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2009 NOV -9 PM 2:54

DIV OF WATER RIGHTS
SACRAMENTO

November 9, 2009

BY HAND DELIVERY

State Water Resources Control Board
Attention: Paul Murphey
Division of Water Rights
Cal/EPA Headquarters
1001 I Street, 2nd Floor
Sacramento, CA 95814-2828

Re: Petition for Reconsideration of Order 2009-0060

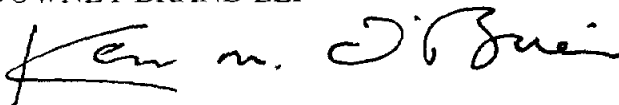
Dear Mr. Murphey:

Enclosed for filing is Pebble Beach Company's petition for reconsideration of Order 2009-0060, adopted by the State Water Resources Control Board ("Board") on October 20, 2009. Order 2009-0060 is a cease and desist order in the matter of the unauthorized diversion and use of water by the California American Water Company. The Pebble Beach Company was a party to the proceedings that resulted in adoption of Order 2009-0060, and now asks the Board to reconsider several provisions of Order 2009-0060 that directly relate to the Pebble Beach Company's water entitlements. Enclosed is a petition for reconsideration and a statement of points and authorities in support of the petition.

Thank you for your attention to this matter.

Very truly yours,

DOWNEY BRAND LLP



Kevin M. O'Brien
Attorneys for the Pebble Beach Company

Enclosures

cc: Mark Stilwell
Attached Service List

Interested Parties List

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Attorneys for Petitioner
PEBBLE BEACH COMPANY

STATE WATER RESOURCES CONTROL BOARD
2009 NOV -9 PM 2: 54
DIV. OF WATER RIGHTS
SACRAMENTO

BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of the PEBBLE BEACH)
COMPANY's Petition for Reconsideration of) **PETITION FOR RECONSIDERATION**
the California State Water Resources Control)
Board's Order WR 2009-0060 (Cease and) **[TITLE 23 CALIFORNIA CODE**
Desist Order In the Matter of the Unauthorized) **OF REGULATIONS §§ 768-769]**
Diversion and Use of Water by the California)
American Water Company).)

In accordance with Title 23 California Code of Regulations sections 768 and 769,
Petitioner the PEBBLE BEACH COMPANY ("PBC") hereby petitions the California State Water
Resources Control Board ("Board") for reconsideration of its October 20, 2009 adoption of Order
WR 2009-0060 ("CDO"), a cease and desist order in the matter of the unauthorized diversion and
use of water by the California American Water Company. A statement of the reasons the CDO
was inappropriate or improper follows, and a Statement of Points and Authorities in support of
the legal issues raised in this Petition is submitted herewith and incorporated herein by reference.
PBC's proposed modifications to the CDO are set forth in **Attachment A** to the Statement of

1 Points and Authorities. By this Petition PBC requests that the Board direct its staff to hold the
2 CDO in suspension without further action until the Board corrects the language of the CDO as
3 requested by Petitioner.
4

5 **I. NAME AND ADDRESS OF PETITIONER:**

6 Pebble Beach Company
7 c/o Mark Stilwell, Executive Vice President
8 P.O. Box 1767
9 Pebble Beach, CA 93953-1767

10 All materials and documents generated in connection with this Petition for
11 Reconsideration should be provided to the counsel of record for PBC at the following address:

12 Kevin M. O'Brien
13 Downey Brand LLP
14 621 Capitol Mall, 18th Floor
15 Sacramento, California 95814
16 Telephone: (916) 444-1000
17 Facsimile: (916) 444-2100

18 **II. THE SPECIFIC BOARD ACTION OF WHICH PBC REQUESTS
19 RECONSIDERATION:**

20 PBC seeks review of the Board's adoption of the October 20, 2009 Order WR 2009-0060,
21 a cease and desist order in the matter of the unauthorized diversion and use of water by the
22 California American Water Company.

23 **III. THE DATE ON WHICH THE ORDER WAS MADE BY THE BOARD:**

24 Order WR 2009-0060 is dated October 20, 2009.

25 **IV. THE REASONS THE CDO WAS INAPPROPRIATE OR IMPROPER:**

26 In a single sentence contained in the CDO's Order provisions, the Board's intention with
27 respect to the PBC Water Entitlements is undermined by a potential interpretation that Cal-Am
28 completely halt all Carmel River deliveries to supply the PBC Water Entitlements after December
31, 2016. Because this cannot have been the Board's intent, PBC asks for a further correction to

1 remove this ambiguous sentence which arguably could lead to a sudden cessation of Cal-Am's
2 Carmel River deliveries to PBC. Such an inflexible cut-off would be inconsistent with the CDO's
3 discussion of the PBC Water Entitlements. In addition, any abrupt interruption of the PBC Water
4 Entitlements would substantially diminish their value and uses for the many landowners who
5 have relied on the Water Entitlements and must continue to do so – not just after 2016, but in the
6 interim, as well.

