

1 Monday, October 17, 2016

2

3 **To: Felicia Marcus, State Water Board Chair, WaterFix Project Co-Hearing Officer and**  
4 **Tam Dudoc, State Water Board Member, WaterFix Project Co-Hearing Officer**

5

6 From: Patrick Porgans, De Facto Public Trustee, Forensic Accountant, representing Planetary Solutionaries

7

8 The following comments and statements of fact are in response to the Co-Hearing Officers' "Ruling" issued on Friday,  
9 7 October 2016, after the close of business.

10

11 The "Ruling", with certain exceptions, could be the best piece of information released by the State Water Board's  
12 California WaterFix Co-Hearing Officers. For example, it clearly delineates what testimony can and cannot be  
13 admitted into the hearing record, and, what types of information can be submitted during each phase of the hearing  
14 procedure, and the order in which the proceeding are tentatively scheduled to take place. The ruling confirms  
15 Porgans / Associates (P/A) assertion that the scope of the proceedings is myopic and, as configured, limit the extent  
16 to which "Protestants" can effectively participate in a "Fix" that raises more questions than it provides answers.

17

18 The ruling addresses objections to written testimony submitted for Part1B of the hearing on the  
19 water right change petition for California WaterFix on the grounds that the testimony is not relevant  
20 to the key issues for Part 1 of the hearing.<sup>1</sup>

21

22 The October 30, 2015, hearing notice set forth the following key issues for Part 1 of the hearing:

23

24 1. Will the changes proposed in the Petition in effect initiate a new water right?

25

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

28

29 a. Will the proposed changes in points of diversion alter water flows in a manner that causes injury to  
30 municipal, industrial, or agricultural uses of water?

31

32 b. Will the proposed changes in points of diversion alter water quality in a manner that causes injury  
33 to municipal, industrial, or agricultural uses of water?

34

35 c. If so, what specific conditions, if any, should the State Water Board include in any approval of the  
36 Petition to avoid injury to these uses?

37

38 **The key issues reserved for Part 2 of the hearing included whether the changes proposed in the**  
39 **petition would unreasonably affect fish, wildlife, or recreational uses of water, or other public trust**  
40 **resources, and whether the proposed changes are in the public interest.**

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<sup>1</sup> Evidentiary objections to Part 1B cases in chief were due on September 21, 2016. Due to an oversight, DWR neglected to submit some of its objections by the deadline, and as a result some DWR objections submitted several hours after the deadline. Several parties have argued that we should discard DWR's objections if they were late. We will consider DWR's objections, however, because DWR made a good faith effort to submit its objections on time, and no party appears to have been prejudiced by DWR's failure to submit all of its objections by noon.

1 P/As response to (a) and (b) indicates that there is a high probability, prefaced on historical performance and  
2 the limited amount of info and data provided by the Petitioners, there is reason to suspect that the proposed  
3 CWF will present injury to other users.

4  
5 In response to (c), prefaced solely on the deplorable track record and performance by the project operators  
6 and the SWB's reluctance to take enforcement actions against DDWR and the Bureau, can only be reconciled  
7 when your Board starts enforcing the terms and conditions of DWR and Bureau's water right permits and  
8 licenses.

9  
10 In footnote 1, it states "Evidentiary objections to Part 1B cases in chief were due on September 21, 2016. Due to an  
11 oversight, DWR neglected to submit some of its objections by the deadline, and as a result some DWR objections  
12 submitted several hours after the deadline. We will consider DWR's objections, however, because DWR made a good  
13 faith effort to submit its objections on time, and no party appears to have been prejudiced by DWR's failure to  
14 submit all of its objections by noon. As a Participant, it is difficult to discern how or why such consideration is being  
15 entertained by the hearing officers! Good faith effort, has not cut it for P/A or is clients, deadlines are deadlines, this  
16 should be considered a dead issue.

