Jeanie Townsend, Clerk of the Board commentletters@waterboards.ca.gov **9 December 2010**

Re: Submittal of Comments Pertinent to the SWRCB's Item 9, **Consideration of Issuance of a Water Quality Certification for the Licensing of the Oroville Hydroelectric Project in Butte County, P**ursuant to Section 401(a)(1) of the Federal Clean Water Act (33USC §§ 1341 et seq.),scheduled for 15 Dec. 2010

Attention: All Members of the State Water Resources Control Board (SWRCB)

As a concerned citizen, I am submitting comments pertinent to the SWRCB's consideration of a Water Quality Certification (WQC) for the Licensing of the State Water Project's (SWP) Oroville Hydroelectric Project (FERC 2100) in Butte County scheduled to be discussed at the SWRCB's 15 December 2010 meeting.

COMMENT NO. I: SWRCB'S FAILURE TO PROVIDE NOTIFICATION OF MEETING REGARDING THE DRAFT WQC

Please be advised, I did not receive notice of either the 15 December meeting or the fact that comments on the 84-page draft WQC are due by noon - no later than 10 December 2010! As stated in my 6 December 2010 e-mail to Russ Kranz, a member of your staff, although I am a participant in this matter, as well as in the Department of Water Resources (DWR) Federal Energy Regulatory Commission's (FERC) relicensing (Project 2100), I did not receive the notice directly from your staff; it was sent by an NGO, at the request of your staff!

Unfortunately, as I have pointed out to both the members of the SWRCB and staff, this is not the first time this type of failure to notify me has occurred. I am somewhat perplexed as to this method of notification, and as to the reason why my e-mail address is not available to you or for that matter any of the SWRCB's personnel in the Division of Water Rights or Water Quality. Am I not listed as a participant in the SWP Water Quality Certification; have I not attended the meetings; have I not submitted my comments; irrespective as to whether the SWRCB responded to the issues and concerns contained therein!

On numerous occasions, and on a number of other SWRCB related notifications, to which I was a party, I have also been "inadvertently" removed, deleted or misplaced from the list of participants; including, but not limited to the environmental review pertinent to this process. I have brought this matter to the attention of the SWRCB and to the appropriate staff personnel and was given the assurances the problem would be corrected; however, it just seems to go on without end. As it stands now, I have less than two-and-one-half days to read, review, and comment on the 84-page draft WQC, and as always, I have to preface what I have to say by addressing things that the SWRCB has failed to do.

COMMENT NO. II: RELATIVE TO THE 84-PAGE DRAFT WQC and FERC No. 2100

As articulated, at the 5 October 2010 SWRCB meeting, I clearly expressed my concerns, as one of "***We the People***", about the simple fact that the revised DRAFT WQC (fourth or fifth rendition) was and still remains fundamentally flawed, and therefore, appears to be inconsistent with the purpose and intent of the respective laws associated with this and the FERC licensing processes; including but not limited to the WQC. More specifically, as was clearly stated in a series of correspondences, commencing in December 2002 through 2010, **DWR intentionally limited the scope of the project boundaries and the impacts and mitigations associated with its FERC No. 2100 and the WQC. DWR and SWP Contractors opted to take this course of 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 issue of confining the geographical scope of the project was addressed in the National Marine Fisheries Service's (NOAA Fisheries) December 2002 letter to DWR's Rick Ramirez, which states:

This concerns the Oroville Hydroelectric Project relicensing (FERC No. 2100). The National Marine Fisheries Service (NOAA Fisheries) is participating in the Alternative Licensing Process (ALP) for the Oroville Project. During the ALP meetings, Division of Water Resources (DWR) and its Water Contractors requested the U.S. Fish and Wildlife Service and NOAA Fisheries (Services) to make a presentation to the ALP environmental working group on scoping. Specifically, the Services were requested to clarify agency positions on the scope of studies necessary to support the National Environmental Policy Act (NEPA), Endangered Species Act (ESA) and Federal Power Act (FPA) informational requirements for relicensing. In response to DWR's request, the attached document, (Scoping Document) was prepared and provided by the Services to the ALP during the September 2001, presentation on scoping. In summary, the Scoping Document defines the regulatory framework for determining required scope of studies pursuant to NEPA, ESA and the FPA. The Services did not receive comments on the Scoping Document or presentation. Accordingly, by letter dated October 11, 2001, NOAA Fisheries filed the Scoping Document with the Federal Energy Regulatory Commission (FERC) and DWR.

