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6 **BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**
7

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

PATRICK PORGANS,
PORGANS/ASSOCIATES' DIRECT
TESTIMONY – PART-II: PUBLIC
TRUST, ENDANGERED SPECIES ACT
COMPLIANCE, AND LEVEE
STABILITY “DUAL PATH SYSTEM”
SUBMITTED ON BEHALF OF
PLANETARY SOLUTIONARIES

8 **PORGANS TESTIMONY CWF: PART-II**

9 PORGANS/ASSOCIATES acknowledge the effort put forth to date by the California WaterFix
10 Co-Chairs and CWF Team Members. Our comments should not be misconstrued as casting
11 aspersions on the Hearing officers or CWF Team Members. This is not a personal matter. It is
12 about due process, public interest, and the right to a fair and unbiased Hearing; wherein,
13 PETITIONERS provide evidence and factual documentation to justify approval of their PETITION.
14 State Board in its October 27, 2017 Ruling addressed the Scope of Part 2 and stated:

15 “The key issues reserved for Part 2 of the hearing included whether the changes
16 proposed in the Petition would unreasonably affect fish, wildlife or recreational uses
17 of water or other public trust resources, and whether proposed changes are in the
18 Public interest,

19
20 Accordingly, on behalf of Planetary Solutionaries, and in the interest of the public good, and Public

21 Trust Resources, we will focus on FIVE (5) basic issues:

- 22 1). **ENVIRONMENTAL DEGRADATION AND ENDANGERED SPECIES ACT “COMPLIANCE”,**
23 **WHILE DELTA-DEPENDENT LISTED SPECIES POPULATIONS DRASTICALLY DECLINE**
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25 2). **LITANY OF BROKEN PROMISES RAISE DOUBTS ABOUT PETITIONERS ABILITY TO**
26 **PERFORM**
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28 3). **LEVEE FAILURE “DUAL PATH” NEED TO PROTECT ALL WATER RIGHTS AND USES**
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30 4). **COMPLIANCE ISSUES DISTURBING PATTERN OF PROJECT OPERATIONS DURING**
31 **DROUGHT YEARS**
32
33 5). **PUBLIC RECORDS ACT REQUEST FOR EX PARTE COMMUNICATION**

1) **ENVIRONMENTAL DEGRADATION AND ENDANGERED SPECIES ACT “COMPLIANCE”,
WHILE DELTA-DEPENDENT LISTED SPECIES DRASTICALLY DECLINE**

Public Trust Doctrine:¹ The public trust doctrine requires the sovereign, or state, to hold in trust designated resources for the benefit of the people. Traditionally, the public trust applied to commerce and fishing in navigable waters, but its uses were expanded in California in 1971 to include fish, wildlife, habitat and recreation. At that time, the California Supreme Court in *Marks v. Whitney* broadened the definition of public trust because “public trust uses are sufficiently flexible to encompass changing public needs.” This definition would be first applied in a legal case in the 1980s (see below).² [**California water rights.**]* FN

Publicly funded projects, such as the federal Central Valley Project (**CVP**) and the California State Water Project (**SWP**) began pumping water from the Delta since the 1950’s and 1960’s. The “management and operation” of the CVP and SWP are responsible for the killing of tens-of-millions of anadromous and pelagic species. However, to date, we have yet to find records that indicate the operators of the **CVP** or **SWP** were ever held accountable for killing “**Take**” or “**Harm**”ⁱ of one threatened or endangered fish, listed under either the federal or state ESA. The way they get away with ESA “Take” limits, they reinstitute section 7 Consultation with fisheries agencies. Thereupon, the SWP-CVP operators and the fishery agencies implement measures to augment the Take limit, which may include increasing the “Take” limits! The number of salmon species, steelhead, and Striped Bass killed (defined as **loss**) at just the **SWP Delta facilities** over a 23-year period was approximately 23,000,000; 1,000,000 per year, 83,000 per month, 2,777 per day, 115 per hour, two (2) fish per minute; scientists contend these figures are grossly underestimated. Lastly, we are awaiting fish loss from CVP Tracy facilities.³ [PORGANS CWF PART-II: ***EXHIBIT 318**] **These figures do not appear to include the 70-80% loss of ESA listed salmonids due to predation!**⁴

¹ California State Lands Commission, **Definition of Public Trust Doctrine:**
<http://www.slc.ca.gov/PublicTrust/PublicTrust.html>

² Public Trust Doctrine <http://www.watereducation.org/aquapedia/water-rights-california>

³ **Memorandum** to Barbara McDonnell, Chief Environmental Services, California Department of Water Resources from Department of Fish and Game, Subject: Mitigation Loss Calculations for Four Pumps Agreement, 31 January, 2007.