17  
18 Porgans/Associates (P/A) takes strong exception to the hearing officers' assertion DWR made a good faith effort ...  
19 and no party appears to have been prejudiced by DWR's failure to submit all of its objections and "...no party appears  
20 to have been prejudiced by DWR's failure to submit all of its objections by noon."

21  
22 The hearing officers' ruling that no party "appears" to have been prejudiced is simply a misstatement of fact. The  
23 hearing officers' willingness "consider" DWR's objections, is simply inconsistent with what is required of P/A and  
24 every other party participating in this so-called California WaterFix (CWF) proceeding.

25  
26 Based on the language in the Friday, 7 October 2016 ruling, the hearing officers' comments and additional  
27 consideration of DWR's request to receive approval of objections after the SWB imposed deadline for filing, is viewed  
28 as prejudicial, and for the record, please note P/As objection.

29  
30 The renown Cambridge Dictionary provides the following definitions of prejudice: **(noun) "An unfair and**  
31 **unreasonable opinion or feeling formed without enough thought or knowledge"** **(verb) "To unfairly influence a**  
32 **person or matter so that an unreasonable opinion or decision results."**

33  
34 In the event that the hearing officers' rule in favor of DWR's request to submit objections after the deadline, would  
35 only reinforce P/As assertion that the hearing officers are conducting themselves in a prejudicial manner. However,  
36 this should not be construed as an isolated issue. Records contained at the State Water Board, Division of Water  
37 Rights File Room, substantiate the fact that on numerous occasions the Board sanctioned violations by Petitioners.  
38 DWR and the Bureau of Reclamation were not only in violation with the terms and conditions of the respective water  
39 right permits issued by the SWB for the operation and compliance of the State Water Project (SWP) and the federal  
40 Central Valley Project (CVP), but that those violations did cause significant harm to other users and property owners,  
41 as was the case during the 1987-1992 drought event. Commencing from the onset of that drought. P/A apprised the  
42 SWB and staff of DWR and Bureau ongoing violations.

43  
44 On behalf of the Sherman Island Landowners Association, P/A presented testimony to the SWB detailing the  
45 violations and the harm that it had caused to those property owners, many of whom were second and third  
46 generation farmers, could no longer farm because there was too much salt in the water due to the project  
47 operators failure to comply with the terms and conditions of the SWB issued permits.

48

1 P/A brought the matter of noncompliance to the State Legislature, which resulted in more than two dozen  
2 legislators filing a letter with the SWB expressing their extreme dissatisfaction of the SWB's failure to hold  
3 DWR and Bureau officials accountable. There again, the SWB members decided not to take an enforcement  
4 actions against the project operators, while the victims of the violations had to sell their land. Presently, DWR  
5 "owns" the majority of land on Sherman Island, purchased with public General Obligation Bond funds.  
6

7 As stated, in P/As January 2016 statement due to the SWB's repetitive sanctioning of DWR and Bureau  
8 violations diminished our confidence in the SWB to hold the project operators accountable for their  
9 violations.  
10

11 P/A lost all confidence in the SWB's back in the early 1990s, when at the direction of then Governor Pete  
12 Wilson, aborted a pending Water Right Decision (D-1630), which most of the parties involved in those  
13 proceeding came to consensus. This led the way to the SWB adoption of Water Right Decision 1641. P/A was  
14 also a party to those proceedings, and testified that the decision was insufficient to protect other users from  
15 harm. P/A also testified that it was doomed to fail once the General Obligation Bond fund ran out. Public  
16 funds were used to purchase water to meet some of the terms and conditions in DWR and Bureau permits,  
17 water supply reliability for the projects, and purchasing water for fish!  
18

19 During the height of a SWB investigation involving more than 1,700 alleged violations of illegal storage and  
20 diversions in the Russian River watershed, caused harm to other water users. At the request of DWR, SWP  
21 Contractors and Westlands Water District the SWB reassigned agents involved within the Russian River  
22 watershed, and assigned them to conduct an investigation of illegal water diversions by in-Delta users!  
23

