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8 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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10 In the matter of 2016 SWRCB Hearing re
11 CalWaterFix Petition for Change

**TESTIMONY OF MELINDA TERRY,
NORTH DELTA WATER AGENCY**

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DOWNEY BRAND LLP

1 **PERSONAL BACKGROUND**

2 1. My name is Melinda Terry. I am the current Manager of the North Delta Water
3 Agency (“NDWA”). I have served as Manager of NDWA since 2008. As Manager I am
4 responsible for a broad range of activities including administration of the “Contract for the
5 Assurance of a Dependable Water Supply of Suitable Quality” (Exhibit DWR-306) executed
6 between NDWA and the Department of Water Resources (“DWR”) in 1981 (“1981 Contract”),
7 pursuing legislative and legal actions necessary to protect the water supply in NDWA from
8 intrusion of ocean salinity, and generally assuring the lands within NDWA a dependable supply
9 of water of suitable quality to meet present and future needs.

10 2. I have also been responsible for representing NDWA in various planning processes
11 relating to development of the “California WaterFix” Project (“WaterFix”) and its predecessor,
12 the Bay-Delta Conservation Plan (“BDCP”). NDWA submitted comment letters on the 2014
13 BDCP Draft Environmental Impact Report/Environmental Impact Statement (“EIR/EIS”) and the
14 2015 WaterFix Recirculated Draft EIR/Supplemental EIS. Exhibits NDWA-35 and NDWA-36
15 are true and correct copies of the NDWA comment letters. I am also the current Executive
16 Director of the (“CCVFCA”). I have served as the Executive Director of CCVFCA since 2008.
17 CCVFCA is a non-profit organization representing more than 75 local agencies with flood
18 management authority in the northern Central Valley, including reclamation districts responsible
19 for parcel drainage and levee maintenance in the Delta. CCVFCA submitted comment letters on
20 the 2014 BDCP Draft EIR/EIS and the 2015 WaterFix Recirculated Draft EIR/Supplemental EIS.
21 Exhibits NDWA-37 and NDWA-38 are true and correct copies of the CCVFCA comment letters.

22 3. Prior to joining NDWA, I served three years as the Deputy Secretary for
23 Legislation for the California Resources Agency in the Schwarzenegger Administration from
24 2004-2006. In my role as the Deputy Secretary I was responsible for overseeing the legislative
25 activities of approximately 8 departments, 17 boards and commissions, 9 conservancies, and the
26 Ocean Protection Council. Attached as Exhibit NDWA-8 is a true and correct copy of my
27 Statement of Qualifications.
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OVERVIEW OF TESTIMONY

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2 4. The principal purpose of my testimony is to provide a broad overview of the
3 NDWA and its 1981 Contract with the Department of Water Resources. (Exhibit DWR-306). I
4 will also provide a brief overview of the testimony to be presented on behalf of NDWA. While I
5 am not an attorney, I have worked extensively with the 1981 Contract over the past 8 years and I
6 have become very familiar with its provisions. In order for the State Water Resources Control
7 Board (“SWRCB”) to fully and fairly evaluate NDWA’s position that legal users of water within
8 NDWA will suffer injury if the WaterFix is constructed and operated as currently configured it is
9 essential that the SWRCB understand the purpose of the NDWA and key provisions of the 1981
10 Contract pertinent to these proceedings.

PURPOSE AND AUTHORITY OF NDWA

11 5. Formed by a special act of the State Legislature in 1973 (North Delta Water
12 Agency Act, Chapter 283, Sections 115-1.1 through 115-9.1), the NDWA jurisdictional
13 boundaries encompass approximately 302,000 acres situated in the Sacramento-San Joaquin
14 Delta, as defined in Water Code § 12220, which includes portions of Sacramento, San Joaquin,
15 Solano, and Yolo Counties. Exhibit NDWA-33 is a map that accurately depicts the NDWA
16 boundaries and counties. A list of the Reclamation Districts within the boundaries of NDWA is
17 provided in Exhibit NDWA-34.

18 6. The general purpose of NDWA is to “take all reasonable and lawful actions,
19 including to negotiate, enter into, execute, amend, administer, perform, and pursue legislative
20 and legal actions” to protect the water supply of the lands within NDWA against intrusion of
21 ocean salinity and to assure the lands within NDWA a dependable supply of water of suitable
22 quality sufficient to meet present and future needs.