⁴ A Review of Delta Fish Population Losses from Pumping Operations **2009 -- NMFS: Biological Opinion**. The **2009 Biological Opinion** for Salmonids reported high pre-screen **losses** in **Clifton. Court Forebay**. Two studies that ...
[A Review of Delta Fish Population Losses from Pumping Operations](https://www.waterboards.ca.gov/waterrights/water.../lwa_reviewoffishlosses.pdf)
https://www.waterboards.ca.gov/waterrights/water.../lwa_reviewoffishlosses.pdf

PUBLIC TRUST RESOURCES FACE EXTINCTION AS BILLIONS OF TAXPAYERS FUNDS HAVE BEEN SPENT

While government “fiddle” and “Rome burns,” species decline:

Extinction and Decline of Native Species

Major Crises Await: Without reform, current water policies and institutions virtually guarantee that California will experience five major, protracted water crises that will involve widespread environmental and economic losses.

California is endowed with a diverse and unique natural environment, with 140 distinct aquatic ecosystems and many other fish and other aquatic and riparian species that live nowhere else on the planet. **Over the past 150 years, California’s native fishes – a broad indicator of aquatic ecosystem health – have lost almost every conflict with economic development. Among the state’s 129 native fish, 7 became extinct, 31 are listed as threatened or endangered under the federal and State Endangered Species Acts (ESAs), and another 69 are in decline and will likely qualify for listing in the future.** Only 22 native fish species are reasonably secure.^{5 6} [Emphasis added]

California will lose more than half (52 percent) of its native anadromous (migratory) salmonids, and over a quarter (27 percent) of its inland salmonids in the next 50 years if present trends continue”, according to a UC Davis report published in 2017.⁷ [Emphasis added]

The 2009 Biological Opinion for Salmonids reported high pre-screen losses in Clifton Court Forebay. ...Endangered Species Act-listed salmonids, with **75-80%** lost due to predation.⁸

1. What is the conservation status of California salmonids, both individually and in aggregate?

Coho salmon numbered in the hundreds of thousands only 50–60 years ago and were significant members of the state’s coastal stream and ocean ecosystems (Brown et al. **1994**); today they number in the hundreds (National Marine Fisheries

⁵ Public Policy Institute of California, Managing California’s Water - From Conflict to Reconciliation, Executive Summary, Ellen Hanak □ Jay Lund □ Ariel Dinar □ Brian Gray Richard Howitt □ Jeffrey Mount □ Peter Moyle Barton “Buzz” Thompson, undated, p. 2. http://www.ppic.org/content/pubs/rb/RB_211EHRB.pdf

⁶ According to the USFWS there are 301 listed species (animals and plants in California <https://ecos.fws.gov/ecp0/reports/species-listed-by-state-report?state=CA&status=listed>

⁷ Nearly Half of California’s Native Salmon, Steelhead and Trout on Track to Be Extinct Within 50 Years, University of California, Davis, and California Trout, State of the Salmonids II: Fish in Hot Water over concerning data about the declining health of these fish populations and opportunities for stabilizing and even revering many species, 2017, Article authored by Nina Erlich Williams on May 16, 2017, in Environment. <http://www.ucdavis.edu/news,nearly-half-californias-native-salmon-steelhead=and-trout-be-extinct-50-years/>

⁸ A Review of Delta Fish Population Losses from Pumping Operations **2009 -- NMFS: Biological Opinion**. The **2009 Biological Opinion** for Salmonids reported high pre-screen losses in **Clifton. Court Forebay**. Two studies that ...[A Review of Delta Fish Population Losses from Pumping Operations https://www.waterboards.ca.gov/waterrights/water.../lwa_reviewoffishlosses.pdf](https://www.waterboards.ca.gov/waterrights/water.../lwa_reviewoffishlosses.pdf)

Service 2010) making the recently completed recovery plan for California coho salmon (NMFS 2010) a strategy to prevent imminent extinction.

