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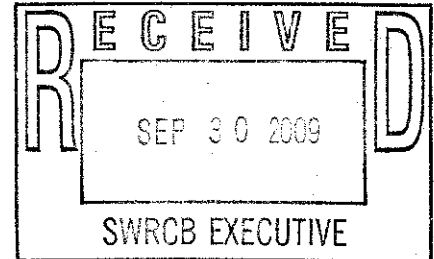
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September 30, 2009

**VIA ELECTRONIC MAIL**

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



**Re: Comment Letter – 10/20/09 Board Meeting: Cal Am CDO**

Dear Honorable Members of the State Water Resources Control Board:

I am writing on behalf of owners of Pebble Beach Water Entitlements and Water District On-Site Water Credits. The purpose of this letter is to request the State Water Resources Control Board ("SWRCB") omit Directive 2 from the September 16, 2009 draft Cease and Desist Order ("draft Order").

Directive 2 states:

Cal-Am shall not divert water from the Carmel River for new service connections or for any increased use of water at existing service addresses resulting from a change in zoning or use. Cal-Am may supply water from the river for new service connections or for any increased use at existing service addresses resulting from a change in zoning or use after September 2, 2009, provided that any such service had obtained all necessary written approvals required for project construction and connection to Cal-Am's water system prior to that date.

The draft Order makes clear that Directive 2 is also intended to nullify outstanding Water Entitlements. However, the draft Order does not make clear whether outstanding On-Site Water Credits for prior conservation retrofits will continue to be honored or on what basis a resident or business can demonstrate a change in use will not intensify existing water demand.

Directive 2 establishes ambiguous restrictions on Cal-Am's ability to serve new and existing service connections which will deny legitimate opportunities to reduce the Monterey Peninsula's

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water demand from the Carmel River. As such, these directives will impair the Monterey Peninsula's ability to satisfy the mandatory diversion reductions prescribed in Directive 3.

**Directive 2 of the draft Order Exceeds the SWRCB's Statutory Authority**

California Water Code section 1831 limits the SWRCB authority to issue a cease and desist order without judicial approval as follows:

- (a) When the board determines that any person is violating, or threatening to violate, any requirement described in subdivision (d), the board may issue an order to that person to cease and desist from that violation.
- (b) The cease and desist order shall require that person to comply forthwith or in accordance with a time schedule set by the board.

California Water Code section 1831 does not empower the SWRCB to issue cease and desist orders which regulate the manner in which a party must comply with diversion limits established by a cease and desist order. Directive 2 clearly dictates how Cal-Am should achieve compliance with Directive 3's mandatory reductions while also limiting the tools available for the Monterey Peninsula to satisfy Directive 3. Moreover, Directive 2's intent to retroactively prohibit new service connections and changes in use vested before the adoption of any CDO is dubious at best.

Any final Order should simply 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**

Directive 2 jeopardizes the ability for the Monterey Peninsula to incentivize water conservation in order to eliminate illegal diversions from the Carmel River. Worse, Directive 2 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, residents and businesses routinely make the investments outlined below because at least a portion of the water savings can be secured for new or future use.

- 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 Directive 2 is adopted in the final Order, residents and businesses will realize that the only means of protecting their existing water demand is to maintain the status quo because it is no longer possible to secure any portion of the water they might save today. Such perverse regulations will hinder local efforts to comply with Directive 3's mandatory reductions.

#### **Pebble Beach Water Entitlements**

Directive 2, if adopted, punishes those who from the outset supported "doing more with less" and forecloses 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 PBC to sell 175 acre feet of its remaining Water Entitlements in order to directly finance improvements to the reclamation system which would allow the system to exceed its original goals by offsetting almost 1,100 acre feet of potable water demand. Water savings yielded by the Pebble Beach reclamation project have (until the publication of the draft Order) been heralded as a success and encouraged exploration of other public / private conservation opportunities.

#### **Public Reliance Upon SWRCB Assurances**

This law firm represents clients who have purchased over \$2 million in Water Entitlements in reliance upon the SWRCB's March 27, 1998, June 05, 1998, October 18, 2001, and April 21, 2004

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's effort to nullify the Water Entitlements is clearly barred by the equitable doctrines of estoppel and laches. See City of Long Beach v. Mansell (1970) 3 Cal. 3d 462; Marie v. Riverside County Regional Park and Open-Space District (2009) 46 Cal. 4th 282; and Wells Fargo Bank v. Goldzbank (1997) 53 Cal. App. 4th 596.

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, estoppel, and laches before the courts, the greater harm to the Carmel River (and the State) is the lost opportunities 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 such malicious vacillation will foreclose statewide opportunities to save water through public / private partnerships.

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 otherwise successful Pebble Beach reclamation program.

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Governor Schwarzenegger's February 27, 2009 Water Shortage Proclamation

The draft Order's nullification of Water Entitlements contradicts Governor Schwarzenegger's February 27, 2009 Water Shortage Proclamation ("Proclamation"). Directive 7 from the Proclamation states:

To the extent allowed by applicable law, state agencies within my administration shall prioritize and streamline permitting and regulatory compliance for desalination, water conservation and recycling projects that provide drought relief.

As described above, nullifying Water Entitlements at a time when the Reclamation Project exceeds its original conservation goals will force private parties to reconsider financing reclamation projects or contracting for reclaimed water in exchange for similar water entitlements. In short, the draft Order contradicts the Proclamation's directive to facilitate and streamline regulatory compliance for water reclamation projects.

With regards to water conservation in general, Directive 2 of the draft Order removes existing incentives for residents and businesses to invest in water conservation today. As such, the draft Order contradicts the Proclamation's intent to promote and streamline permitting for water conservation.

### 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> The problem with the draft Order is that it appears to be drafted out of this frustration rather than an objective and reasonable assessment of the quickest means of achieving compliance while respecting the health, safety, and welfare of the Monterey Peninsula and existing rights in water.

Sincerely,



Angus 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.