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12 NORTH DELTA WATER AGENCY

13 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

14 In the matter of Hearing re California  
15 WaterFix Petition for Change

16 NORTH DELTA WATER AGENCY'S  
17 RESPONSE TO THE CALIFORNIA  
18 DEPARTMENT OF WATER  
19 RESOURCES' MOTION FOR  
20 PROTECTIVE ORDER AND MOTION TO  
21 COMPEL COMPLIANCE WITH NOTICE  
22 REQUESTING WITNESSES AND  
23 PRODUCTION OF DOCUMENTS

24 I. INTRODUCTION

25 North Delta Water Agency ("NDWA") hereby responds to the Department of Water  
26 Resources' ("DWR") Motion for Protective Order filed in response to NDWA's Notice  
27 Requesting Witnesses and Production of Documents dated April 28, 2017 ("Notice"). Contrary  
28 to DWR's argument that the Notice is "unreasonable and oppressive," NDWA seeks information  
that is not publicly available, was not included in DWR's case-in-chief, could not be presented by  
NDWA's own witnesses, and is squarely within the proper scope of rebuttal evidence in this  
hearing. Accordingly, NDWA respectfully requests that the Hearing Officers deny DWR's  
motion for protective order, and direct DWR to comply with NDWA's Notice.

II. BACKGROUND

DWR has taken the position in this hearing that NDWA will not suffer injury as a result of

1 the proposed changes in project water rights identified in the Petition for Change. This assertion  
2 apparently rests on DWR's oft-repeated statements that it "intends to" comply with the "Contract  
3 for the Assurance of a Dependable Water Supply of Suitable Quality" executed by DWR and  
4 NDWA in 1981 ("1981 Contract," admitted into evidence as DWR-306).

5 MS. NIKKEL: So, in your view, the – an increase in EC would not result in injury so long  
6 as it is within the terms of the contract; is that right?

7 WITNESS SERGENT: That's my belief, yes.

8 Part 1A Transcript, Vol. 18, p. 8:1-4 (Sept. 23, 2016, Testimony of M. Sergent). The 1981  
9 Contract requires DWR to operate the State Water Project ("SWP") to provide water quality at  
10 specified locations that is the better of (1) standards adopted by the SWRCB (for example, D-  
11 1641), or (2) the water quality criteria set out in the 1981 Contract ("Contract Criteria"). DWR-  
12 306, p. 2, Article 2(a)(i). The Contract Criteria are not static; they fluctuate from month to month  
13 and year to year, based on forecasted inflow that varies by year type, under the Four-River Basin  
14 Index, which includes the unimpaired runoff from the Sacramento River, the Feather River, the  
15 Yuba River, and the American River. See *id.* at p. 1, Article 1(f). To determine compliance with  
16 the Contract Criteria, water quality is monitored measured at seven different locations:  
17 Sacramento River at Three Mile Slough, Rio Vista, and Walnut Grove; and North Fork  
18 Mokelumne River near Walnut Grove; Mokelumne River at Terminus; San Joaquin River at San  
19 Andreas Landing; and Steamboat Slough at Sutter Slough. NDWA-13.

20 In contrast, D-1641 sets a one-dimensional salinity objective, measured at Emmaton, from  
21 April 1 through August 15. Unlike the more variable Four River Basin Index, D-1641 water  
22 quality objectives are tied to the Sacramento Valley Year Type Index. Part 1B Transcript, Vol.  
23 25, p. 72:3-12 (October 28, 2016, Testimony of G. Kienlen). Petitioners presented testimony in  
24 their case in chief purporting to show the WaterFix Project's expected compliance with D-1641,  
25 including an average 18 to 19% increase in EC at Emmaton, a measurement location situated  
26 downstream of the Three Mile Slough compliance location under the 1981 Contract. Petitioners  
27 apparently take the position that as long as the Project meets D-1641 water quality objectives, it  
28 will not cause additional exceedances of the Contract Criteria. Part 1A Transcript, Vol. 18, p.