24 In the SWB 2015 Drought Emergency Regulations requiring mandatory 25 percent cutbacks by urban water  
25 users, exempting agriculture, and relaxing the D-1641 Delta standards, purportedly provided a savings of an  
26 estimated 3.2 million acre-feet of water. P'A had requested information from the SWB's executive officer,  
27 Tom Howard, as to the specific whereabouts of this vast amount of saved water, with an estimate Water  
28 Market value of more than \$3 billion! P/A is currently awaiting the executive officer's response.  
29

30 Common sense provides insight into the whereabouts of this saved water; it was stored in DWR and Bureau  
31 reservoirs, placed in the ground and illegally diverted for other SWP/CVP purposes to ensure their  
32 contractors with water. The project operators' actions and their assurances to be compliant no matter what  
33 it takes, is not consistent with the facts contained in the record.  
34

35 This saved water came at a significant cost to the California taxpayers for the benefit of a SWP and CVP  
36 contractors. And while enforcement action against urban water users for violations of the drought  
37 regulations, DWR and Bureau officials had a hands-on-approach to this windfall of saved water, while  
38 violating the terms and conditions of SWB permits.  
39

40 While it is difficult to decipher what the SWB will do next for its sister agency (DWR) and the Bureau is tied  
41 up in the moving target approach to these proceedings. However, it is important for the hearing officers to  
42 keep in mind that DWR has had ample time and resources to file the information by the SWB imposed  
43 deadline; after all, they are the Petitioners. As a Participant, P/A is concerned about the harm the Petitioners  
44 proposed project poses, bearing in mind that the SWB files attest to the fact that SWB members have  
45 repeatedly failed to take enforcement action against DWR and Bureau officials when they engaged in

1 violating regulatory standards, purportedly to “protect” the Delta with false assurances and broken promises  
2 that the proposed CWF would not cause harm to other users.

3  
4 The operation of the SWP and CVP have and continued to cause harm to other water users and have caused  
5 the loss of 10,000 acres of what was once productive land on Sherman Island. The records prove that DWR  
6 willingly violated the SWB D-1485 standards during the 1987-1992 drought event, and the North Delta Water  
7 Contract, combined violations totaling more than 400 violations. At that same time, Bureau officials notified  
8 SWB personnel that they did not intend to meet the Vernalis standards, without approval of the SWB. P/A  
9 obtained document from the Bureau, via FIOA, that reveals another 400 hundred or so violations of the SWB  
10 D-1422 Vernalis standard. There again, Bureau personnel informed SWB staff that it was not going to provide  
11 water to meet the Vernalis standard.

12  
13 Time nor resources afford me the opportunity to reply to other substantive issues associated with the  
14 “ruling.” Therefore, P/A will limit its comments and concerns regarding the SWB CWF co-hearing officers’  
15 ability to conduct the proceedings in a fair and unbiased manner’ i.e., where there is no showing of prejudice  
16 to any party or the Board.

17  
18 P/A has been a party to other SWB water right proceedings, wherein, our focus was on SWB decisions  
19 specifically related to permits and licenses issued to DWR and the federal Bureau of Reclamation. Permits  
20 that require water officials to operate the State Water Project (SWP) and the federal Central Valley Project in  
21 compliance with the terms and conditions therein. Our comments address the SWB selective enforcement  
22 tactic, that sanctions the project operators’ violations, while coming down heavy on non-project water users.

23  
24  
25 **§ 648.4. Identification of Witnesses; Presubmission and Presentation of Testimony and Exhibits.**

26 Part 1 appears to allow for discussion and testimony as to whether the CWF is in the Public Interest. This is a  
27 valid question that requires an unbiased and factual response. DWR and Bureau personnel assurances that  
28 the proposed fix will not cause harm to other water users, at this stage of the proposed project, is without  
29 basis in fact.

