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November 8, 2022

Michael George, Delta Watermaster  
State Water Resources Control Board  
Delivered Via E-mail: [Michael.George@Waterboards.ca.gov](mailto:Michael.George@Waterboards.ca.gov)

**Re: Comments on the Draft Findings and Resolution of Friant Water Authority’s  
Complaint Alleging Unlawful Water Diversion in the Legal Delta**

Dear Watermaster:

The North Delta Water Agency (NDWA) appreciates the opportunity to comment on the Delta Watermaster’s Draft Summary of Findings and Resolution (“Findings”) of its investigation of a complaint by the Friant Water Authority (FWA) alleging unlawful water diversions of Central Valley Project (CVP) and State Water Project (SWP) “Project Water” in the Legal Delta.

NDWA agrees with the Watermaster’s conclusion that FWA’s complaint fatally lacks the information necessary to distinguish Project Water from available natural flows in the Delta. NDWA also agrees with and supports the comments from the Central Delta Water Agency (CDWA) and South Delta Water Agency (SDWA) for summarizing the unique physical and historical nature of the Delta, and for underscoring the State’s continuing obligation to protect beneficial uses of water within it.

**Background**

The Delta’s statewide value as a source of water, agricultural output, and fish and wildlife habitat is well-recognized. (See Wat. Code, § 12200, *et seq.*; see also Pub. Resources Code, §§ 29703–29704.) California law prioritizes the vested rights and public interest needs for water in the Delta over exports from the Delta for any other purpose. (Wat. Code, § 12204; see also State Water Board Water Rights Decision 1485, at p. 9.) Construction of the CVP in the 1930s and the SWP in the 1960s greatly diminished the Delta’s seasonal supply of fresh water that used to naturally maintain water quality. Recognizing the outsized impacts of the Projects on northern California and Delta water interests, the Legislature enacted the County of Origin Law of 1931 (Wat. Code, §§ 10500-10506), the Watershed Protection Statute of 1933 (Wat. Code, §§ 11460-11465), and the Delta Protection Act of 1959 (Wat. Code, §§ 12200-12205) to clarify the priority of areas of origin and help preserve water quality in the Delta.

NDWA was formed by special act of the Legislature in 1973 for the purpose of ensuring a dependable supply of water of suitable quality sufficient to meet present and future needs for

approximately 300,000 acres of the northern portion of the Delta. (Wat. Code App'x, § 115-4.1.) Its boundaries encompass substantially all of that portion of the Sacramento-San Joaquin Delta, as defined in Water Code Section 12220, that is situated within Sacramento, Yolo, and Solano Counties, as well as lands in northeastern San Joaquin County comprising New Hope Tract, Canal Ranch, and Staten Island.

On January 28, 1981, NDWA and DWR negotiated the Contract for the Assurance of a Dependable Water Supply of Suitable Quality (1981 Contract) to mitigate the water rights impacts of the SWP on northern Delta water rights. The crux of the 1981 Contract, which remains in full force and effect, is a guarantee by the State of California that, on an ongoing basis, DWR must operate the SWP in a manner that provides year-round water quality, water elevation, and water supply in the North Delta to satisfy all agricultural and other reasonable and beneficial uses in all channels within NDWA's boundaries. The 1981 Contract contains numerous recitals and agreements that speak to the nature of the Delta hydrology and the significance of NDWA's water rights, and is incorporated here in its entirety.

### **NDWA Comments on the Delta Watermaster's Findings**

#### **A. NDWA Water Users are Properly Excluded from Enforcement Consideration.**

As a preliminary matter, NDWA agrees with the Watermaster's decision in Section VI of the Findings to narrow the focus of its investigation by eliminating consideration of potential enforcement against unauthorized diversions within the NDWA and East Contra Costa Irrigation District (ECCID) boundaries by virtue of their contracts with DWR. In executing the 1981 Contract, the State has already agreed to relevant facts about the Delta that the Watermaster should reference in its Findings. The State recognizes the right of water users within NDWA to divert water for agricultural, municipal, and industrial uses, and said diversions are not to be disturbed or challenged by the State. (1981 Contract, Art. 8(ii) and Recital (a).)

#### **B. The Mass Balance Analysis Underlying FWA's Complaint is Insufficient.**

NDWA also supports the Watermaster's central finding in Section V that FWA's complaint fails for lack of evidence to enforce against any individual diverter within the Legal Delta. The complaint alleges unauthorized depletions of previously stored CVP and SWP water were taking place in the Delta, based on a mass balance analysis that showed Delta inflows were at times almost entirely supported by SWP and CVP releases. However, the analysis did not take into account the variables of a tidal system or the existence of diverters between the Delta and the releases.

The Watermaster's Findings acknowledge that the mass balance approach utilized by FWA and State Water Board staff to try and quantify Delta inflows and determine water availability was flawed in several respects. (Findings, at p. 5.) For instance, FWA assumed that all flows that were bypassed by the SWP reservoirs were conveyed to the Delta, without accounting for any depletions by upstream diverters. (*Id.*)

Critically, FWA attempted to apply a mass balance analysis for streamflow to a water system that includes tidal inflows. As noted in the comments by CDWA and SDWA, the amount of water present in the Delta at any time is fed by tidal flows, drainage pumping, artesian flow, accretions of groundwater, root zone retention, and precipitation, in addition to natural tributary

flows and Project Water. (CDWA and SDWA November 1, 2022 Comment, at p. 2; see also CDWA and SDWA August 5, 2022 Comment, Attachment A [technical comment that the water unavailability methodology for the Delta Watershed prepared by State Water Board staff ignores the unique hydrodynamics of a tidal system].) Because of those inherent flaws, neither FWA's analysis nor the Watermaster's investigation was ultimately able to quantify the amount of brackish water entering the Legal Delta that contributes to the natural flows available for diversion.

