA WATERFIX PETITION HEARING
Patrick Porgans/Associates and Planetary Solutionaries (Protestants)**

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

CLOSING BRIEF: CWF - PART-I SUBMITTED BY PATRICK PORGANS

to be served by **Electronic Mail** (email), in parts due to server limitations, upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated November 2, 2017, posted by the State Water Resources Control Board at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml

I certify that the foregoing is true and correct and that this document was executed on Wednesday, 8 November 2017.

Signature:

/sg/ Patrick Porgans

Name: Patrick Porgans

Title: Solutionist

Party/Affiliation:

Patrick Porgans/Associates

Address: P.O. Box 60940

Sacramento, CA 95860