In June 2002, DWR and its Water Contractors prepared and DWR adopted the Cumulative Impact Assessment Guidance Document (Guidance Document). The Guidance Document defines the limits and scope of studies necessary for the Services to meet their regulatory and informational requirements for the Oroville relicensing. DWR requested NOAA Fisheries' comments on the Guidance Document. ***NOAA Fisheries reviewed DWR's Guidance Document and find DWR's purpose and intent in advancing an alternative scoping document unclear. DWR's document defines and restricts what information the Services will need to administer their prescriptive and consultive authorities****. However, it is the Services who are responsible for determining what information will be necessary to administer their authorities and for conveying this information to the applicant and FERC. It is towards that end that NOAA Fisheries recommends studies through the relicensing process.*[Emphasis added.]

Regarding cumulative impact assessment, DWR's Guidance Document incorrectly combines NEPA, ESA and CEQA definitions of cumulative impacts. ***It is important to identify the different statutory authorities, so that it is clear what information will be expected for the Service's Biological Opinions. Also, care should be taken to avoid confusing the distinction between direct and indirect impacts of the project and cumulative impacts.*** *These are two very different concepts under both NEPA and the ESA. Indirect impacts are causally linked to the project and therefore, must be considered as resulting from the proposed action. Cumulative impacts are not causally linked to the project, but must be accounted for in determining project effects on the listed species. For additional explanation, please see the attached Scoping Document.* [Emphasis added.]

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

impractical. *The description of the action area in the attached Scoping Document is correct and should be used for guidance.* [Emphasis added.]

The DWR Scoping Document also includes a discussion of how impacts to listed species will be judged by considering "overall" effects. Overall effects would be calculated through a process of "offsetting" negative impacts by beneficial impacts to achieve "overall" effects. Please be aware, the ESA consultation regulations do not allow for a determination of no adverse impacts on listed species based on a "netting out" of positive and negative impacts. Likewise, mitigation that takes the form of compensation for unavoidable impacts does not serve to lessen the impacts that must be considered under the jeopardy analysis. [Emphasis added.]

Our concern is that DWR develop an adequate administrative record upon which to base our prescriptions and recommendations within statutory filing deadlines.[1] *An incomplete license application may lead to additional information requests or other administrative delays. In turn, a lengthy delay in issuing a new license may result in irreparable harm to sensitive resources through the ongoing impacts of current project facilities and operations.*

Thank you for your cooperation in the above. If you have questions concerning these comments, please contact Mr. Steve Edmondson at (707) 575-6080.

DWR'S DESCRIPTION OF OROVILLE RELICENSING PROJECT

According to the Initial Information Package (IIP) for the Oroville Project relicensing, the Project purposes are described as: "*a multipupose water supply, flood control, power generation, recreation, fish and wildlife, and salinity control project*." Further, Project operations are specifically managed as follows: "*On a weekly basis,* [Project] *releases are scheduled to accommodate water supply requirements, water quality and quantity requirements in the Sacramento-San Joaquin Delta, instream flow requirements in the Feather River, power requirements, and minimum flood control space*."[2]

From a purely scientific basis, by its very nature, a dam could affect resources well beyond project boundaries. If the project is affecting the environment down or upstream of the actual project boundaries, it would be arbitrary and nonsensical to consider and mitigate only for impacts occurring within the project boundaries. For example, according to DWR records, it sells "peak power", generated at the SWP's Oroville Hydroelectric facilities, and uses "base load" power, generated from other sources, such as coal and oil plants, to pump water from its Harvey Banks Delta Pumping Plants and Clifton Court Forebay, which occurs at night, and has been found to exacerbate take because a number of those species are active during those hours.

