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October 8, 2008

John Kirlin, Executive Director
Delta Vision
1416 9th Street, Suite 1311
Sacramento, CA 95814

Re: Watershed-of-Origin Provisions in California Water Law (Water Code Sections 11460-63)

Dear Mr. Kirlin:

This letter is in response to the July 2, 2008 letter to you from the Attorney General's Office regarding "Area of Origin Provisions in California Water Law." The City of Fairfield, representing also the cities of Benicia and Vacaville, offers the following points to clarify and correct some of the statements in the letter for the record.

Page 6: "Recently, the Cities of Fairfield, Vacaville, and Benecia (sic) entered into contracts with the Department [of Water Resources], rather than seeking their own water rights based on watershed of origin benefits."

We wish you to be aware that these contracts constituted a settlement of the cities' claims to watershed-of-origin water rights based on 1998 filings for water rights permits we made with the State Water Resources Control Board. The Department and six other parties filed protests.

In May 2002, six weeks prior to the State Board hearing scheduled to resolve the outstanding protests, the Department proposed a comprehensive settlement. The settlement agreement, reached in February 2003, resulted in the cities withdrawing their permit applications, making the protests moot. The settlement provided the cities with a water supply comparable to what they would have received under a successful water rights hearing process (about 32,000 acre-feet per year). The settlement also included a wheeling (conveyance) agreement for settlement water through the North Bay Aqueduct, a unit of the State Water Project.

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It is also important to note that the cities reserved their respective rights pursuant to Water Code sections 11460-11465 to file an application for additional quantities of water needed to meet future demands over and above the amount of water provided for in the settlement.

Page 9: Quoting from 25 Ops.Cal.Atty.Gen. 8 at 24, "It is the purpose and effect of . . . section 11462 to make it crystal clear that no person entitled to the priority reserved by section 11460 is thereby entitled to receive free of charge water which is made available by construction of any project works by the authority."

What constitutes a legally acceptable charge for any such "project water" remains an open question. However, for the "authority" (i.e., the Department) to deny project water at any cost would be a violation of section 11460, because that section prohibits operation of the project in a manner that deprives watershed-protected areas, "directly or indirectly," of water that they require.

Similarly, a watershed-of-origin claimant has a legal right to a wheeling agreement, at some cost, as our cities obtained to the North Bay Aqueduct from the Department by settlement. We contend that to have meaning, the priority section 11460 grants must extend to sites for facilities as well as water rights. By occupying the best locations for dams, canals, and other facilities—and by causing environmental impacts related to those facilities—the "works of the authority" (i.e., the State Water Project and the Central Valley Project) have, in a very real sense, deprived watershed-of-origin claimants of the ability to build their own facilities. Our cities were consequently prepared to claim, prior to settlement, that if the Department refused to provide us with a wheeling agreement for the North Bay Aqueduct under reasonable terms, it would constitute an effort to deprive us of our water rights "directly or indirectly," which is prohibited by section 11460.

Page 9: "As noted above, recently, the Cities of Fairfield, Benecia (sic) and Vacaville entered into contracts with the Department, under which they will receive and pay for State Water Project water."

This statement is factually incorrect. The cities' settlement water is, by definition in the settlement agreements, not "State Water Project water" (though by providing the cities with settlement water, the Department undeniably has slightly reduced the reliability of Project Water to its contractors). The cities' settlement water is available only when standard water rights Term 91 is not in effect, meaning settlement water is not "made available" by state or federal project facilities. The settlement water is derived from natural flow. Consequently, settlement water payments, to the extent they are

John Kirlin

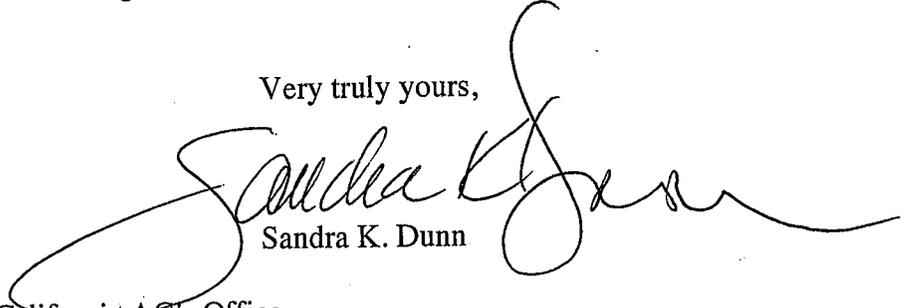
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required, are simply part of the negotiated settlement and are not "Project Water" payments.

Very truly yours,

A handwritten signature in black ink, appearing to read "Sandra K. Dunn". The signature is fluid and cursive, with a large loop at the end.

Sandra K. Dunn

cc: Virginia Cahill, California AG's Office
Richard Wood, City of Fairfield
Dave Tompkins, City of Vacaville
Chris Tomasik, City of Benicia
Dave Okita, Solano County Water Agency

SKD:cr