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The Pebble Beach Company, and
6 City of Carmel

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STATE OF CALIFORNIA
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
10 CENTRAL COAST REGION

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12 In the matter of:

13 PROPOSED CEASE AND DESIST
ORDERS,

14 Requiring The Pebble Beach Company,
Monterey County, and City of Carmel, to
15 Cease and Desist from Discharging Waste to
Areas of Special Biological Significance
16 (ASBS) in Violation of Prohibitions
Prescribed by the State Water Resources
17 Control Board

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PROPOSED CEASE AND DESIST ORDER
NOS. R3-2005-0021 AND R3-2005-0022

MOTION FOR CONTINUANCE

Hearing Date: February 11, 2005
Time: 8:30 a.m.
Place: Richard W. Nutter Agricultural
Conference Center
1432 Abbott Street
Salinas, CA 93901

1 **I. OPENING STATEMENT**

2 By this motion, The Pebble Beach Company and the City of Carmel
3 (“Respondents”) hereby respectfully request that the Regional Water Quality
4 Control Board grant a continuance of the hearing on Cease and Desist Orders No.
5 R3-2005-0021 and -0022, presently set for February 11, 2005. Good cause exists
6 for this motion because Respondents have only recently obtained representation in
7 this matter and would be prejudiced by the inability to adequately prepare for the
8 hearing should the continuance not be granted. Respondents’ constitutional right
9 to due process will be denied if they are not given adequate opportunity to
10 prepare. The action the Regional Board proposes to take affects the substantive
11 rights of Respondents, constituting formal agency enforcement action, fixing
12 substantive rights, and subjecting Respondents to material risk regarding the
13 Agency’s proposed findings of fact and conclusions of law. Under these
14 circumstances, Respondents are entitled to a full and fair opportunity to prepare
15 and put on a defense, exercising the rights to offer their own witnesses and cross-
16 examine those agency personnel involved in this action. Accordingly, the
17 Regional Board must continue the proceedings pursuant to this motion.
18 Should the Regional Board choose to deny this Motion for Continuance, Pebble
19 Beach has filed a separate Motion to Modify Proceedings of this hearing,
20 requesting additional time to adequately present its case. However, granting the
21 Motion to Modify Proceedings will not cure the Agency’s due process violations.
22 Under separate cover, Respondents are subpoenaing Regional Board records
23 relevant to these proceedings in order to more adequately present its case. In
24 order to cure Due Process violations, the Regional Board’s only recourse is to
25 grant our motions to continue, set this matter for a later date, and in the meantime
26 produce the documents per the subpoenas and give Respondents a reasonable pre-
27 hearing opportunity to review them.
28 Consequently, Pebble Beach respectfully requests that the hearing be continued

1 for a period of not less than 30 days.

2 **II. ARGUMENT**

3 **A. No Harm Will Result From A Continuance**

4 Pebble Beach has owned and operated a golf course adjacent to Carmel Bay since
5 1919—over 85 years. In 1975, the Carmel Bay was first designated as an Area of Special
6 Biological Significance (ASBS) by Resolution No. 75-61 of the State Water Resources Control
7 Board. More recently, Senate Bill 512, which became effective January 1, 2005, changed the
8 language of Section 36700(f) of the California Public Resources Code. However, the full
9 significance and scope of this change has yet to be determined by either the State Water
10 Resources Control Board (“State Board”), the Regional Water Quality Control Boards, or the
11 courts, or the regulated community. Consequently, every entity state-wide that is potentially
12 connected to the ASBS is still attempting to determine their duties and responsibilities required
13 by the legislative change.

14 Respondents have long had a unique interest in protecting the Carmel Bay and
15 have been good stewards of the natural resources under that control. These new statutory
16 changes have not diminished that commitment to stewardship. Furthermore, there are no recent
17 changes that render any particular urgency to this hearing. Granting a continuance will not alter
18 the status quo that has been in effect for decades. The Agency has not put forth any evidence
19 that there has been, is, or will be any deterioration of the natural water quality of the ASBS.
20 Sound public policy dictates that the State and Regional Boards, the entities connected to the
21 ASBS, and the courts should have additional time to more fully consider the impact of the new
22 legislation and the proposed regulations of the ASBS.

23 In the Board’s February Response to Comments for the CDOs, the Board
24 indicated that it had prioritized the issuance of the CDOs based upon the Phase II application for
25 a Municipal Separate Storm Sewer System (MS4) Storm Water Management Plan. However,

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1 because Pebble Beach is not an MS4 under the Agency's logic,¹ there is no urgency to enforcing
2 the CDO immediately with respect to it, as the Phase II permit is not at stake. Accordingly, a
3 decision on the CDO's should be delayed until the Regional Board can evaluate and analyze
4 similarly-situated entities. To pursue this issue now in the absence of any urgency or evidence
5 showing any present impact to the water quality of the Carmel Bay ASBS, and in particular
6 against a private entity such as Pebble Beach, constitutes selective enforcement and violation of
7 Respondents' Due Process rights.

8 **B. Respondents Have Only Recently Obtained Representation In This Matter**

9 Recent legislative changes, along with the rules and regulations necessary to
10 implement and give effect to those changes, pose complex legal questions for Respondents and
11 the other entities served with the Cease and Desist Orders ("CDO"). Respondents' recognition
12 of the potential sweeping public policy implications prompted them to retain counsel to represent
13 them in this matter. However, this occurred only very recently. Counsel was formally asked to
14 represent Respondents in this matter on February 3, 2005 and Counsel has been working
15 diligently to make written submissions to the Agency to prepare for this hearing, but such
16 preparation cannot occur overnight.