30  
31 While, it is encouraging that water officials pledge that they will operate the proposed project in compliance  
32 with the terms and provisions of their respective SWB water right permits, even if it means adversely  
33 affecting their respective SWP/CVP water contractors, is not supported by their historical performance or  
34 public documents.

35  
36 Ironically, both DWR and Bureau officials made this same pledge as part of the terms and conditions of their  
37 respective SWB permits, issued in the mid-twentieth Century. In the interim period, public records support  
38 P/As assertion that the “operational and managerial practices” of the SWP and CVP present configuration has  
39 and continues to harm all other water users and uses in the Delta proper. To our knowledge there has not  
40 been a full accounting for the harm that the existing projects have and continue to cause to other water  
41 users.

42  
43 Assurances that were initially violated without first obtaining permission from the SWB to modify the terms  
44 and conditions of their respective permits along with ongoing noncompliance issues. Exhibit submitted by  
45 P/A provide government documents from the SWB, DWR, Bureau, State Library, U.S. Army Corps of

1 Engineers, USEPA, Central Valley Water Quality Control Board files, via Public Records Act and Freedom of  
2 Information Act request.

3  
4 Files contained in the SWB's Division of Water Rights File Room, contain exhibits provided by SWB staff,  
5 DWR, Bureau and P/A during the 1987-1992 drought event. The records attest to the fact that between  
6 1990-1991 alone, DWR and Bureau conceded to more than 287 violations of the then SWB Water Right  
7 Decision D-1485. Ironically, these blatant violations, which according to SWB exhibit involved as much as  
8 500,000 acre-feet of water that DWR and Bureau officials made available to their SWP and CVP contractors.  
9 The estimate cost of the water rustlers illegally by DWR and the Bureau was worth an estimate \$29 million on  
10 the Water Market.

11 In order to discern whether the proposed CWF will not cause harm to other water users, on the surface, this  
12 appears to be a valid question that requires a "global and in-depth understanding of the purposes and  
13 mandates of the respective projects, compliance

14  
15 The Petitioners (DWR and Reclamation) assert unequivocally that the proposed change in the point of  
16 diversion will cause no harm to other water users.

17  
18 I am a 43-year veteran, seasoned participant, and witness, in State Water Board's (SWB) Water Right Decisions D-  
19 1485; D-1630 (Aborted); D-1641, the 1975 Bay-Delta Water Quality Control Plan, The 1982 Coordinated Operating  
20 Agreement between DWR and the federal Bureau of Reclamation; the 1982 Defeat of the Peripheral Canal, the 1994  
21 Bay-Delta Accord, the defeat of the Los Banos Grande Reservoir south of the Delta and the Glenn Complex Reservoir  
22 north of the Delta; the Monterey Agreement, the 1995 Bay-Delta Water Quality Control Plan, Clean Water Act (303)  
23 Listings, The 1992 CVPIA Act, and the Regional Water Quality Control Plans for many of the State's nine hydrological  
24 regions, CalFed; the Bay Delta Conservation Plan. All of which were promoted under the auspices that they would  
25 improve conditions that heretofore have contributed to the demise of the Bay-Delta ecosystem.

26  
27 **Deplorable State of the Delta:** Billions of dollars of public funds have been expended on a plethora of studies,  
28 models, and reports, which, if one measures the extent of the expenditures and rates it according to the deplorable  
29 condition of the Delta, we would have to ask ourselves, what's the endgame!

30  
31 To begin, the title of the so-called California WaterFix in the Delta is a misnomer. The Delta is not broken, yet, it has  
32 been the victim of a litany of broken government promises and a myriad of failed plans conjured up by DWR and  
33 Reclamation over the past five decades, which, for the most part, have failed. DWR has failed to get any major  
34 projects off the ground, it has essentially been floundering around.