1 5:19-6:1 (Sept. 23, 2016, Testimony of M. Sergent). However, evidence presented during Part  
2 1A by NDWA shows that after August 15 of each year it is the 1981 Contract, not D-1641, that  
3 controls water quality in the north Delta. See NDWA-3, p. 10:6-11.

4 To date, Petitioners have presented no technical evidence addressing the WaterFix  
5 Project's impact on DWR's ability to meet the 1981 Contract Criteria. Part 1A Transcript, Vol.  
6 18, pp. 4:23-5:4 (Sept. 23, 2016, Testimony of M. Sergent). During the first three panels of Part  
7 1A of the hearing, Petitioners' witnesses testified that they (i) did not analyze how the 1981  
8 Contract might constrain the Project, or (ii) were not familiar enough with the Contract Criteria to  
9 answer. See Part 1A Transcript, Vol. 1, pp. 127:23-128:1 (July 29, 2016, Testimony of J. Pierre)  
10 (project overview witness not generally familiar with the terms or purpose of the 1981 Contract);  
11 Part 1A Transcript, Vol. 6, pp. 114:23-115:5 (August 5, 2016, Testimony of John Bednarski)  
12 (engineering witness never reviewed the 1981 Contract and was not aware of "any specific  
13 direction that was given to take into consideration requirements" of the Contract in preparation of  
14 the Project's conceptual design); Part 1A Transcript, Vol. 9, p. 118:8-22 (August 11, 2016,  
15 Testimony of John Leahigh) (operations witness not familiar with concept that the 1981 Contract  
16 may control in late summer, as opposed to D-1641); *id.* at p. 118:8-22 (operations witness  
17 unaware of any analysis of impacts to water users within NDWA boundaries due to water level  
18 reductions).

19 In fact, the Petitioners' modeling witnesses expressly testified that the 1981 Contract  
20 requirements did not factor into either the DSM-2 or CalSim modeling for the Project, even  
21 during those periods in which D-1641 does not control.

22 WITNESS NADER-TEHRANI: So DSM-2 is not the tool to enforce certain water  
23 qualities. It's a tool to just check the desired outcome based on the assumptions that were  
24 made in CalSim.

25 MS. NIKKEL: Okay. So maybe the question is better directed to Mr. Munévar. But my –  
26 question goes to, either in DSM-2 or in CalSim, is there a modeling assumption that at  
27 some times of the year this contract must be – the water quality requirements of this  
28 contract must be met and not D-1641?

WITNESS NADER-TEHRANI: I'm not aware that this – This contract is part of the  
modeling, if that's what you're referring, but – but Mr. Munévar could prove me wrong.

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**MS. NIKKEL:** Mr. Munévar, do you have a different answer?

**WITNESS MUNÉVAR:** No. In the CalSim modeling, D-1641 water quality requirements are what drive the operations.

Part 1A Transcript, Vol. 14, pp. 23:10-24:7 (August 24, 2016, Testimony of P. Nader-Tehrani and A. Munévar). Dr. Nader-Tehrani further explained that the Petitioners’ respective water projects typically meet water quality objectives by identifying “a handful” of locations, meaning certain D-1641 compliance points, that act as “constraining” locations for operations throughout the greater Delta. *Id.* at pp. 24:12-25:1. The modeling itself only specified “four or five” of the D-1641 locations as controlling points for the simulated runs. *Id.* at p. 28:4-18.

However, during cross-examination of the water rights panel in Part 1A, DWR witness Maureen Sergent testified that DWR had in fact performed modeling, not only of D-1641 criteria, but also of the 1981 Contract Criteria at each monitoring location specified in the Contract, and that she had relied on that modeling analysis and graphical representations of potential impacts to reach the conclusion that WaterFix operations would not result in additional exceedances of the water quality criteria specified in the 1981 Contract:

**MS. NIKKEL:** Are you aware of any analysis that has been done by DWR or anyone associated with the project to determine whether the California WaterFix Project will increase the number of days in which DWR is out of compliance with [the 1981 Contract]?