Likewise, the combined abundance of Chinook salmon ESUs in the Central Valley once averaged around 2 million fish annually (Yoshiyama et al.1998); today three of the runs (spring, winter, latefall) average only a few thousand fish each. The fall run has recently been experiencing extreme annual fluctuations in abundance, reaching an all-time low of 66000 in 2008

(Anadromous Fish Restoration Program website) and appears to be heavily influenced by hatchery production (Williamson and May 2005; Williams 2006; Lindley et al. 2009).⁹ [Emphasis added]

Fish populations of the Sacramento-San Joaquin Delta (Delta), some of California's most valuable resources, are declining. Striped bass populations dependent upon the Delta have been declining since the 1960's. Today, California's Chinook salmon resource is extremely dependent upon the Sacramento River System. Fall runs of Chinook salmon stocks in the Feather and the American Rivers are in good condition due to habitat maintenance, hatchery production, and stocking procedures. Other fall runs of Chinook salmon in the Sacramento System have been depleted to varying degrees - Winter and spring runs of Chinook salmon are severely depleted. Salmon stocks in the San Joaquin System are depleted more than stocks in the Sacramento River System. Steelhead stocks in the Sacramento System are depressed.¹⁰ [PORGANS Exhibit 319: ARRP Fish Doubling Graph.]*

After More Than 50 Years of Monitoring - Fish Loss Guesstimates Face a High Degree of Uncertainty: Experts Assert High Degree of Uncertainty as to Loss Estimates:

Methods for Measuring Incidental Take

Current Method

For this report, DWR and Reclamation quantified incidental take for the listed species to the nearest whole fish at each facility using the current methods that are described in the 2009 NMFS Biological Opinion. DWR and Reclamation estimated the incidental take of steelhead and green sturgeon based on salvage, and estimated the incidental take of Chinook salmon based on loss using the procedures in DFW (2013), For implementation of NMFS Reasonable and Prudent Alternative (RPA) Action IV.2.3, DWR and Reclamation also estimated daily steelhead loss using the interim DOSS (2011) method, which expands for steelhead loss from salvage using Chinook salmon expansion factors.¹¹ [Emphasis added] (Page 64)

⁹ Impending extinction of salmon, steelhead and trout (Salmonidae) in California, Jacob Katz & Peter B. Moyle & Rebecca M. Quiñones & Joshua Israel & Sabra Purdy. Received: 7 April 2011 / Accepted: 3 January 2012 # Springer Science+Business Media B.V. 2012, pp. 6 and 7.

¹⁰ Agreement Between the Department of Water Resources and the Department of Fish and Game to Offset Losses in Relation to the Harvey O. Banks Delta Pumping Plant, 4 Nov. 1987, p. 1.
<http://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=40848&inline>

¹¹ Annual Report of Activities October 1, 2014, to September 30, 2015 Delta Operations for Salmonids and Sturgeon (DOSS) Technical Working Group October 2015, p. 64. <http://deltacouncil.ca.gov/sites/default/files/2015/10/2015-10-29-Item-6-WY-2015-DOSS-Annual-Report-FINALwithAppendices.pdf>

Alternative Methods

As presented in the 2013/2014 report, there is **still a high degree of uncertainty and poor documentation associated with the current methods used to estimate loss or incidental take of Chinook salmon, steelhead, and green sturgeon.**

Reclamation is required to improve the quantification of loss by developing an alternative technique to quantify incidental take of listed anadromous species at the Delta fish facilities in compliance with Term and Condition 2a of the 2009 NMFS Biological Opinion. In the summer of 2013, Reclamation and DWR, with guidance from the interagency Term and Condition 2a (T&C 2a) Technical Work Team (technical team), drafted Anonymous (2013) to describe the proposed modifications to the current methods for estimating loss. Anonymous (2013) was drafted for independent review and consideration at the 2013 Long-Term Operations Biological Opinions (LOBO) Annual Review, and was based on various documents drafted for the T&C 2a process.¹² [Emphasis added]

OPERATION OF DELTA CROSS CHANNEL GATE

LOSS OF JUVENILE WINTER-RUN CHINOOK SALMON AT CVP/SWP DELTA FACILITIES

Government reports proved that the operation of the Delta Cross Channel (DCC), located in the Sacramento-San Joaquin Delta, near the town of Walnut Grove, has and continues to take its toll on ESA listed species; and ALL emigrating salmon.