8 PBC and other landowners have relied on the Board's assurances that the PBC Water
9 Entitlements would be protected against this Board's enforcement efforts under Order WR 95-10
10 provided certain conditions continue to be met. Pursuant to 23 Cal. Code Regs. § 768, any
11 interpretation of the CDO that would revoke the Water Entitlements by ordering the water supply
12 cut off after December 31, 2016 amounts to an arbitrary and capricious abuse of discretion which
13 the Board is equitably estopped from exercising. Such an interpretation and action would also
14 constitute an error of law under 23 CCR § 768(d), which the Board must reconsider and correct.
15 In addition, no substantial evidence supports the (implied) assertion behind any such
16 interpretation that an abrupt cut-off of Cal-Am's supply of the PBC Water Entitlements will
17 materially affect the public trust interests the CDO purports to protect. In fact, there is no
18 evidentiary support in the record for the proposition that exercise of the PBC Water Entitlements
19 will cause harm to public trust resources. Reconsideration is therefore justified under 23 CCR
20 § 768(b), as well.

23 **V. THE SPECIFIC ACTION PBC REQUESTS:**

24 PBC requests that the Board direct its staff to hold Order WR 2009-0060 ("CDO") in
25 suspension without further action until the Board corrects the language of the CDO as requested
26 by Petitioner in its accompanying Statement of Points and Authorities.

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VI. STATEMENT THAT COPIES OF THE PETITION AND ANY ACCOMPANYING MATERIALS HAVE BEEN SENT TO ALL INTERESTED PARTIES:

A list of persons known to have an interest in this Petition is attached hereto as **Exhibit 1**.

Copies of the Petition and the accompanying materials have been sent to all interested parties as listed in **Exhibit 1**.

DATED: November 9, 2009

DOWNEY BRAND LLP

By: 

KEVIN M. O'BRIEN
Attorney for Petitioner
PEBBLE BEACH COMPANY

1 **STATEMENT OF SERVICE**

2 I, Cassandra J. Baines, am a resident of the State of California, over the age of eighteen
3 years, and not a party to the within action. My business address is Downey Brand LLP, 621
4 Capitol Mall, 18th Floor, Sacramento, California, 95814-4731. On November 9, 2009, I served
5 the within document(s):

6 **PETITION FOR RECONSIDERATION OF STATE WATER
7 RESOURCES CONTROL BOARD ORDER WR 2009-0060**

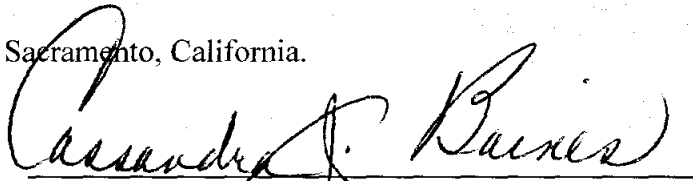
- 8 **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax
9 number(s) set forth below on this date before 5:00 p.m.
- 10 **BY HAND:** by personally delivering the document(s) listed above to the person(s)
11 at the address(es) set forth below.
- 12 **BY MAIL:** by placing the document(s) listed above in a sealed envelope with
13 postage thereon fully prepaid, in the United States mail at Sacramento, California
14 addressed as set forth below on the Interested Parties List to City of Carmel-by-
15 the-Sea ONLY.
- 16 **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an
17 overnight delivery service company for delivery to the addressee(s) on the next
18 business day.
- 19 **BY PERSONAL DELIVERY:** by causing personal delivery by _____ of
20 the document(s) listed above to the person(s) at the address(es) set forth below.
- 21 **BY ELECTRONIC MAIL:** by transmitting the document(s) listed above via
22 electronic mail to all parties listed to receive electronic service at the electronic
23 mail address set forth on the Interested Parties List.

24 ***See Attached Interested Parties List***

25 I am readily familiar with the firm's practice of collection and processing correspondence
26 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
27 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
28 motion of the party served, service is presumed invalid if postal cancellation date or postage
meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above
is true and correct.

Executed on November 9, 2009, at Sacramento, California.