Despite the flaws identified by the Watermaster, FWA continues to insist that the mass balance analysis is sufficient to support enforcement against individual Delta water users during certain months of low natural freshwater flows. (Findings, p. 5, fn. 19.) This insistence indicates to NDWA that the final Findings document must be bolstered with key recitals and provisions of the 1981 Contract that highlight water quality as the primary concern. (See, e.g., 1981 Contract, Recital (e) ["As a result of the geographical location of the lands of the Delta and tidal influences, there is no physical shortage of water."].)

NDWA also incorporates CDWA and SDWA's references to the historical records and statutes cited in the 2013 Delta Watermaster's report on California's Area of Origin Laws that exemplify how water issues in the Delta have focused on quality, as opposed to quantity. (See, e.g., June 1969 Memorandum Report, DWR ["These studies, using the classical approach to solution of water rights problems, considered priority of rights to quantity of water rather than quality. No resolution was reached in the Delta using this approach. Actually, in the Delta, *the question of quantity is of little concern, since the Delta is never short of water.*"].)

### **C. The Findings Should Include Relevant Legal and Historical Authorities and Additional Details to Support its Conclusions.**

For the sake of establishing a clear record of the Watermaster's investigation, the final Findings presented to the State Water Board should be revised to address the following remaining issues. The title of the Findings document as a "Summary of Findings and Resolution" implies that a more detailed Findings and Resolution document exists, but is not provided for the State Water Board's consideration. Each of the sections discussed below would be aided by additional detail and background on the legal and procedural authorities that govern enforcement of such complaints.

**Sections I, II, and III** of the Findings are overly succinct and leave out most of the legal and historical context introduced in this comment letter and in the comments previously submitted by CDWA and SDWA. These sections should include the relevant standards and authorities to support the Findings' reasoning and conclusions.

**Section IV, Investigation Process**, should similarly provide greater detail to describe the procedural framework for coordinating meetings with the complainants, and the issues that were addressed during the year-long investigation, so that the public may better understand it. As currently written, it appears a great deal of interaction occurred with complainants, but less with Delta water users or agencies.

Beginning with the second **Section V, Differentiating Water Uses within the Legal Delta**, the roman numerals identifying the headings are off by one.

**Section VIII.A, Legal Issues**, describes how the Watermaster’s investigation “focused on settled issues of water rights administration”, identifying two legal issues that have been resolved since 2015: (i) standards and burdens of proof needed to prosecute alleged unlawful diversions; and (ii) the “indicia” of a riparian right after the parcels of land have been severed to remove contiguity with a watercourse. It is not clear how these legal issues were utilized in the course of the FWA investigation. Further discussion of the Byron-Bethany case would be warranted, since the State Water Board enforcement team ultimately withdrew its prosecution due to insufficient evidentiary data. While the Byron-Bethany case may have informed the current Water Availability Methodology for the Delta Watershed, the Findings state that the FWA investigation was “based on a separate analysis,” presumably the mass balance approach, which failed to develop into a workable model.

The discussion of the *Modesto Irrigation District v. Tanaka* case is referenced for the idea that “colorable riparian water right claims represent the predominant justification” for agricultural diversions, though there is no explanation how this case was relevant to this investigation. A third case, decided in 2020, *Stanford Vina Ranch Irrigation Co. v. State of California*, is mentioned as a “tangentially related” case because it upheld the State Water Board’s authority to implement curtailment regulations. However, the Findings misstate the holding by suggesting that the Court of Appeal broadly upheld the State Water Board’s authority to implement curtailment regulations. The curtailment orders were issued pursuant to emergency regulations in that case. (*Stanford Vina Irrigation Co. v. State of California* (2020) Cal.App.5th 976, 983.)

Relatedly, and as a follow up to the Byron-Bethany enforcement proceeding, the Sixth District Court of Appeal recently held in the *California Water Curtailment Cases* (2022) 83 Cal.App.5th 164, that the State Water Board may have authority to curtail pre-1914 or riparian rights under emergency regulations, but does not have the ability to curtail pre-1914 rights under Water Code section 1052(a) on the basis of water availability determinations without an emergency regulation or other authority.

**Section VIII.B, Unresolved Issues Not Addressed in the Investigation**, identifies several important legal issues that were raised by CDWA and SDWA in earlier comments, but does not explain why these issues were left unresolved. Additional discussion is warranted for the legal considerations that touch on FWA’s allegation of unlawful diversions in the Delta, particularly the appropriate burden of proof for establishing riparian rights.

**Section IX, Alternative Paths to Resolve Allegation of Unlawful Diversion**, acknowledges potential pathways to achieve a working methodology for enforcing claims of unlawful Delta diversions such as improved data, refined methodology, collaborating on curtailments, or simply resolving legal disputes, but does not go further to analyze them.

### Conclusion

NDWA agrees with the Findings that FWA's mass balance methodology lacked the evidentiary justification to support enforcement of its complaint against individual Delta water users.

NDWA also agrees with the Findings that the 1981 Contract works to preclude the consideration of NDWA water users for enforcement of such a complaint. NDWA believes the Findings can be made stronger and more comprehensive by including the historical and legal principles that govern water rights in the Delta and more details on the actual investigation conducted by the Watermaster, including which documents it relied on to determine Findings. Lastly, NDWA supports the incorporation of its comments and the comments of CDWA and SDWA in the final version of the Watermaster's Findings.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Melinda Terry". The signature is fluid and cursive, with a large loop at the end of the last name.

Melinda Terry,  
Manager