**WITNESS SERGENT:** I reviewed the modeling done, and it does not indicate any greater or lesser ability to provide the water at both locations of suitable quality.

**MS. NIKKEL:** And which locations are you thinking of specifically?

**WITNESS SERGENT:** Each of the locations in the -- in the agreement.

**MS. NIKKEL:** And I think I heard you yesterday testify that you looked at not only the modeling results that were included within the testimony and exhibits offered by DWR, but you also looked at other modeling results; is that right?

**WITNESS SERGENT:** I looked at -- it's still the same modeling. It's just -- I asked modelers, subsequent to reviewing the -- the information that was provided in the exhibit, I asked them if they could provide a similar graphical representation at each of the North Delta Water Agency locations.

**MS. NIKKEL:** So you specifically looked at results of the modeling for each of the locations, including Three Mile Slough?

1 WITNESS SERGENT: That's correct.

2 MS. NIKKEL: And have those been offered into the record here?

3 CO-HEARING OFFICER DODUC: They have not.

4 Part 1A Transcript, Vol. 18, pp. 3:24-5:4 (September 23, 2016, Testimony of M. Sergent). When  
5 asked why DWR omitted the graphical representations of those modeling results that she relied  
6 on to support her expert opinion, Ms. Sergent testified that although DWR intended to continue  
7 meeting the conditions of the various settlement contracts that it had entered into in the Delta, it  
8 was more important to provide results for the D-1641 objectives, which would control during  
9 most of the year. *Id.* at pp. 9:24-10:15. As explained above, however, the D-1641 salinity  
10 objectives at Emmaton are only in place from April 1 to August 15, whereas the 1981 Contract  
11 imposes water quality requirements year-round. Part 1B Transcript, Vol. 25, p. 71:21-24  
12 (October 28, 2016, Testimony of G. Kienlen). For this reason and others, the modeling results  
13 and graphical representations of WaterFix's water quality impacts at the 1981 Contract locations  
14 under all scenarios (Alt 4A, H3, H4, B1 and B2) are highly relevant to the issue of whether legal  
15 users of water within NDWA will suffer injury (in the form of increased violations of the  
16 Contract Criteria) as a result of WaterFix Project operations.

17 To obtain the modeling analysis described by Ms. Sergent in her sworn testimony, NDWA  
18 served its Notice on March 28, 2017, twenty-eight days prior to the scheduled commencement of  
19 the Part 1 Rebuttal Hearing. On April 12, 2017, DWR submitted its Motion for Protective Order,  
20 seeking to vacate NDWA's Notice on the grounds that requiring Dr. Nader-Tehrani or other  
21 DWR witnesses to provide the requested documents and testimony would be unreasonable or  
22 oppressive, and amounts to an abuse of the processes established by the Hearing Officers.  
23 Motion for Protective Order, p. 6.

### 24 III. ARGUMENT

25 No subpoena is required to compel the appearance of a party to a proceeding. Gov. Code,  
26 § 11450.50. Instead, written notice requesting the witness to attend, with the time and place of  
27 the hearing, must be served on the attorney of the party as provided under section 1987 of the  
28 Code of Civil Procedure, at least 10 days prior to the time required for attendance. Gov. Code, §

1 11450.50(a); Code Civ. Proc., § 1987. Where that notice is provided at least 20 days before the  
 2 time required for attendance, it “may include a request that the party or person bring with him or  
 3 her books, documents, electronically stored information, or other things.” Code Civ. Proc., §  
 4 1987(c). This notice has the same effect as service of a subpoena on the witness. Gov. Code, §  
 5 11450.50.