COMMENT NO. III: RELATIVE TO THE 84-PAGE DRAFT WQC and FERC No. 2100

[1] 18CFR16.8

[2] State of California, The Resources Agency, Department of Water Resources, ***Federal Energy Regulatory Commission License Project No. 2100. Initial Information Package; Relicensing of the Oroville Facilities***, January, 2001.

After having had the opportunity to peruse the 84-page "draft" WQC, it became apparent that even though the SWRCB had been repeatedly apprized by me that the "draft" once again FAILED to addressed the comments and concerns raised in my correspondence, which were submitted, on several occasions, but to this day are not even referenced in the "latest" draft WQC! In light of that fact, I will reiterate for the record, comment submitted both in writing and orally at the SWRCB's meeting on the subject matter. At the SWRCB's 5 Ocotber 20101 meeting, Item 7. Consideration of issuance of a water quality certification for the relicensing of the Oroville Facilities in Butte County; I made the following comments; reiterating on my previous written comments:

For the record my name is Patrick Porgans: I am appearing before this Board as one of "***We the People***" to express my concerns regarding the inherent shortcomings associated with the Department of Water Resources' (DWR) application for Water Quality Certification (WQC) for the State Water Project (SWP) Oroville Hydroelectric Facilities, Federal Energy Regulatory Commission's #2100, pursuant to section 401(a)(1) of the Federal Clean Water Act (33USC §§ 1341 et seq.).

Over the course of the past 15 months, I have submitted comments to the board regarding the inherent shortcomings contained in the board's series of "draft" renditions of the WQC; the board's three minute time constraint does not afford me the opportunity to go into detail; therefore, I refer you to the record for the specific comments.

However, before elaborating on those shortcomings, I am compelled to advise the board of my concerns relative to the manner in which this process has been conducted to date. Since the initial application was filed back 26 October 2005, DWR has withdrawn its WQC application on six separate occasions.[3]

The most recent request by DWR to with draw its WQC application was received in writing by the board on 2 August (the matter was tentatively schedule to be heard before the board on 3 August); the deadline for submitting comments was 23 July 2010. I sent comments in on the 22 July and requested confirmation that my e-mail comments had been received; I received no such confirmation. On 23 July I made contact with the Office of the Chief Counsel to get confirmation; however, I was informed by Marianna Aue, she said there was no need to be concerned as the board had agreed to provide yet another extension to DWR and its contractors to comment on the Board's 2 July draft.

Unlike the DWR or the SWP contractors, as a citizen, I use my own resources, and savings, to afford the time to participate in this so-called process. I had no way of knowing that the board had granted the extension or that the deadline period was once again extended. Had I not telephone to make sure my comments were received, which is something I have grown accustomed to doing, because there have been a number of times over the years were the board staff claimed it either did not receive my comments or the comments were submitted after the board imposed deadline. Whatever the case that brings me to the following matters; according to the posting on the board's website, the 2 July 2010 was the issuance of the most previous DRAFT WQC prepared by staff; my question to the board is that rendition of the WQC that is under consideration before the board today?

If so, I question how my and other members of the public that submitted comments prior to the 23 July deadline, where in that document is the response to the concerns and issues that I and others raised? **Obviously, the comments were not included in that draft or the latest draft WQC**. Therefore, in view of the record, and prefaced solely upon the SWRCB's past performances, it is obvious that it has opted to ignore, placate or disregard meaningful public input on a matter of public trust and within the purview of its regulatory responsibilities.

AS stated in my 22 July 2010 letter to the board - WQC IS FUNDAMENTALLY FLAWED: In regards to the WQC, it is obvious that it is inherently flawed, simply because, as documented herein, the basis upon which it is premised and

[3] State Water Resources Control Board's letter to Henry M. Ramirez, Oroville Relicensing Program, ***Re: Request for Water Quality Certification for the Relicensing of the Oroville Facilities, FERC No. 2100***, 5 August 2010.

the scope of the related water quality, water quantity, and the cumulative adverse impacts associated directly and/or indirectly with the SWP Oroville Hydroelectric facilities were intentionally limited in scope by the Department and its water contractors.

