

1 DOWNEY BRAND LLP
2 KEVIN M. O'BRIEN (Bar No. 122713)
3 MEREDITH E. NIKKEL (Bar No. 254818)
4 621 Capitol Mall, 18th Floor
5 Sacramento, CA 95814-4731
6 Telephone: 916.444.1000
7 Facsimile: 916.444.2100
8 kobrien@downeybrand.com
9 mnikkel@downeybrand.com

6 Attorneys for Protestant
7 NORTH DELTA WATER AGENCY

8 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11 In the matter of Hearing re California
12 WaterFix Petition for Change

**NDWA RESPONSE TO CALIFORNIA
DEPARTMENT OF WATER
RESOURCES' OBJECTIONS TO
EXHIBITS SUBMITTED IN SUPPORT OF
PROTESTANTS' CASE-IN-CHIEF**

15 The objections raised in the Department of Water Resources' ("DWR") Objections to
16 Exhibits Submitted in Support of Protestants' Case-in-Chief ("Objection") to the exhibits
17 submitted by North Delta Water Agency ("NDWA") are without merit. DWR's Objection is not
18 timely, and those exhibits are relevant, reliable, and plainly admissible. Accordingly, NDWA
19 respectfully requests that the Hearing Officers overrule the Objection in its entirety.

20 **I. PROCEDURAL BACKGROUND**

21 The Hearing Notice issued in this proceeding directed that any party "proposing to present
22 testimony on factual or other evidentiary matters" submit that testimony in writing, including
23 sufficient information in support of technical evidence to "clearly identify and explain the logic,
24 assumptions, development, and operation of the studies or models." Notice, Enclosure D, at 33.
25 In keeping with the SWRCB's policy of discouraging surprise testimony, parties were directed to
26 file a written summary of each witness's direct testimony, together with all supporting exhibits, in
27 advance of the witnesses' oral testimony. January 15, 2016 Ruling Letter Re: Service List of
28 Participants, List of Interested Parties, and Pre-Hearing Conference Agenda, pp. 5-6. The Notice

1 barred parties from reading written testimony directly into the record, instead directing them to
2 use their time on direct examination “to summarize or emphasize their written testimony.”
3 Notice, Enclosure D, at 35. Consistent with that direction, the Notice confirmed that “written
4 testimony affirmed by the witness is direct testimony.” Notice, Enclosure D, at 35.

5 Consistent with those directions, on September 1, 2016 NDWA submitted evidence in
6 support of its case in chief, including a written summary of testimony for each witness proposed
7 to testify at the Hearing (NDWA-3, NDWA-5, NDWA-7, NDWA-9, NDWA-10) and supporting
8 exhibits for that testimony. That submission included, among other supporting documentation,
9 four comment letters authored by Ms. Melinda Terry in her capacity as the General Manager of
10 NDWA (NDWA-35 and NDWA-36) and as the Executive Director of the California Central
11 Valley Flood Control Association (NDWA-37 and NDWA-38)¹; two photographs of the RD 999
12 Headquarter Siphon (NDWA-42 and NDWA-43), taken by Mr. Tom Slater, the President of the
13 RD 999 Board of Trustees; and a map of RD 999, also prepared by Mr. Slater, depicting RD
14 999’s siphons and their proximity to the proposed WaterFix intakes (NDWA-41). Each of these
15 exhibits were referenced and described in the witness’ direct written testimony. NDWA-7, ¶ 2;
16 NDWA-10, ¶¶ 6, 11.

17 The deadline for the written procedural or evidentiary objections to exclude a witness’s
18 testimony was September 21, 2016 at noon. Co-Hearing Officer’s Ruling on Department of
19 Water Resources’ Request for Time, Sept. 9, 2016 (“September 9th Ruling”); *see also* Ruling on
20 Submittal Deadlines, Rebuttal Process, and Scheduling, December 19th, 2016 (“December 19th
21 Ruling”) (confirming that further objections seeking exclusion would be rejected “unless they are
22 based on new information that was presented during cross-examination.”). On September 21,
23 2016, DWR filed a “Master Objection” generally requesting that the Hearing Officers refuse to
24 admit certain unspecified exhibits, on the grounds that that “Protestants have raised various issues
25 that are outside the scope of the hearing.” Master Obj., p. 11. DWR filed no other objection to
26

27
28 ¹ The California Central Valley Flood Control Agency letters (NDWA-37 and NDWA-38) were also incorporated by
reference into NDWA-35 and NDWA-36 (*see* NDWA-35 at p. 5; NDWA-36 at p. 2).