6 These requests for attendance and production of documents are subject to the authority of  
 7 the Hearing Officers to protect parties from unreasonable or oppressive demands. Gov. Code, §  
 8 11450.30. To obtain a protective order, the party objecting to a discovery request must provide a  
 9 statement of grounds justifying the objection within five days of receipt of the notice, or some  
 10 other authorized amount of time. § 11450.50(a); Code Civ. Proc., § 1987(c). The requesting  
 11 party may then respond to the objection with its own motion, accompanied by a showing of good  
 12 cause and of materiality of the items to the issues, after which the Hearing Officers “may order  
 13 the production of items to which objection was made, unless the objecting party or person  
 14 establishes good cause for nonproduction or production under limitations or conditions.” *Ibid.* In  
 15 such cases, the scope of discovery may be limited if the “burden, expense, or intrusiveness of that  
 16 discovery *clearly outweighs* the likelihood of discovering admissible evidence.” Civ. Code Proc.,  
 17 § 2017.020 (emphasis added); see also March 16, 2017 Ruling, pp. 2-3.

18 Here, the modeling data and graphical representations prepared by DWR in its evaluation  
 19 of the Project, and in particular in its evaluation of its ability to comply with the 1981 Contract,  
 20 are crucial pieces of evidence to be considered in the SWRCB’s ultimate determination of the  
 21 Part 1 issues of this hearing, and are therefore the proper subject of a Notice to Appear and  
 22 Produce. Gov. Code, § 11450.50(a); Code Civ. Proc., § 1987(c). DWR has failed to establish  
 23 good cause for nonproduction of the requested documents.

24 **A. NDWA’s Notice is Appropriate Under the Processes Established by the**  
 25 **Hearing Officers for this Hearing.**

26 As a preliminary matter, DWR’s Motion for Protective Order was submitted on April 12,  
 27 2017, fifteen days after its receipt of NDWA’s Notice, rendering the objection untimely under  
 28 Section 1987 of the Code of Civil Procedure. Code Civ. Proc., § 1987(c) (“Within five days

1 thereafter, or any other time period as the court may allow, the party or person of whom the  
2 request is made may serve written objections to the request or any part thereof, with a statement  
3 of grounds.”); compare *Shell Oil Co. v. Superior Court*, 50 Cal.App.3d 489, 491 (1975) (finding  
4 an objection to a request to produce that was filed 10 days after service was only timely under a  
5 five-day extension for service by mail under Code of Civil Procedure section 1013(a)). NDWA’s  
6 Notice was served electronically, extending the five-day period of notice by two days, pursuant to  
7 Code of Civil Procedure section 1010.6, subdivision (a)(4)(A), but DWR’s Motion was not  
8 submitted within that period. As such, the Hearing Officers should reject DWR’s Motion for  
9 Protective Order as untimely. But even if the Hearing Officers, in their discretion, allow DWR’s  
10 belated Motion for Protective Order, the Motion still fails.

11 The Notice specifically requests that DWR provide the materials and modeling analysis  
12 that Ms. Maureen Sergent confirmed had been prepared, together with the witnesses that prepared  
13 them, which formed the basis of her conclusion that there would be no increase in exceedance of  
14 the water quality objectives set out by the criteria of the 1981 Contract. Notice, pp. 2-3; see Part  
15 1A Hearing Transcript, Vol. 18, pp. 4:4-6:25 (September 23, 2016, Testimony of M. Sergent).  
16 DWR argues that this request is “unreasonable and oppressive” because it does not include  
17 supporting arguments to justify the request for information. Motion for Protective Order, p. 3.  
18 DWR appears to have conflated the requirements of a notice requesting attendance under Section  
19 1987 with the requirements for serving a subpoena *duces tecum* under Section 1985, which  
20 requires an accompanying affidavit of the materiality of the items to the issues and good cause  
21 only following an objection by DWR. Code Civ. Proc., § 1985(b); compare Code Civ. Proc., §  
22 1987(b, c).