Cassandra J. Baines

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8 Attorneys for Petitioner
9 PEBBLE BEACH COMPANY

10 BEFORE THE
11 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

12)
13 In the Matter of the PEBBLE BEACH)
14 COMPANY's Petition for Reconsideration of)
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16 Board's Order WR 2009-0060 (Cease and)
17 Desist Order In the Matter of the Unauthorized)
18 Diversion and Use of Water by the California)
19 American Water Company).)

20 **STATEMENT OF POINTS AND**
21 **AUTHORITIES IN SUPPORT OF**
22 **PEBBLE BEACH COMPANY'S**
23 **PETITION FOR RECONSIDERATION**
24 **OF ORDER WR 2009-0060**

25 [TITLE 23, CALIFORNIA CODE
26 OF REGULATIONS §§ 768-769]

27 **I. INTRODUCTION**

28 The State Water Resources Control Board ("Board"), in Order WR 2009-0060 dated October 20, 2009 ("CDO"), determined that the Pebble Beach Company ("PBC") Water Entitlements should not be subject to the limitations imposed on Cal-Am's diversions from the Carmel River. This determination reversed the position of the previous draft CDO, which would have subjected the PBC Water Entitlements to the diversion limitations applicable to Cal-Am. The reasons for this reversal were well-articulated by Board Member (and Hearing Officer) Baggett at the October 20, 2009 Board meeting: Mr. Baggett indicated that a change in the CDO's approach to the PBC Water Entitlements was appropriate due to (1) the substantial

1 reliance of many persons on prior representations of the Board and staff; (2) the substantial
2 benefits of the Carmel Area Wastewater District (“CAWD”)/Pebble Beach Community Services
3 (“PBCSD”) Wastewater Reclamation Project (“Reclamation Project”) in producing a net decrease
4 in Carmel River withdrawals; and (3) the small amount of water that might potentially be used
5 under the PBC Water Entitlements. As stated in the final CDO, recognition of the unique status
6 of the PBC Water Entitlements promotes the position that the “State Water Board strongly
7 supports the use of recycled water for nonpotable uses where recycled water is available in order
8 to maximize the beneficial use of the state’s scarce water supplies.” (CDO, p. 50.)

10 To implement the Board’s decision, the Board (presumably with the aid of staff) had to
11 modify the language from the prior draft CDO during the brief interval between the close of the
12 Board’s discussion of the draft CDO and its vote on the final version of the CDO. PBC had no
13 opportunity to review or comment on the new language of the CDO prior to its adoption by the
14 Board. Once the final version of the CDO became available for public review, however, it
15 became clear that the CDO contained several internal inconsistencies and substantive errors that
16 place the CDO at odds with the Board’s stated intent. Most significantly, in a single sentence
17 added to the CDO’s Order provisions, the Board’s intention to change the draft CDO with respect
18 to the PBC Water Entitlements could be completely undermined if that sentence is interpreted to
19 direct that Cal-Am completely halt all Carmel River deliveries to supply PBC’s Water
20 Entitlements after December 31, 2016. (CDO para. 3(a)(6), p. 59). If the sentence is so
21 interpreted, such an inflexible cut-off would be inconsistent with the CDO’s discussion of the
22 PBC Water Entitlements and with the stated intent of the Board in directing modification of the
23 previous draft CDO. As a practical matter, any December 16, 2016 cut-off would completely
24 eviscerate the protections for the PBC Water Entitlements that the Board intended to add to the
25 CDO.
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1 PBC and other landowners have reasonably relied on repeated assurances by Board staff
2 that the PBC Water Entitlements would be protected against this Board's enforcement efforts
3 under Order WR 95-10 provided that the Reclamation Project continued to save at least as much
4 as the amount of the Water Entitlements. Pursuant to 23 Cal. Code Regs. § 768, any
5 interpretation that would effectively revoke those Water Entitlements by ordering that supply cut
6 off after December 31, 2016 amounts to an arbitrary and capricious abuse of discretion which the
7 Board is equitably estopped from exercising.¹ Such interpretation and action would also
8 constitute an error of law under 23 CCR § 768(d), which the Board must reconsider and correct.
9
10 In addition, no substantial evidence would support the (implied) assertion behind any such
11 interpretation that an abrupt cut-off of Cal-Am's supply of the PBC Water Entitlements will
12 materially affect the public trust interests the CDO purports to protect. In fact, there is no
13 evidentiary support in the current record for the proposition that exercise of the PBC Water
14 Entitlements will cause harm to public trust resources. Reconsideration is therefore justified
15 under 23 CCR § 768(b), as well.