The proportion of the juvenile winter-run population lost at the Delta facilities each year is correlated to the proportion of Sacramento River flow diverted into the interior Delta that year during the time juvenile winter-run are emigrating through the lower Sacramento River in the vicinity of the Delta Cross Channel and Georgiana Slough. The proportion of flow diverted into the interior Delta is significantly influenced by the position of the DCC gates. Highest losses of juvenile winter-run at the Delta facilities has occurred in years when the DCC gates were open during the time juvenile winter-run were migrating through the lower Sacramento River. During the period juvenile winter-run Chinook salmon are emigrating through the lower Sacramento River, approximately 40-50% of Sacramento River flow is diverted into the interior Delta through DCC when both gates are open; with the gates closed, approximately 15-20 % of Sacramento River flow enters the interior Delta through Georgiana Slough. [Emphasis added]

Winter-run Chinook salmon are distinguishable from the three other Chinook runs in the Sacramento River system by the timing of their upstream migration and spawning. **Due to a precipitous decline in the population from the late 1960's through the late 1980's, NOAA Fisheries listed the run as threatened in August 1989, and subsequently reclassified the run as endangered in 1992. The state of California listed the run as endangered in 1989.** [Note: Livingston-Stone National Fish Hatchery, located on the upper Sacramento River, below Shasta Dam, is the last support leg of this sub species, which raises 200,000 fish annually.]

¹² Annual Report of Activities October 1, 2014, to September 30, 2015 Delta Operations for Salmonids and Sturgeon (DOSS) Technical Working Group October 2015, p. 64. <http://deltacouncil.ca.gov/sites/default/files/2015/10/2015-10-29-Item-6-WY-2015-DOSS-Annual-Report-FINALwithAppendices.pdf>

Many factors contributed to the decline in the winter-run Chinook population since the 1960's. **One factor has been the direct entrainment losses of juvenile winter-run Chinook at the federal Central Valley Project and State Water Project export facilities in the Delta.** [Emphasis added]

During the period juvenile winter-run Chinook salmon are emigrating through the lower Sacramento River, approximately 40-50 % of Sacramento River flow is diverted into the interior Delta through DCC when both gates are open; with the gates closed, approximately 15-20% of Sacramento River flow enters the interior Delta through Georgiana Slough.¹³

Over the course of the past 15 years, we have obtained public records that document the fact that the DWR and USBR irresponsibly dropping flows in rivers, during spawning seasons, caused drying up of the redds, killing off our future salmon runs.

Title 34, the **Central Valley Project Improvement Act**, mandates changes in management of the Central Valley Project, particularly for the protection, restoration, and enhancement of fish and wildlife... Ten major areas of change include: 800,000 acre-feet of water dedicated to fish and wildlife annually; tiered water pricing applicable to new and renewed contracts; water transfers provision, including sale of water to users outside the CVP service area; **special efforts to restore anadromous fish population by 2002**; restoration fund financed by water and power users for habitat restoration and enhancement and water and land acquisitions; no new water contracts until fish and wildlife goals achieve...¹⁴ [Emphasis added]

Since Fiscal Year (FY) 1993 through FY 2016, \$1.7 billion have been expended to implement CVPIA actions and programs; 60% for habitat improvement, 33% for CVP facilities. \$134,175,766 Anadromous Fish Restoration, \$79 million Water Acquisition-instream flows, \$129,810,207 for refuge water acquisition-Level 4, \$136,103,747 for Refuge Water Convey Wheeling (L2) (d)(1)(2)(5)d; \$61,810,780 for Eco/Water System Ops Model (g)...¹⁵

*¹ U.S. Bureau of Reclamation, Draft CVPIA Fiscal Year 2014 Annual Work Plan June 10, 2013 *Program Title: Anadromous Fish Restoration Program 3406(b)(1) Responsible Entities*: https://www.usbr.gov/mp/cvpia/docs_reports/awp/2014/docs/AFRP%20all.pdf