1 NDWA testimony prior to the September 21 deadline.²

2 On October 7, 2016, the Hearing Officers ruled that “specific testimony concerning the
3 adequacy of the information contained in the RDEIR/SDEIS as it relates to a specific hearing
4 issue is permissible,” but testimony on the question of whether the RDEIR/SDEIS satisfies the
5 requirements of CEQA or the National Environmental Policy Act (NEPA) is not relevant.
6 October 7th Ruling, p. 3. The October 7th Ruling identified certain parties whose evidentiary
7 submissions included material outside the scope of Part 1, including testimony regarding the
8 adequacy of the environmental documents for the WaterFix project. *Id.*, pp. 4-5. NDWA was not
9 among the parties named in the October 7th Ruling.

10 At the Hearing on October 20, 2016, DWR objected to oral testimony offered by Mr.
11 Walter Bourez, of MBK Engineers, on the grounds that it was improper for him to discuss the
12 technical details in exhibits previously submitted to the SWRCB, as those exhibits were not part
13 of Mr. Bourez’s “direct testimony.” WaterFix Hearing Transcript, Oct. 20, 2016, 35:23-38:9.
14 Counsel for SVWU explained that Mr. Bourez’s testimony was not just the written summary of
15 testimony provided as SVWU-100, but also included the exhibits prepared by Mr. Bourez and
16 offered by SVWU on the September 1, 2016 deadline. WaterFix Hearing Transcript, Oct. 20,
17 2016, at 37:3-37:20. Recognizing the interrelated nature of the exhibits and oral testimony in this
18 hearing, Hearing Officer Doduc ruled:

19 HEARING OFFICER DODUC: Thank you Mr. Lilly. Mr. Berliner, your
20 objection is overruled. I actually was going to compliment Mr. Bourez on the fact
21 that I appreciated his outline testimony a lot. It was clear, it was succinct, and it
22 did refer back to these other documents that provide the substantive technical
issues to which he is testifying. So, I recognize Mr. Lilly’s argument, and overrule
Mr. Berliner’s objection.

23 WaterFix Hearing Transcript, Oct. 20, 2016, 37:21-38:6.

24 NDWA’s panel of witnesses provided their oral summaries of testimony and were subject
25 to cross-examination at the Hearing on October 28, 2016. Ms. Terry testified that in her role as a

26 _____
27 ² At the time of filing of this response, no final ruling had been issued on DWR’s Master Objection. NDWA
28 previously responded to the Master Objection, and to the extent that DWR intends by this December 30 filing to
incorporate the arguments contained in the Master Objection, NDWA incorporates by reference its prior response to
that objection.

1 General Manager of NDWA her responsibilities included participating in the Delta planning
2 process, including engaging in the BDCP and WaterFix comment process on behalf of NDWA, in
3 order to ensure that NDWA met the obligations imposed upon it by the North Delta Water
4 Agency Act. WaterFix Hearing Transcript, Oct. 28, 2016, 23:15-24:15. In his oral testimony,
5 Mr. Slater provided an overview of RD 999's operations and the potential impacts of the
6 WaterFix on that district. WaterFix Hearing Transcript, Oct. 28, 2016, 55:29-61:15. Mr. Slater
7 testified that the expected changes to water elevations in RD 999 would impact the operations of
8 siphons in that District, resulting in injury. WaterFix Hearing Transcript, Oct. 28, 2016, 56:3-
9 60:20. After the close of testimony on October 28, when each NDWA witness had testified and
10 been made available for cross-examination, NDWA offered all of its exhibits into evidence.

11 Also on October 28, DWR submitted a list of parties whose exhibits, in the opinion of
12 DWR, were still beyond the scope of Part 1. Letter from Mr. Tripp Mizell to Hearing Officers,
13 Re: List of Testimonies that are Outside the Scope of Part 1 Hearing and More Applicable for
14 Part 2, October 28, 2016. No exhibit from NDWA was identified on this list.

15 On December 19, 2016, the Hearing Officers directed parties to submit any additional
16 objections by December 30, 2016, and again confirmed that they would not accept objections that
17 seek to exclude a witness's testimony, in whole or in part, unless that objection was based on new
18 information presented during cross-examination. On December 30, 2016, DWR objected to the
19 admission of Exhibits NDWA-35, NDWA-36, NDWA-41, NDWA-42, and NDWA-43 on the
20 grounds that NDWA's witnesses did not refer to those exhibits during "direct testimony or cross
21 examination," and that therefore those exhibits lacked relevance and foundation. Objection, 5:21-
22 25. DWR additionally objected to Exhibits NDWA-37 and NDWA-38 on the grounds that
23 comment letters regarding the environmental documents for the WaterFix project are irrelevant to
24 Part 1 issues. Objection, 6:1-9.