23 Although a notice requesting the production of a party and documents has the effect of a  
24 subpoena *duces tecum*, it utilizes a separately defined procedure. Gov. Code, § 11450.50; Code  
25 Civ. Proc., § 1987(c) (“The procedure of this subdivision is alternative to the procedure provided  
26 by Sections 1985 and 1987.5 in the cases herein provided for, and no subpoena *duces tecum* shall  
27 be required.”). The Notice complies with the procedural requirements established by law by  
28 requesting a party’s witness to attend, listing the time and place of the hearing, and stating the

1 exact materials that are under DWR's possession and control at least 20 days in advance. Civ.  
2 Code Proc., § 1987(b, c).

3 **B. The Requested Information Has Not Been Made Available Nor Offered Into**  
4 **the Record.**

5 Modeling data analysis and the graphical representations reflecting the Project's  
6 compliance (or lack thereof), with the specific monitoring locations and water quality criteria of  
7 the 1981 Contract, are squarely within the scope of proper rebuttal, and Petitioners have thus far  
8 not introduced such materials into evidence in this hearing. Part 1A Transcript, Vol. 18, p. 4:23-  
9 5:4 (Sept. 23, 2016, Testimony of M. Sergent). Although DWR's witnesses have testified that  
10 they prepared and reviewed modeling analysis pertaining to the monitoring locations under the  
11 1981 Contract, and concluded that this modeling did not "indicate any greater or lesser ability" to  
12 provide water of suitable quality to North Delta Water Agency under its Contract, DWR has not  
13 included those documents in the record for this hearing and now seeks a protective order to avoid  
14 doing so. *Id.* at 4:4-7.

15 DWR argues that the documents NDWA seeks are or were available from alternative  
16 sources, including publicly available documents, through cross-examination of DWR witnesses,  
17 and through NDWA's own retained experts, and that DWR should therefore be excused from  
18 providing these witnesses and materials in response to NDWA's Notice. Motion for Protective  
19 Order, p. 4. These assertions are contradicted by DWR's own witnesses. See, e.g., Part 1A  
20 Transcript, Vol. 18, pp. 3:24-5:4 (September 23, 2016, Testimony of M. Sergent). The updated  
21 model study package, as referenced in DWR's Motion, does not contain the graphical  
22 representations relied upon by Ms. Sergent. See DWR-500. Furthermore, although DWR touts  
23 that physical modeling has been available online since May 2016, the SWRCB has not, as of yet,  
24 accepted Exhibit DWR-500 into evidence for this hearing. (See February 21, 2017 Ruling, pp.  
25 23-24.) The Petitioners have included DWR-500 in their rebuttal materials, but whether such an  
26 exhibit is within the scope of limited rebuttal, as established by the SWRCB, remains to be  
27 determined.

28



1 NDWA witnesses could not have testified on these matters because they do not have  
2 access to the graphical representations prepared by Dr. Nader Tehrani and cited by Ms. Sergent  
3 on cross-examination. See, Part 1B Transcript, Vol. 25, p. 81:7-11 (October 28, 2016, Testimony  
4 of G. Kienlen) (“To my knowledge, and from what I’ve seen, I – all I have seen is D-16 –  
5 comparisons with D-1641. I do not – I’m not aware that they modeled or at least presented  
6 anything in regard to the contract.”). DWR also argues that the graphical representations are  
7 available through more convenient, less burdensome sources, but that is simply not true. Indeed,  
8 one of NDWA’s expert witnesses, Dr. Gomathishankar Parvathinathan, described the difficulty in  
9 attempting to apply the Petitioners’ daily modeled outputs of salinity and contract criteria based  
10 on hydrology under the different modeled Project scenarios to assess contract violations based on  
11 14-day salinity data at different contract locations. Part 1B Testimony, Vol. 25, pp. 133:22-135:7  
12 (October 28, 2016, Testimony of Gomathishankar Parvathinathan). None of the 1981 Contract  
13 analyses or graphical representations were offered into evidence, made available for NDWA’s  
14 review, or even mentioned before the cross-examination of Ms. Sergent. DWR prepared the  
15 graphical analyses and even relied upon them as part of the Petitioners’ case-in-chief, but now  
16 seeks to prevent their disclosure.