¹ Implementation of the Central Valley Improvement Act, Annual Report for Fiscal Year 2006, p. 10.

https://www.usbr.gov/mp/cvpia/docs_reports/docs/annual_rport_cvpia_fy06_final_draft_dec08.pdf

¹ Contact was made with USBR's Rate Setting personnel, Thursday, 14 September 2017, at 4:00 p.m., Public Workshop schedule for Friday, 15 Sept. 2017, at 12:30 p.m. at the Bureau's office located at 2400 Cottage Way; handout will be provided.

¹ Documentation obtained by a Public Records Act request, and provided by the by Department of Water 22 July 2008.

¹³ **Relationship of Delta Cross Channel Gate Operations To Loss of Juvenile Winter-run Chinook Salmon at the CVP/SWP Delta Facilities** Alice F. Low and Jim White *California Department of Fish and Game*, Erin Chappell *California Department of Water Resources* November 2006, p. 2.
http://www.science.calwater.ca.gov/pdf/ewa/EWA_delta_cross_channel_closures_06_111406.pdf

¹⁴ U.S. Bureau of Reclamation, Mid-Pacific Region, **Central Valley Project Improvement Act (CVPIA) 1992**, <https://www.usbr.gov/mp/cvpia/>

¹⁵ U.S. Bureau of Reclamation, Mid-Pacific Region, Reclamation Managing Water in the West, Central Valley ECO Report and Croffsets, CVPIA Expenditures, Credits, and Offsets, to Determine Water and Power Contractors Repayment Obligations FY 1993 – FY2016, Plant in Service, report provided as USBR Workshop 15 September 2017.

1 **2). LITANY OF BROKEN PROMISES RAISE DOUBTS ABOUT PETITIONERS ABILITY TO**
2 **PERFORM**

3 The evidence in the Public Record indicates that previous approved points of
4 diversions (PODs) did cause significant and irreparable injury to Delta water users,
5 especially agriculturalist, and Public Trust resources (aquatic, terrestrial and avian species,
6 a number of which are listed on the Endangered 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 **Disturbing Pattern and Practices of Non-Compliance with Delta Water Quality Standards,**
12 **injurious to other water users:**

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, which has **proven to be**
15 **extremely problematic exacerbating injury to other water users and public trust resources.**
16 Details are contained herein.

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

20 While the PETITIONERS' promises of compliance may appear to be reassuring, there is
21 a question as to how much faith one could place on their promises. An extensive review of
22 the PETITIONERS' compliance track-record, available in the Public Record, documents and
23 evidence contained therein, attest that there is no question during dry and critically dry
24 periods they have committed hundreds of violations of the Terms and Conditions inclusive in
25 their water right permits, issued by this Board. Testimony by PETITIONERS assert that they
26 only violated their permits one percent over an extensive number of years.

1 PORGANS pointed out that the percentile was flawed, due to the fact that during dry
2 periods, wherein the PETITIONERS made record-break water deliveries, in the early years
3 of the drought, drawing down the reservoirs, north of the Delta, and then Petitioned the
4 Board to relax the Delta water quality standards.

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

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

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

18 The damages in the Sherman Island injuries were also attributable to the SWB's failure to
19 exercise its enforcement authority, and by the SWB's repeatedly approval of DWR and the Bureau
20 of Reclamation's Petition to relax Delta water quality standards and related regulatory
21 requirements.

22 **SWB'S PUBLIC HEARING DWR AND BUREAU COMPLIANCE WITH DELTA STANDARDS**

23 During the initial year of drought periods, after exporting record-breaking amounts of Delta
24 water, the DWR and Bureau officials Petition the SWB to relax Delta water standards, which save
25 more water for SWP and CVP contractors. The potential water supply and storage improvements

1 from the changes approved by this and the February 3 and March 5 Orders total more than 1.2
2 million acre-feet (MAF). [PORGANS-6: April 6, 2015 Order that Approved and Denied in Part
3 ...DWR and USBR Petition for Temporary Urgency Changes to License and Permit Terms and
4 conditions Requiring Compliance with Delta Water Quality Objections in Response to Drought
5 Conditions, p.5; is in the previous Index Description.]]¹⁶