17 Moreover, the CDOs raise issues of first impression and of statewide importance.
18 By issuing these CDOs, the Agency is attempting to assert that no entity, not even a private
19 property owner such as Pebble Beach, can allow any storm water, whether point or non-point
20 source, to enter an ASBS. As noted in Finding 6 of the Pebble Beach CDO, the CDOs rely in
21 part upon Senate Bill 512, whose provisions only became effective January 1, 2005. It is not
22 reasonable to issue the CDOs on the basis of the recently modified regulatory scheme introduced

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24 ¹ An MS4 is defined by federal regulations, specifically 40 C.F.R. 122.26. The framework of
25 122.26 generally defines an MS4 as a composition of "separate storm sewers." A
26 "municipal separate storm sewer," which may include a conveyance or system of
27 conveyances, must be "[o]wned or operated by a State, city, town, borough, county, parish,
28 district, association, or other public body (created by or pursuant to State law). . . ." These
separate sewers, owned by a public entity, comprise the MS4. An MS4, or municipal
separate storm sewer system, cannot be comprised of privately owned storm sewers. The
PBC, organized as a general partnership, is not an MS4 and is improperly classified as such
in the draft CDO.

1 by Senate Bill 512, prohibiting all discharges, without allowing Respondents adequate time
2 prepare a challenge the Agency's interpretation and application of the new enforcement scheme.
3 Moreover, if the prohibitions in the CDO can be directed towards a private property owner such
4 as Pebble Beach, it implies that private landowners situated near ASBS up and down the
5 California coast could be subjected to these same prohibitions. California landowners adjacent
6 to ASBS zones can not be expected to build a wall or divert runoff from their property away
7 from the ASBS, nor could they in most cases. Because the CDOs have such potentially broad
8 ramifications, more time must be afforded to Respondents to prepare an adequate challenge to
9 the CDOs.

10 The CDOs also raise important and complex scientific questions. Respondents
11 are in the process of engaging experts to assist and to advise them regarding these scientific
12 questions. However, these experts must have time to prepare analysis and complete their reports.
13 These expert reports will ensure that any steps taken will be efficient, effective and not
14 overburdening. These reports are particularly vital with the respect to these CDOs since the
15 Agency has not put forth even a scintilla of evidence that drainage to the ASBS has resulted in
16 any deterioration of natural water quality. Pebble Beach has already notified the Board that it
17 intends to apply for an exception to the ASBS-discharge prohibition. These expert reports will
18 help both Respondents and the Board to recognize and implement the most effective measures, if
19 any, needed to protect the ASBS. A meaningful hearing cannot be had without this expert
20 analysis.

21 The CDOs, as issued, are technically and legally complex and have the potential
22 to drastically impact Respondents' substantive and legal rights. Accordingly, Respondents'
23 response to the CDOs, to be effective and meaningful, requires both high-quality expert reports
24 and well-reasoned advice from counsel. Respondents have simply not had adequate time to
25 prepare for a matter of such importance and complexity, notwithstanding every effort to do so in
26 a limited time frame. This continuance is necessary for Respondents to adequately prepare for
27 the hearing and to protect their substantive and legal rights, as well as the rights of similarly
28 situated parties that have not yet received CDOs but who have the potential to be impacted by an

1 unfair determination by the Agency.

2 **C. A Continuance is Necessary to Protect Pebble Beach’s Constitutional Right**
3 **to Due Process**

4 Constitutional due process consists of two aspects: notice and a right to be heard.
5 The United States Supreme Court has stated time and again that: “The fundamental requisite of
6 due process of law is the opportunity to be heard.”² “An elementary and fundamental
7 requirement of due process in any proceeding which is to be accorded finality is notice
8 reasonably calculated, under all the circumstances, to apprise interested parties of the pendency
9 of the action and afford them an opportunity to present their objections.”³

10 The U.S. Constitution guarantees that the opportunity to be heard be meaningful.⁴
11 Pebble Beach has requested a continuance so that it may adequately prepare for this hearing on
12 the CDO. Pebble Beach’s hearing on the CDO will not be meaningful without the benefit of its
13 own scientific and expert reports. Pebble Beach’s hearing will also not be meaningful if its
14 counsel and scientific experts are not given adequate time to analyze the CDO and prepare a
15 meaningful response. If Pebble Beach is denied its request for a continuance, it will be deprived
16 of its due process rights because its opportunity to be heard will not have been meaningful.

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24 ² Grannis v. Ordean, 234 U.S. 385, 394 (1914). See also Green v. Lindsey, 456 U.S. 444, 449-
25 50 (1982) (holding that “the right to be heard has little reality or worth unless one is informed
26 that the matter is pending and can choose for himself whether to appear or default, acquiesce
27 or contest....”) (citations omitted).

26 ³ Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

27 ⁴ See Matthews v. Eldridge, 424 U.S. 319, 333 (1972) (“The fundamental requirement of due
28 process is the opportunity to be heard at a meaningful time and in a meaningful manner.”)
(citations omitted).

1 **III. CONCLUSION**

2 For the foregoing reasons, respondents respectfully request that the Board grant this
3 motion and continue the hearing for a period not less than 30 days.

4 Dated: February 7, 2005

5 LATHAM & WATKINS LLP
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7 Kelly E. Richardson

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11 PEBBLE BEACH COMPANY, and
12 CITY OF CARMEL
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