In addition, I have repeatedly informed the SWRCB of the fact that DWR had historically operated the SWP Oroville felicities in a manner that caused unmitigated impacts to other beneficial uses; highlighted the ongoing incongruities between DWR's position and the SWRCB staff report; wherein, DWR claimed SWP operation is currently meeting all of the beneficial use requirements as would the WQC/settlement agreement. Conversely, SWRCB staff claim the SWP is not being operated to meet the beneficial uses. **Although the recent draft WQC proposes a list of mitigation measures for the DWR imposed limited geographical boundaries, many of those proposed mitigation measures have been tried over the past 40 years and have failed**; i.e., gravel replenishment, additional salmon spawning habitat; etc, and there are no assurances that they will work in the future. At the October meeting, DWR was arguing over the cold water pool requirements stating that it would be difficult to meet – essentially was proposing a nonenforcable moving target. Lastly, DWR's boosting about hatchery fish populations and mitigation as a success story, appears to be inconsistent with NOAA-Fisheries testimony regarding the long-term adverse implications associated with hatchery fish propagation and its implications on the survival of salmonid species.

COMMENT V: FERC COLLABORATIVE PROCESS AND SETTLEMENT AGREEMENT ISSUES

Actions or Failure to Act by DWR Officials Lead to a "Breakdown" in the Collaborative Process

Unlike the Board, P&A was a "party" to the DWR's Alternative Licensing Process (ALP) used during the renewal of its FERC No. 2100, relicensing 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 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 two of 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,[i] and its comments and concerns known to FERC in April 2006,[4] which states:

> *Members of the Commission, please let this correspondence serve as formal notice of Porgans & Associates, Inc. (P&A), objections to the proposed settlement agreement as stated in FERC License 2100-052,relating to the California Department of Water Resources' (DWR) Re-licensing of the State Water Project's (SWP) Oroville, CA.*
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> *"The purpose of the Settlement Agreement is to resolve all issues that have or could have been raised by settling parties in connection with the Commission's issuance of a new license for the*

[4] **Patrick Porgans & Associates, Inc., communication** (e-Filing: http://www.ferc.gov) **To: Joseph T. Kelliher, Chairman, and All Other Members of the Federal Energy Regulatory Commission, Project:** California **D**epartment of **W**ater **R**esources' (DWR) Relicensing of the State Water Project's Oroville Hydroelectric Facilities — **F**ederal **E**nergy **R**egulatory **C**ommission (FERC) Project **2100; Subject**: Formal Notification/Objections to the Proposed Settlement Agreement — FERC License 2100-052 **A**lternative **L**icensing **P**rocedure (**ALP**), and to Inform FERC and the Public of the **ALP's Inherent Shortcomings**, Diametric to Meaningful Public Input, Government's Trust Responsibilities and DWR's Written Assurances, 25 April 2006.

project and to establish DWR's obligation for the protection, mitigation and enhancement of resources affected by the project." March 27, 2006.[5]

What is more important, is that this correspondence it to inform FERC and the public of the ALP's inherent shortcomings, which are diametric to meaningful public input, government trust responsibilities and DWR's written assurances.

INTRODUCTORY STATEMENT PERTINENT TO THE PROPOSED "SETTLEMENT AGREEMENT"