17 **C. NDWA’s Notice Is Not Unduly Burdensome, Abusive of Process or**  
18 **Inequitable.**

19 NDWA could not have obtained the requested documents at an earlier point in the hearing  
20 because it was not made aware such documents existed before the cross-examination of Ms.  
21 Sergent at the end of Petitioners’ case-in-chief. Though NDWA offered testimony in its own  
22 case-in-chief that called into question DWR’s assertions regarding 1981 Contract compliance,  
23 DWR still failed to provide this missing testimony in its rebuttal submittal. DWR argues that  
24 NDWA had the opportunity to ask DWR witnesses about the sought-after documents, but does  
25 not explain how such questioning would lead to the production of those documents absent  
26 NDWA’s noticed request. See Motion for Protective Order, pp. 4-5. Instead, as it had in its case-  
27 in-chief, DWR takes the position that proof of the existence of the 1981 Contract, alone, is  
28 sufficient to demonstrate a lack of injury. See DWR-77, p. 14:19-23 (Written Rebuttal Testimony

1 of M. Sergeant).

2           Objections based on burden “must be sustained by evidence showing the quantum of work  
3 required, while to support an objection of oppression there must be some showing of either an  
4 intent to create an unreasonable burden or that the ultimate effect of the burden is  
5 incommensurate with the result sought.” *West Pico Furniture Co. v. Superior Court* (1961) 56  
6 Cal.2d 407, 417. Beyond repeating its conclusory allegation that NDWA’s Notice is  
7 unreasonable and oppressive, DWR has utterly failed to explain why providing materials that  
8 have previously been prepared, and making available a witness already scheduled to testify,  
9 results in any unreasonable burden on DWR. See Motion for Protective Order, at p. 5.  
10 Moreover, DWR has not made any claim as to how the effect of the burden might be considered  
11 incommensurate with the result sought. Accordingly, NDWA now seeks this evidence and  
12 testimony to offer during the rebuttal phase of the hearing, as material that is “responsive to  
13 evidence presented in connection with another party’s case-in-chief.” Notice, Encl. D, pp. 35-36;  
14 see also Feb 21 Ruling, pp. 1-2.

#### 15 IV. CONCLUSION

16           The question of whether Project operations will result in an increased number of  
17 violations of the 1981 Contract Criteria, and what operational changes might be necessary in  
18 order to achieve Contract compliance, is central to the Part 1 issue of whether the proposed  
19 change will operate to the legal injury of water users in the North Delta. As they have not yet  
20 been offered into evidence by DWR, NDWA requests that the Hearing Officers compel the  
21 presentation of the “graphical representations” of the “modeling” and other analyses related to  
22 1981 Contract compliance and that DWR’s witnesses have testified about in order to ensure that a  
23 full and fair record is presented to the Hearing Officers during this proceeding.

24 DATED: April 21, 2017

DOWNEY BRAND LLP

25  
26 By: 

27 KEVIN M. O'BRIEN  
28 Attorney for Protestant  
NORTH DELTA WATER AGENCY

**STATEMENT OF SERVICE**

**CALIFORNIA WATERFIX PETITION HEARING  
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

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:

**NORTH DELTA WATER AGENCY'S RESPONSE TO THE  
CALIFORNIA DEPARTMENT OF WATER RESOURCES' MOTION  
FOR PROTECTIVE ORDER AND MOTION TO COMPEL  
COMPLIANCE WITH NOTICE REQUESTING WITNESSES AND  
PRODUCTION OF DOCUMENTS**


to be served by **Electronic Mail (email)** upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated March 30, 2017, posted by the State of Water Resources Control Board at  
[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml):

*Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.*

**For Petitioners Only:**

	I caused a true and correct <b>hard copy</b> of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818:  <b>Method of Service:</b> _____
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I certify that the foregoing is true and correct and that this document was executed on April 21, 2017.

Signature: 

Name: Catharine Irvine

Title: Legal Secretary

Party/Affiliation: Downey Brand, LLP

Address: 621 Capitol Mall, Sacramento, CA 95814