25 **II. ARGUMENT**

26 DWR's objection does not comply with the Board's requirements, and the subject exhibits
27 are plainly relevant to the issues before the SWRCB in Part 1 of this Hearing. Accordingly, this
28 objection must be overruled in its entirety.

1 A. **The Objection Does Not Comply With the Board’s Rules, and So Must Be**
 2 **Rejected.**

3 Objections to the admission of evidence must be timely and specific. September 9th
 4 Ruling; Gov. Code § 11513(d); *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d
 5 626, 659–660; *People v. Castaneda* (1975) 52 Cal.App.3d 334, 339. This Objection, filed long
 6 after the September 21, 2016 deadline for objections to exclude testimony, and lacking any
 7 meaningful discussion of the basis for the objection, does not meet this standard. A general
 8 evidentiary objection like this one is not sufficient to exclude evidence “without specific
 9 identification of the evidence to which the party objects and the reason for that objection.”
 10 SWRCB Order WR 2012-0012, p. 11, fn. 28.

11 The deadline for written objections seeking to exclude testimony passed on September 21,
 12 2016, and the Hearing Officers confirmed that further objections to testimony seeking exclusion,
 13 “in whole or in part,” would be rejected “unless they are based on new information that was
 14 presented during cross-examination.” Ruling on Submittal Deadlines, Rebuttal Process, and
 15 Scheduling, December 19, 2016 (“December 19th Ruling”), p. 1. The Hearing Officers have
 16 already considered and rejected a claim that exhibits submitted by parties are not properly
 17 considered part of those parties’ direct testimony, and DWR has not identified any new
 18 information presented during cross-examination that would justify its failure to include these
 19 materials in its September 21 objections. *See* WaterFix Hearing Transcript, Oct. 20, 2016, 35:23-
 20 38:9. DWR cannot now rely on semantics to evade the deadline set by the Hearing Officers and
 21 obtain a second bite at the apple. Duplicative objections have no place in this proceeding. *See*
 22 Ruling on Evidentiary Objections and Other Procedural Matters, July 22, 2016 (“July 22nd
 23 Ruling”), p. 3 (“These arguments have been reviewed and considered in our [previous] ruling,
 24 and will not be reexamined.”). As this Objection is both duplicative and untimely, it should be
 25 overruled.

26 B. **The Subject Exhibits Are Relevant and Based on Proper Foundation.**

27 DWR asserts that NDWA-35, NDWA-36, NDWA-41, NDWA-42, and NDWA-43 were
 28 not referred to in direct testimony or on cross examination, and therefore should be excluded

1 because they “lack demonstrated relevance” and foundation. Objection, 5:21-25. These assertions
2 are plainly contradicted by the record, as each of these exhibits were specifically referred to in the
3 written summaries of testimony of either Ms. Terry or Mr. Slater, and each of those written
4 summaries of testimony were later affirmed by those witnesses at the Hearing. *See* WaterFix
5 Hearing Transcript, Oct. 28, 2016, 23:1-34:3 and 55:29-61:15. Pursuant to the Hearing Notice,
6 the affirmation by Ms. Terry and Mr. Slater is sufficient to allow written testimony as direct
7 testimony. Notice, Enclosure D, at 35. Therefore, Ms. Terry and Mr. Slater offered direct
8 testimony regarding each of the disputed exhibits by way of their affirmed written testimony and
9 properly laid the necessary foundation by explaining their understanding of each such exhibit.
10 *See* Evid. Code, § 403 (a witness may establish preliminary facts that are relevant and within the
11 witness’ personal knowledge); *see also Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 324
12 (holding “any ‘qualified witness’ who is knowledgeable about the documents may lay the
13 foundation” for their introduction). In any case, “[t]here is no requirement under the State Water
14 Board regulations or Chapter 4.5 of the APA that a proper trial-like foundation be made for
15 exhibits and evidence.” Ruling on All Outstanding Motions and Procedures for the Upcoming
16 Hearing on Perchlorate Contamination at the 160-Acre Site in the Rialto Area, SWRCB/OCC File
17 A-1824, August 11, 2011, p. 11.