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

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

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

15 Sherman Island Irreparable Injury due to SWP-CVP Projects and SWB Failure to Enforce the Law

16

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

20 A case in point occurred on Sherman Island, during the 1987-1992 drought years,
21 when the water the Projects provided was laden with salts. Evidence retained at the SWB's
22 office, exhibits submitted by DWR and Bureau officials documenting 100's of violations,

¹⁶ I certify Patrick Porgans Exhibit-6 is a true and correct copy of verbatim excerpts from SWRCB April 6 2015 Order that Approved and Denied in Part a Petition for Temporary Urgency Changes to License and Permit Terms and Condition Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions.

1 where submitted at a SWB hearing on the illegal diversions and violations of the Delta water
2 protections requirements.

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

8 Sherman Island water rights were theoretically protected by the terms and conditions
9 embedded in the initial water right filings by the State Department of Finance; Area of Origin
10 Laws, Delta Protection Act, SWB Water Right Decisions and an insurance policy it signed
11 via a 1981 North Delta Agency Water Contract

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3). LEVEE FAILURE “DUAL PATH” NEEDED TO PROTECT ALL WATER RIGHT USERS

U.S. Geological Survey, CalFed, and other governmental entities expressing concerns regarding the inevitable failure of the fragile Delta levee system.

During the last century, there have been over 160 levee failures. In addition to threatening life and property and disrupting the economy, Delta levee failures can threaten the water supply by allowing seawater from San Francisco Bay to enter areas that are critical to the distribution of freshwater. [Emphasis added]

The Delta is particularly vulnerable to levee failure due to its location, aging infrastructure, low elevation, and subsidence.

Levee failures can be caused by:

- OVERTOPPING – due to floods, tidal fluctuations, and wind-driven waves; and
- STRUCTURAL FAILURE – caused by inadequate foundations, subsidence, seepage, erosion, and burrowing animals. Earthquakes also can cause soil liquefaction and levee failure.

THE RISK:

Delta levees are particularly vulnerable to failure. Since the Delta is near active earthquake faults, one earthquake could cause the failure of multiple levees during a non-high water event. This not only threatens life and property in the Delta itself, but would disrupt water supplies throughout California. Risk is a combination of the likelihood that something will happen and the costs of the event.

MORE THAN 50 PERCENT OF LEVEE FAILURES OCCURRED SINCE DELTA EXPORTS

Note: More than half of those levee failures occurred since Delta water exports commenced in the 1950s. [Refer to PORGANS CWF PART- II EXHIBIT 320: LEVEE FAILURE- DWR-URS Graphic]

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

BIG Picture: The proposed PETITION is rife with short- and long-term uncertainties that present real challenges and risks to the Sacramento-San Joaquin Delta-Estuary, which is the last remaining Delta Estuary on the West Coast of the Americas. PETITIONERS successfully destroyed the largest Delta of the Colorado River, which was a thriving ecosystem that emptied into the Sea of Cortez.

1 **2). LITANY OF BROKEN PROMISES RAISE DOUBTS ABOUT PETITIONERS ABILITY TO**
2 **PERFORM - PROJECT OPERATORS TRACK-RECORD OF NONCOMPLIANCE**
3

4 To begin, the title of the so-called California WaterFix in the Delta is a misnomer. The Delta is
5 not broken, yet, it has been the victim of a litany of broken government promises and a myriad of
6 failed plans conjured up by DWR and Reclamation over the past five decades, which, for the most
7 part, have failed. DWR has failed to get any major projects off the ground; it has essentially been
8 floundering around on self-serving peripheral issues.

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

15 Since 1960, Petitioners have made endless promises of their intent to improve the Delta;
16 provide protections for Delta levees, and to comply with the terms and conditions of their water
17 right permits and licenses, double anadromous fish populations, all, according to government
18 document, failed. Countless billions-of-dollars have been expended on a myriad of plans, and a
19 plethora of studies have been conducted, the end result is that the Delta is in worse condition now
20 than ever before.