23 7. NDWA is authorized to levy property assessments, make and execute contracts
24 and other instruments necessary to exercise its powers, to conduct technical and other
25 investigations necessary to accomplish its purpose, and to act jointly with or cooperate with the
26 state and federal agencies to perform the duties required in its governing statutes. NDWA has no
27 authority or power to affect, bind, prejudice, impair, restrict, or limit vested water rights.
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PROVISIONS OF THE 1981 CONTRACT RELEVANT TO THIS PROCEEDING

8. The crux of the 1981 Contract is a guarantee by the State of California that, on an ongoing basis, DWR will ensure through the operation of the SWP that suitable water of specified quality will be available to satisfy all agricultural and other reasonable and beneficial uses in all channels within NDWA’s boundaries. The 1981 Contract differs from other DWR water supply contracts in that there are no acre foot limitations. Instead, the State is obligated to furnish “such water as may be required within the Agency to the extent not otherwise available under the water rights of water users.” (1981 Contract, Article 8.)

9. The State also recognizes the right of water users in NDWA to divert from Delta channels and agrees that said diversions and beneficial uses shall not be disturbed or challenged by the State (1981 Contract, Article 8); and commits “not to alter the Delta hydraulics in a manner to cause a measurable adverse change in the ocean salinity gradient or relationship among the seven monitoring locations identified in the 1981 Contract and interior points from those locations, with any particular flow past Emmaton.” (1981 Contract, Article 2.)

10. The State must also affirmatively defend the use of water to maintain the water quality standards set forth in the 1981 Contract as a reasonable and beneficial use; and agrees that such use should only be examined after a judicial determination that all uses of water exported from the Delta by state and federal agencies are reasonable and beneficial; and that irrigation practices, conservation efforts, and groundwater management in those export areas should be examined in particular. (1981 Contract, Article 8.)

11. Recognizing the importance of protecting water quality for beneficial uses, if the water quality in the NDWA channels falls below the water quality standards specified in the 1981 Contract, then the State is required to: (i) cease all diversions to storage in SWP reservoirs; (ii) release stored water from SWP reservoirs; (iii) cease all export by the SWP from the Delta channels; (iv) or any combination of these. (1981 Contract, Article 12.)

12. The 1981 Contract has been amended once. In accordance with a 1997 memorandum of understanding between NDWA and DWR the 1981 Contract was modified to

1 allow DWR to purchase the majority property holdings on Sherman Island in lieu of providing an
2 overland water supply in accordance with Article 5. Consistent with the intent of Article 5,
3 NDWA agreed the water quality standards for the Emmaton monitoring location specified in
4 Attachment A would be applied to the Three Mile Slough monitoring station thereafter. DWR
5 also waived any NDWA liability for damages, reimbursed NDWA's engineering costs incurred
6 from design of the overland facility, and permanently reduced NDWA's annual contract payment
7 by the percentage of acres owned or thereafter purchased by DWR. Exhibit NDWA-12 is a true
8 and correct copy of the 1997 amendment.

9 13. A 1998 Memorandum of Understanding between NDWA and DWR (Exhibit
10 DWR-308) specifically relates to the water right permit changes at issue in the WaterFix petition.
11 In accordance with DWR's obligation under Article 2 of the 1981 Contract to operate the SWP in
12 a manner that provides water quality at least equal to the better of the water quality standards in
13 the 1981 Contract or water quality objectives as they are occasionally updated by the SWRCB,
14 the 1998 agreement specifies that DWR is responsible for providing SWP water supplies to
15 achieve any flow or salinity objectives imposed by the 1995 Delta Water Quality Plan that would
16 otherwise apply to water users in the NDWA.

17 14. NDWA makes an annual payment to DWR pursuant to Article 10 in exchange for
18 the reimbursable benefits allocated to water users within NDWA resulting from the operation of
19 the SWP and CVP projects, which are to be conversely offset by any detriments caused thereby.
20 Exhibit NDWA-39 is a summary of all payments made to date by NDWA to DWR, totaling just
21 over \$10 million since 1981.

22 15. Although the two signatories to the 1981 Contract are public agencies, landowners
23 who execute subcontracts pursuant to Article 18 have an additional legal mechanism to enforce
24 the terms of the 1981 Contract on their own, if necessary. Many of these subcontracts have been
25 signed and recorded by the appropriate county on the property deed of lands within NDWA.

26 16. The 1981 Contract does not have a termination date, but does require negotiations
27 every 40 years to consider revisions to the annual payment amount. The first payment revision
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1 negotiation is scheduled to commence in 2021. (1981 Contract, Article 9)

2 17. The 1981 Contract remains in full force and effect, with a true and correct copy
3 submitted in this proceeding as Exhibit DWR-306.

