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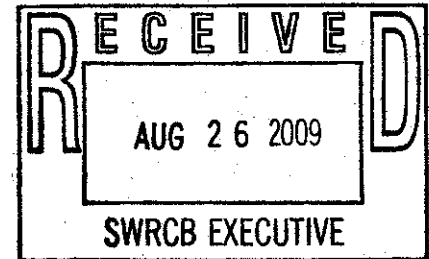
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August 26, 2009

**VIA ELECTRONIC MAIL**

Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street  
Sacramento, California 95814



**Re: Comment Letter: Cal Am CDO Hearing Workshop**

Dear Honorable Members of the State Water Resources Control Board:

The purpose of this letter is to request the State Water Resources Control Board ("SWRCB") omit Directives 2.a and 2.b from the draft Cease and Desist Order ("draft Order"). Directives 2.a and 2.b establish ambiguous restrictions on Cal-Am's ability to serve new and existing service connections to the detriment of legitimate opportunities to reduce the Monterey Peninsula's water demand from the Carmel River. As such, these directives will impair the Monterey Peninsula's ability to satisfy mandatory diversion reductions prescribed in Directive 2.c.

Any final Order should lay out the mileposts necessary for the Monterey Peninsula to maintain compliance with Order 95-10 and Permit 20808A. The means of achieving compliance should be left to Cal-Am and the Monterey Peninsula Water Management District ("Water District") which is statutorily charged by the State of California to manage water use within the Monterey Peninsula. The Water District, in particular, has more on the ground experience implementing regional conservation programs than any other local regulator and is best situated to determine how to comply with the final Order's mandatory diversion reductions.

**Doing More With Less**

Directives 2.a and 2.b jeopardize the ability for the Monterey Peninsula to incentivize water conservation in order to eliminate illegal diversions from the Carmel River. Worse, Directives 2.a and 2.b reinforces the wasteful and archaic water law maxim of "use it or lose it" at the expense of the more productive philosophy of "doing more with less".

Under existing local regulations, I can encourage property owners and businesses to consider the investments outlined below because at least a portion of the water savings can be secured for new

or future use. In other words, water users do not feel like they are shooting themselves in the foot by conserving.

- Replacement of traditional urinals with no flush models.
- Use of cisterns or gray water systems to reduce irrigation with potable water.
- Purchase or subsidy of reclaimed water to reduce irrigation with potable water.
- Conversion of high water demand uses to low water demand uses.
- Installation of low flow water fixtures which exceed the local standards.

If Directives 2.a and 2.b are adopted in the final Order, I would regrettably have to advise clients that the status quo is the most secure means of protecting their existing water demand because it is no longer possible to secure any portion of the actual water saving opportunities described above. I know of one developer who wishes to convert a property from a high water demand use to a low water demand use which would save over 2 afa. Directives 2.a and 2.b put this opportunity in jeopardy because the developer is not willing to abandon the existing use of the property in order to obtain the Water District On-site Water Credit necessary to document the project's water savings for purposes of CEQA.

### **Pebble Beach Water Entitlements**

Directives 2.a and 2.b go beyond merely limiting opportunities for water conservation, these broad mandates punish those who have supporting "doing more with less" and foreclose future public / private partnerships such as the Pebble Beach water reclamation program.

In 1989, the Water District granted the Pebble Beach Company ("PBC") 365 acre feet of Water Entitlements in exchange for financing commitments to build a wastewater reclamation system intended to allow PBC and other large irrigators within the Del Monte Forest to offset at least 800 acre feet of potable water previously used for irrigation. Ironically, the wastewater reclamation system was not able to produce water of sufficient quality because effective conservation on the Monterey Peninsula reduced the amount of wastewater available for reclamation. Between 1994 and 2006 annual deliveries of recycled water still managed to average 706 acre feet per year. On average 267 acre feet of potable water was still required in order to flush salts resulting from the overly saline reclaimed water.