21
22 **PETITIONERS Are a Major Factor in the Decline of the Delta:**

23 Exhibits submitted by PORGANS, in Phase-1, all from government sources, clearly indicate
24 that the deplorable conditions of the Delta, is the result of the PETITIONERS failure to fulfill their
25 respective regulatory duties, statutory requirements, compliance with the terms and conditions of
26 their water right permits and licenses, issued by the BOARD, selective-enforcement tactic, and
27 negating their Legislative, Voter, and Public Trust Mandates.
28

1 A prime example of the PETITIONERS' failures by not building the Delta Master Levees that
2 were authorized and funded back in 1960 DWR opted to defer construction and spent the funds
3 allocated for levees to pay for other underfinanced State Water Project (SWP) facilities. [EII
4 PORGANS-300 CWC Referenced during his cross examination of Petitioners' attorneys, California
5 Water Code section 12934(d)]¹⁷

6 The fact that the Master Levees were authorized, and funded (\$85 million), but never
7 constructed, have cause injury to users dependent on the Delta for their water supply at risk. This
8 would include PETITIONERS' State Water Project and federal Central Valley Project supplies. In
9 addition, previous breaks in Delta levee have cause the entrainment and death of both listed and
10 non listed aquatic species.

11 Construction of the proposed tunnels, tentatively schedule for the year 2026 has the
12 potential to jeopardize water deliveries for the next 13 years.

13 Levee Failure

14
15 During the last century, there have been over 160 levee failures. In addition to
16 threatening life and property and disrupting the economy, **Delta levee failures can**
17 **threaten the water supply by allowing seawater from San Francisco Bay to**
18 **enter areas that are critical to the distribution of freshwater.** [Emphasis added]
19 PORGANS Exhibit 320]*
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¹⁷ California / Water Code - WAT / CHAPTER 8. Water Resources Development Bonds [12930. - 12944.] / Section 12934. Section 12934. (Added by Stats. 1959, Ch. 1762.) **Cite as:** Cal. Water Code §12934(d)(3) Master levees, control structures, channel improvements, and appurtenant facilities in the Sacramento-San Joaquin Delta for water conservation, water supply in the Delta, transfer of water across the Delta, flood and salinity control, and related functions.

1 **4). COMPLIANCE ISSUES DISTURBING PATTERN OF PROJECT OPERATIONS DURING**
2 **DROUGHT YEARS**

3
4 PORGANS client have serious concerns that the PETITIONERS have yet agreed to submit
5 a Comprehensive Emergency Contingency Plan in the event a major break in the fragile Delta
6 levee system. If you will, a dual path system of providing palatable water that protects the public,
7 and ensures a usable supply of water for Project contractors, water right permittees, and property
8 owners from injury. Ideally, this type of system should be in place, during the construction period,
9 tentatively scheduled for completion in the year 2026. The dual system could be provided by
10 strengthening levees that convey the majority of water to in-Delta users and Project contractors.

11 **In the unfortunate event of a levee break, in the absence of a Contingency Plan, that**
12 **injures other legal water right users, or causes injury to public or private resources, than it**
13 **should be the responsibility of the PETITIONERS and there SWPCVP water project**
14 **contractor to be held liable for such damages.**

15
16 **Key Hearing Issues Narrowly Focused and Myopic in Scope:**

17 On behalf of our client, we have little confidence in the PETITIONERS' promises that they
18 intend to be compliant with the requirements of the BOARD's Water Right Decision 1641, is
19 inconsistent with their previous commitments to be compliant. PORGANS provided records from
20 the PETITIONERS that documented hundreds of violations of D-1485, D-1422, and D-1641. The
21 BOARD accepted some of PORGANS exhibits illustrating the extents of some of the violations, but
22 it also denied other exhibits that documented hundreds of other Delta water quality violations.

23 PORGANS repeatedly expressed concerns that the "key" hearing issues, which are narrowly
24 focused on the changes in point of diversion proposed for the WaterFix project, rules out any
25 semblance of the broader and more substantive issues associated with the PETITIONERS Project.
26 The myopic scope of the Hearing proceedings, negate the fact that the proposed project present
27 serious implications to the future economic and ecological sustainability of the Sacramento-San

1 Joaquin Delta, which, according to water officials has been brought to the brink of collapse. A half-
2 a-Century later, California water officials issue the following rhetoric.