18 Evidence is relevant if it has “any tendency in reason to prove or disprove any disputed
19 fact that is of consequence to the determination of the action.” Evid. Code, § 210. Here, Mr.
20 Slater’s written testimony identified NDWA-42 and NDWA-43 as photographs of the RD 999
21 Headquarter Siphon taken by Mr. Slater, and NDWA-41 as a map of RD 999, also prepared by
22 Mr. Slater. NDWA-10, ¶¶ 1, 2, 6, 11. Mr. Slater testified that if reduced water levels became the
23 norm during operation of the WaterFix Project, “RD 999’s siphons will operate at a continuously
24 reduced efficiency level and result in crop damage within RD 999.” NDWA-10, ¶¶ 11-13; *see*
25 WaterFix Hearing Transcript, Oct. 28, 2016, 55:29-61:15. NDWA-41, NDWA-42, and NDWA-
26 43 are each relevant to the question of whether RD 999 will suffer injury as a result of the
27 changes requested by Petitioners, and so are plainly admissible here.

28

1 Likewise, Ms. Terry's written testimony confirms that "for the past several years, NDWA
2 has participated in good faith in various regulatory and administrative processes relating to
3 potential new water diversion and conveyance facilities in the north Delta. NDWA has
4 consistently and repeatedly asserted in these processes that any projects, programs or actions,
5 including but not limited to the WaterFix, must be: (i) based on the best available science, (ii)
6 consistent with the contractual obligations of the State of California under the 1981 Contract, and
7 (iii) undertaken in accordance with all applicable state and federal laws." NDWA-7, ¶¶ 2. Ms.
8 Terry's written testimony confirms that NDWA-35 and NDWA-36 are true and correct copies of
9 the comment letters submitted by NDWA analyzing WaterFix and its predecessor project.
10 NDWA-7, ¶ 2; *see* WaterFix Hearing Transcript, Oct. 28, 2016, 23:1-13 (affirming Ms. Terry's
11 written testimony). Ms. Terry's responses on cross-examination reiterated the flaws in the project
12 that these comment letters earlier identified and confirmed the Agency's position that the project
13 must be based on the best available science, consistent with the 1981 Contract, and undertaken in
14 accordance with all applicable state and federal laws. WaterFix Hearing Transcript, Oct. 28,
15 2016, 23:15-24:15.

16 Finally, DWR suggests that NDWA-37 and NDWA-38 should be excluded NDWA has
17 not demonstrated that those exhibits are relevant or supported by an "adequate evidentiary basis,"
18 and because "challenges to the environmental review process are outside the scope of Part 1 of
19 this proceeding." Obj., 6:1-9. These assertions, too, are misplaced. The Hearing Officers have
20 repeatedly explained that while testimony regarding WaterFix's compliance with CEQA or
21 NEPA is not relevant to Part 1 of this Hearing, "specific testimony concerning the adequacy of
22 the information contained in the RDEIR/SDEIS as it relates to a specific hearing issue" is
23 permissible. February 11 Ruling, p. 10. Indeed, the February 11 Ruling explained that the
24 SWRCB staff exhibits (which include NDWA-38 as a comment letter among those included in
25 SWRCB-3) are each "public documents that contain information that is relevant to hearing
26 issues." February 11 Ruling, p. 10. NDWA-35, 36, 37, and 38 each reflect NDWA's ongoing
27 participation in this regulatory process, and each identify flaws that remain unaddressed in the
28 proposed WaterFix project. Regardless of whether or not the environmental review of WaterFix

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

complied with CEQA or NEPA, the flaws identified in those comment letters are relevant to the question of whether the changes requested by Petitioners will result in injury to a legal user of water.

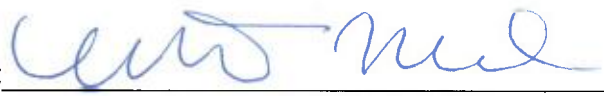
Government Code section 11513, subdivision (c), is unambiguous: where evidence is “relevant and such as could be relied on by responsible persons,” there is a “statutory mandate” that it be admitted. *Martin v. State Personnel Bd.*, (1972) 26 Cal.App.3d 573, 582. Because the subject exhibits are both relevant and reliable, and because DWR’s objection is not timely, this objection must be overruled.

III. CONCLUSION

For the reasons outlined herein, DWR’s objections to the exhibits presented by NDWA should be overruled in their entirety.

DATED: January 6, 2017

DOWNEY BRAND LLP

By: 

MEREDITH E. NIKKEL
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(s);

**NDWA RESPONSE TO CALIFORNIA DEPARTMENT OF WATER
RESOURCES' OBJECTIONS TO EXHIBITS SUBMITTED IN SUPPORT OF
PROTESTANTS' CASE-IN-CHIEF**

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 November 15, 2016, 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:

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 hard copy 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: Method of Service: _____
--	---

I certify that the foregoing is true and correct and that this document was executed on January 6, 2017.

Signature: 

Name: Catharine Irvine

Title: Legal Secretary

Party/Affiliation: Downey Brand, LLP

Address: 621 Capitol Mall, Sacramento, CA 95814