In 2004, the Water District enacted Ordinance 109 which allowed the PBC to sell 175 acre feet of its remaining Water Entitlements in order to directly finance improvements to the reclamation system which would allow it to achieve its intended goal of entirely offsetting at least 800 afa of potable water demand. Water savings yielded by the Pebble Beach reclamation project have (until

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the publication of the draft Order) been heralded as a success and an example of the conservation opportunities available through public / private cooperation.

Public Reliance Upon SWRCB Assurances

I represent clients who purchased over \$2 million in Water Entitlements in reliance upon the SWRCB's March 28, 1998 and October 18, 2001 letters which do communicate that the SWRCB will not penalize Cal-Am for diversions necessary to satisfy Pebble Beach Water Entitlements so long as (1) the wastewater reclamation project continues to produce as much as, or more than, the quantity of water potable water delivered to the Del Monte Forest property; and (2) the reclaimed water is utilized on lands within the Cal-Am service area.

This interpretation is consistent with the conclusions of the Water District when it adopted its Ordinance 109 in 2004 (permitting the sale of a portion of the Pebble Beach Company's existing Water Entitlements to subsidize improvements to the reclamation system). In adopting Ordinance 109 the Water District stated:

The SWRCB has concluded that the Water Entitlement is not subject to these [Order 95-10] limitations on production of water from the Carmel River system because the Original Project has provided a source of recycled water for irrigation of the golf courses and certain other vegetated areas within the Del Monte Forest, thereby enabling Cal-Am to reduce its diversions from the Carmel River system by the amount of recycled water thus used in lieu of potable water. The SWRCB requested that MPWMD obtain and submit to it information documenting that (a) the new use of potable water does not exceed the historic quantity of potable water provided by Cal-Am to the Del Monte Forest property, and (b) the quantity of Recycled Water put to beneficial use equals or exceeds the potable water use.

The draft Order goes to some lengths to argue that contrary to the public's interpretation of its prior communications, the SWRCB made no assurances regarding the security of Water Entitlements representing actual water savings. While it may be necessary to test the issues of justifiable reliance and estoppel before the courts, the greater harm to the Carmel River is the lost opportunity for greater public / private cooperation. Unless the draft Order is amended, no future statute, regulation, ordinance, or order no matter how bold in its assurances will be able to extinguish the fear that the SWRCB is functionally unable to honor its commitments. This is a shame as additional supplies of reclaimed water are expected to come online shortly (as close as Marina, California) which could supply additional reclaimed to the Monterey Peninsula.

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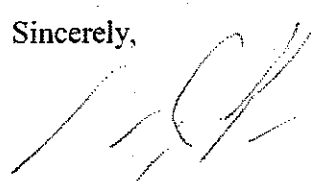
If the SWRCB seeks to enforce the maxim of "use it or lose it" no one will be interested exposing themselves to the same trap that befell supporters of the Pebble Beach reclamation program

### Conclusion

I am personally sympathetic with the SWRCB's frustration that upon satisfying the interim diversion reductions outlined in Order 95-10 and Permit 20808A, additional water savings on the Monterey Peninsula have for the most part supported new development rather than further reductions in Carmel River diversions.<sup>1</sup> This letter does not formally comment on the mandatory diversion reductions outlined in Directive 2.c of the draft Order but does acknowledge these mandatory reductions are less severe than those originally proposed by the SWRCB and as such they warrant a thorough assessment of whether the Monterey Peninsula can feasibly comply with these requirements.

Unfortunately, it is almost impossible to assess the Monterey Peninsula's ability to feasibly comply with the reductions outlined in Directive 2.c when Directives 2.a and 2.b radically alter existing conservation programs and close the door on any future public / private opportunities to "do more with less" so more water can be left in the Carmel River. Moreover, the emotions fueled by the threat of false assurances for doing the right thing prevents any practical assessment of Directive 2.c.

Sincerely,



Aengus L. Jeffers

ALJ/ec

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<sup>1</sup> In fairness to Cal-Am it must be noted that every effort of Cal-Am to develop a new sources of legal water have been stymied by other State agencies.