3 **A Healthier Delta Fact Sheet**
4

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

12 It has been clear to water experts and biologists over the past decade that the status
13 quo in the Delta is unacceptable. The water infrastructure in the Delta is outdated
14 and operations can be harmful to fish. The fragile levees and ecosystem are
15 vulnerable to earthquakes, severe storms, saltwater intrusion and further
16 environmental degradation. WaterFix protects water supply from natural disasters,
17 helps the state prepare for the effects of climate change, and reduces stressors on
18 native fish.¹⁸

20 **PETITIONERS' Track-Record of Broken Promises Raise Doubts of Their Ability to Perform**

21 PETITIONERS' promises that they intend to be compliant with the requirements of the BOARD's
22 Water Right Decision 1641, is inconsistent with their previous commitments to be compliant.
23 PORGANS provided public records, obtained from the PETITIONERS that documented hundreds
24 of violations of D-1485, D-1422, and D-1641. The BOARD accepted some of PORGANS exhibits
25 illustrating the extents of the violations, but it also denied other exhibits that documented hundreds
26 of other Delta water quality violations.

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

¹⁸ 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 The PETITIONERS have repeatedly failed to provide the body of evidence to fully describe and
2 disclose the scope of the proposed California WaterFix Project or final operating criteria. This type
3 of documentation fails to clearly indicate whether there will be an increase in the amounts of water
4 to be diverted; over that amount provided in their existing water right permits and licenses.

5 **5). PUBLIC RECORDS ACT REQUEST FOR EX PARTE COMMUNICATION**

6 **PORGANS respectfully request that the CWF officers enter the Public Records Act Request**
7 **and reply for ex parte communication into the record.**

8 **Conclusion:**

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

12 **Deplorable State of the Delta:** Billions of dollars of public funds have been expended on a
13 plethora of studies, models, and reports, which, if one measures the extent of the expenditures and
14 rates it according to the deplorable condition of the Delta, we would have to ask ourselves what's
15 the end- game!

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

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

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

1 described in the documents listed in DWR's email of today (which describe the dead
2 three-intake twin-tunnel project), then DWR needs to amend their project application
3 to make those documents a part of the project description as contained in the
4 application.

5
6 It is not up to the parties to describe DWR's dead project for DWR by submitting
7 publicly available documents into evidence.

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9 Bad planning on government's part does not constitute an Emergency on PROTESTANTS' part!

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11 Respectfully,

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13 Patrick Porgans
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1
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3 **STATEMENT OF SERVICE**
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5
6 **CALIFORNIA WATERFIX PETITION HEARING**
7 **Patrick Porgans/Association and Planetary Solutionaries (Protestants)**
8

9 I hereby certify that I have this day submitted to the State Water Resources Control Board
10 and caused a true and correct copy of the following document(s):
11

12 **TESTIMONY OF PATRICK PORGANS**
13

14 to be served **by Electronic Mail** (email), in parts due to server limitations, upon the parties listed in
15 Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated November
16 15, 2016, posted by the State Water Resources Control Board at
17 [http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/se](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)
18 [rvice_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)
19

20 I certify that the foregoing is true and correct and that this document was executed on 30
21 November 2017.
22

23
24 Signature:

25
26 */sg/ Patrick Porgans*
27

28 Name: Patrick Porgans

29 Title:
30

31 Party/Affiliation:

32 Patrick Porgans
33

34 Address: P.O. Box 60940, Sacramento, CA 95860
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ⁱ Endangered Species Act | Regulations and Policies, SUMMARY: This final rule defines the term "harm", which is contained in the definition of "take" in the Endangered Species Act (ESA). The purpose of this rulemaking is to clarify the type of actions that may result in a take of a listed

species under the ESA. This final rule is not a change in existing law. It provides clear notification to the public that habitat modification or degradation may harm listed species and, therefore, constitutes a take under the ESA as well as ensuring consistency between NMFS and the Fish and Wildlife Service (FWS). This final rule defines the term "harm" to include any act which actually kills or injures fish or wildlife, and emphasizes that such acts may include significant habitat modification or degradation that significantly impairs essential behavioral patterns of fish or wildlife. <https://www.fws.gov/endangered/laws-policies/definition-of-harm.html>