4 18. NDWA retained a consultant, High Impact, Inc., to produce Exhibit NDWA-40, a
5 short “flyover” film that presents a view of the NDWA service area and the proposed new
6 intakes. At my direction, High Impact, Inc. reviewed the conceptual engineering report (Exhibit
7 DWR-212) and the Petitioners’ intake animations¹ to develop the animated depictions of the
8 proposed intakes. The renderings in the film rely on Petitioners’ own evidence in this proceeding
9 for location and design specifications of the intakes and tunnels. Specifications for the tunnel
10 animation were drawn from Exhibit DWR-2 errata, *California WaterFix: Engineering Overview*,
11 Engineering Refinements, p. 4. Specifications for the intake animations were drawn from Exhibit
12 DWR-2 errata, *California WaterFix: Engineering Overview*, Typical River Intake Rendering, p.
13 13, and Exhibit DWR-212, DHCCP *Conceptual Engineering Report*, Figure ES-1 (p. 25), Figure
14 3A (p. 288), Figure 4A (p. 290), Figure 5A (p. 292), and Figure 7 (p. 296). At my further
15 direction, High Impact, Inc. reviewed the Delta Protection Commission’s “Economic
16 Sustainability Plan for the Sacramento-San Joaquin River Delta”, dated January 19, 2012² and the
17 University of California Cooperative Extension’s Delta Crops Resource Management section on
18 Delta Crops for 2012³ to present agricultural data during the film. I have reviewed Exhibit
19 NDWA-40 and the referenced materials.

20 **OVERVIEW OF NDWA’S PROTEST**

21 19. For the past several years, NDWA has participated in good faith in various
22 regulatory and administrative processes relating to potential new water diversion and conveyance
23 facilities in the north Delta. NDWA has consistently and repeatedly asserted in these processes
24 that any projects, programs or actions, including but not limited to the WaterFix, must be: (i)
25 based on the best available science, (ii) consistent with the contractual obligations of the State of

26 ¹ Available at https://www.youtube.com/channel/UCwshE4HatFzyTi2X1qG_tDA.

27 ² Available at http://www.delta.ca.gov/res/docs/ESP/ESP_ES_FINAL.pdf.

28 ³ Available at <http://ucanr.edu/sites/deltacrops/>.

1 California under the 1981 Contract, and (iii) undertaken in accordance with all applicable state
2 and federal laws.

3 20. When DWR signed the 1981 Contract, the State accepted NDWA's assertion in
4 Recital (h) of the 1981 Contract that its water users have the right to divert and will continue to
5 divert water from the Delta that would have been available therein if the SWP and CVP were not
6 in existence; together with the right to enjoy or acquire such benefits to which the water users
7 may be entitled as a result of the SWP and CVP. Recital (g) also memorializes the State's
8 commitment to comply with Part 4.5, Division 6 of the California Water Code which affords a
9 first priority to providing salinity control and maintenance of an adequate water supply in the
10 Delta for reasonable and beneficial uses; and relegates to lesser priority all exports of water from
11 the Delta to other areas for any purpose. NDWA has filed this protest to ensure that any terms
12 and conditions inserted into the SWP/CVP permits in this hearing process are designed to uphold
13 and implement these foundational water rights assurances for all beneficial uses within its
14 jurisdiction.

15 21. Because the WaterFix does not include any operations criteria or propose permit
16 terms, NDWA asserts the Petitioners' conclusions that no legal injury to other water users is
17 premised on speculative assumptions that are not supported by the necessary quantitative data or
18 analysis identifying anticipated changes in water quantity, water quality, timing of diversion or
19 use, consumptive use of the water, reduction in return flows, or reduction in the availability of
20 water within the streams affected by the proposed changes.

21 22. NDWA will present expert testimony by Gary Kienlen and Shankar
22 Parvathinathan, of MBK Engineers, explaining in more detail how the Petitioners have failed to
23 establish that the WaterFix will not cause injury to other legal users of water. This expert
24 testimony will be supplemented by the testimony of two third-generation north Delta farmers,
25 Steve Mello and Tom Slater providing specific examples of impacts to water users in the north
26 Delta.

27 23. Gilbert Cosio of MBK Engineers will identify WaterFix construction activities that
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1 will impair the safe conveyance of flood flows during high water events and interfere with local
2 flood management facilities, resulting in seepage and erosion damage to levees, reduced flood
3 capacity in Delta channels, and rendering drainage systems incapable of keeping lands reclaimed
4 for farming.

5 24. Based on DWR's aforementioned contractual obligations to operate the SWP to
6 comply with water supply and quality assurances in the 1981 Contract and the testimony provided
7 by NDWA's witnesses, it is the position of NDWA that the WaterFix as currently proposed will
8 cause injury to legal users of water within NDWA.

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