35  
36 DWR personnel and its consultants acknowledge that the impending collapse of the Delta and the potential threat to  
37 SWPs water supply deliveries is the result of DWR's failure to provide the flood and water right "fix" protections,  
38 mandated by state government and the voters, back in November 1960. The public needs to understand that this  
39 latest fix is not new. The CWF is the latest in an ongoing series of plans initiated more than 50 years ago by the  
40 enabling Act; however, they never materialized.

1 The Petitioners request to modify the terms and conditions of their respective State Water Board (SWB) issued  
2 licenses and permits, is extremely myopic and difficult to challenge. As it stands now, the Fix is viewed as a moving  
3 target, with crucial aspects of the proposed action wafting in the ethos, was prefaced predominately on skewed and  
4 faulty model assumptions and disinformation.

5 Regarding Patrick Porgans request to amend his notice tor intent to appear and present a case in chief during  
6 the Fix was a prerequisite to its involvement in the CWF hearing proceedings. Furthermore, contrary to the  
7 hearing officers 'conclusion that the appeal was prefaced on the fact that the "expert witnesses" would be  
8 prepared to answer fundamental questions regarding their level of witness's expertise on matters pertinent  
9 their role and responsibility in the fix. To P/As dismay, the four witnesses that we had the opportunity to  
10 cross examine had very little or no knowledge about fundamental issues, that one would expect of an expert.  
11 The ruling states that it denied Porgans request to append his NOI. It states, "The basis for the request is that  
12 Mr. Porgans found the responses of Petitioners witnesses' to questions asked during the cross examination  
13 unsatisfactory. The fact that Petitioners did not provide the answers that Mr. Porgans was expecting,  
14 however, does not justify his failure to indicate on his original NOI to present a case in chief in Part 1 of the  
15 hearing. Accordingly, this request is denied.

16  
17 Here again, the hearing officers misinterpreted the basis for my appeal, P/A opted to cross examination and  
18 rebuttal was prefaced on the assumption that the experts would be able to provide fundamental answers to  
19 questions regarding the Petition and the scope of their knowledge of the subject matter. It has nothing to do  
20 with unsatisfactory answers, it has to do with expecting experts to know the subject matter. That was the  
21 basis of my appeal, I respectfully suggest that the Hearing officers pay more attention to what the  
22 protestants are saying and less to the disinformation generated by the Petitioners. It came as no surprise that  
23 the hearing officers would deny my request. What is really disconcerting is the basis of their findings!

24  
25 In fact, records provided by P/A, SWRCB, and DWR during previous water rights and compliance proceeding  
26 heretofore, and during this proceeding, and previous water right decisions and compliance issues associated  
27 with DWR's operation of the State Water Project (SWP) and the federal Central Valley Project (CVP),  
28 administered by the Bureau of Reclamation, attest to the fact that State Water Board members weighted  
29 previous rulings and water right decisions that sanctioned more than 500 violations of DWR/Reclamation  
30 permits approved by the Board. After a Public Hearing, wherein hundreds of violations of the terms and  
31 conditions of the project operators' permits, the SWB opted not to take an action against the project.

32  
33 Time is running out, comments are due by high noon, so I will conclude by making the following statements:  
34 The manner in which the proposed CWF is being proposed is hap hazardous, moving target, and attempt to  
35 skirt the big picture issue, which, simply stated, is the SWB and the project operators' 40 year contribution to  
36 the demise of the Sacramento-San Joaquin Delta.

37  
38 Furthermore, P/A will be submitting a protest against the hearing officers for impeding and violating my  
39 clients due process rights.

40  
41 In my 40 years of involvement in water right proceedings, this proceeding set a new low in the hearing  
42 process. It is a serious sign when the watch dog become the lap dog. The SWB enforcement track record of  
43 enforcement is replete failures and selective enforcement tactics. The hearing officers and the water  
44 purveyors have lost track of the big picture, and remain in full earned to achieve approval of a myopic plan  
45 that provides no real assurances for the sustainability of the Sacramento-San Joaquin Delta.

46 You have a Public Trust mandate to protect the waters of the state, I suggest you start with the projects.

DRAFT