The "Settlement Agreement" "may" resolve all of the "issues" for those that signed it; however, it simply does not resolve "all" of the relative issues pertinent to the relicensing. Notwithstanding, P&A takes strong exception to the manner in which backdoor "settlement agreement" was orchestrated and crafted, because it was inconsistent with the protocols and procedures, to wit, the Plenary Group and all of its participants had agreed to at the very early stages of the Alternative Licensing Procedure (ALP). Therefore, the methodology and tactics employed by the DWR et al, upon which the "settlement agreement" is prefaced, is and will forever remain skewed. What is even more disconcerting is the fact that the ALP process did not provide a fail-safe mechanism to deter an applicant from conducting itself in a manner that is either disingenuous or misleading. Although certain participants are "pleased" with their efforts and involvement in "crafting" the language, terms and/or conditions of said, there are also many "local" participants, and others, directly impacted by the operation and future management of the California SWP Oroville hydroelectric facilities, although they spent years participating in the ALP, they opted not to sign the settlement agreement. Nevertheless, before P&A elaborates on the inherent shortcomings of the settlement agreement, which it has no intentions of enumerating, because ***the skewed settlement agreement is only symptomatic, the crux of the problem is that the ALP itself is fundamentally flawed.*** *Before discussing that issue, P&A is compelled to share and/or reiterate its involvement and "input" into the FERC/DWR ALP.* [The aforementioned correspondences have previously been submitted to the SWRCB as a part of the WQC record and should be available to each member of the board.]

OVERVIEW OF PORGANS & ASSOCIATES HISTORICAL INVOLVEMENT AND INPUT INTO THE FERC/DWR ALP

P&A's support for the ALP was premised on a consensus-based collaborative process that assured transparency, full disclosure of impacts and/or actions, trust, and, most important, that the Plenary Group would have the ultimate authority to decide the terms of the 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

[5] U.S. Federal Energy Regulatory Commission's ***Notice of Settlement Agreement and Soliciting Comments***, *California Department of Water Resources, P-*2100-052, March 27, 2006.

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.***"[6] [Emphasis added.]

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.

According to FERC written statement, *"The ALP is intended to facilitate greater participation by and improve communications amongst the applicant, resource agencies, Indian tribes, the public, and Commission staff in pre-filing consultation."*[7] *Prima facia* the FERC's statement makes sense; however, meaningful communication is a two-way street, and the ALP, as directed by DWR and/or its facilitators, turned out for many of us to be a dead-end street. As stated, in P&A's February 2004 nine-page statement to FERC, after having had spent more than four years of active involvement in FERC/DWR's ALP, it had no other ethical alternative but to spend its involvement in the process, because of all of the specific reasons elaborated on and referenced in its Feb. 2004 letter.[8] (Information submitted to the SWRCB in prior comments made on the previous "draft" QWCs.

In closing, while one can appreciate the limited involvement and collective knowledge that the SWRCB and its staff may possess, relative to the historical operation of the SWP's Oroville facilities and the yet-to-be mitigated adverse impacts attributable to its operation; notwithstanding, the mitigations proposed in the "draft" WQC, as written, although meaningful, are insufficient to either identify the impacts of the proposed action and/or for mitigating the extent and scope of the project. I respectfully request that the SWRCB address the deficiencies and amend the draft WQC accordingly. Tam Dudoc correctly stated that the settlement agreement has nothing to do with the board;s WQC and related authority; they were not a signatory to the settlement agreement, and it should not be a consideration or a limitation on the SWRCB's regulatory authority or public trust mandate; failure for the SWRCB to exercise the full extent of its authority will be viewed as an arbitrary, capricious and complicit action. Thank you for your time and consideration of this matter.

REQUEST FOR CONFIRMATION THAT COMMENTS HAVE BEEN RECEIVED AND POSTED BY THE SWRCB'S STAFF

Confirmation can be made via e-mail **(porgansinc@sbcglobal.net).**

P.S. Obviously, if I had been provided sufficient time to comment on the draft WQC, my response would have been much

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[6] California Department of Water Resources, ***Initial Information Package, Relicensing of the Oroville Facilities, Federal Regulatory Commission License Project No. 2100***, Jan. 2001, p. 7.

[7] Federal Energy Regulatory Commission, J. Mark Robinson, Director, Office of Energy Projects, Project letter to Carol A Smoots, Perkins Coie, LLP, ***Re: Settlement Agreement Proceedings***, No. 2100-134-California, Oroville Facilities, California Department of Water Resources, Feb. 22, 2006.

[8] P&A's Notification to FERC Re: *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 DWR's Written Assurances*, Feb. 2004.

more detailed; however, the SWRCB did not afford me and/or others the same latitude it provides to DWR and its SWP Contractors.