17 **II. STATEMENT OF FACTS**

18 PBC and other landowners in the Del Monte Forest own the PBC Water Entitlements
19 under agreements with, and permits issued by, the Monterey Peninsula Water Management
20 District ("MPWMD"), the agency created by State law specifically to manage water supply on the
21 Monterey Peninsula. The Water Entitlements arose from PBC's agreement to underwrite 100
22 percent of the financial costs to develop the \$68 million Reclamation Project jointly undertaken
23 by MPWMD, CAWD, and PBCSD. As the single most successful water conservation project in
24 the history of the Monterey Peninsula, the Reclamation Project produces up to 1,100 acre-feet per
25 year of high quality recycled water to irrigate the world-renowned golf courses of the Del Monte
26
27

28 ¹ PBC's September 30, 2009 Comment Letter on the Draft CDO sets forth the legal authorities in support of equitable estoppel at pp. 5-6. That discussion is incorporated here by this reference.

1 Forest. Since commencing operation in September 1994, the Reclamation Project has saved more
2 than 3.5 billion gallons of potable water from Cal-Am's water supply, primarily from the Carmel
3 River, all at no cost to any public agency or taxpayer due to PBC's private financial support.

4 In exchange for PBC's agreement to be the sole financial guarantor of the Reclamation
5 Project, MPWMD granted PBC and two other "fiscal sponsors" 380 afa of Water Entitlements, as
6 a vested property right. This Board, in Order 95-10, excluded these Water Entitlements from any
7 cap on Cal-Am's Carmel River diversions. Order 95-10 also gave the Chief of the Division of
8 Water Rights express authority to modify any conservation requirements to the extent such
9 requirements conflicted with any prior commitments by MPWMD, of which the Water
10 Entitlements are assuredly one. The commitments of the Chief(s) of the Division of Water
11 Rights, expressed on a number of occasions in writing, are referred to and spelled out (in part) in
12 the CDO.
13

14 **III. DISCUSSION**

15 The CDO as revised unmistakably shows the Board's intention to recognize and protect
16 the PBC Water Entitlements so long as recycled water in excess of the aggregate amount of the
17 Water Entitlements is being made available through operation of the Reclamation Project. The
18 CDO not only reiterates the Board's policy favoring the development and use of recycled water,
19 but it also contains a lengthy description of the assurances given by the Board's senior
20 management in 1998 and 2001 that so long as Cal-Am's diversions do not exceed the limits
21 imposed by Order 95-10 plus PBC's (and other sponsors') Water Entitlements, those entitlements
22 would remain secure. For these and other reasons, the CDO's discussion of the PBC Water
23 Entitlements concludes that the Board "should not prohibit increased diversions from the river by
24 Cal-Am for deliveries made under PBC's entitlement from MPWMD." In short, the CDO's entire
25 discussion of the PBC Water Entitlements reflects the Board's intention to exclude those Water
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1 Entitlements from the limitations imposed on Cal-Am's diversions, so long as the same conditions
2 obtain that have been recognized and reinforced by the Board and its staff since Order 95-10
3 issued.

4 Unfortunately, the Board's clear intentions are not fully reflected in the language of the
5 CDO. PBC's proposed modifications of the CDO are attached to this Statement as **Attachment**

6 **A.** The reasons why these changes are needed are discussed below.

7
8 As already noted, PBC's principal concern is the new statement in the CDO that "Cal-Am
9 shall not divert water from the Carmel River after December 31, 2016, to supply PBC's Water
10 Entitlements from MPWMD." (CDO "Order," paragraph 3(a)(6), p. 59.) This sentence could be
11 interpreted to mean that existing users of the Water Entitlements – both PBC and residents who
12 had already built or remodeled homes – could no longer be served after such date if Cal-Am had
13 failed to develop an alternative water supply project by then. Due to the unique characteristics of
14 the PBC Water Entitlements, any interpretation that would require a 2016 cut-off makes no sense.
15 Specifically, the Board's decision not to subject the PBC Water Entitlements to the diversion
16 restrictions applicable to Cal-Am under the CDO was explicitly based on the fact that PBC,
17 through its efforts to finance the \$68 million Reclamation Project, has made a new supply of
18 water available to the Monterey Peninsula, and has substantially reduced historic usage from the
19 Carmel River. There is no evidence in the record that this new supply of water will cease to exist
20 after December 31, 2016; indeed, by all accounts, this new supply will continue for many
21 decades.

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24 As a practical matter, if the sentence were so interpreted, a December 31, 2016 cut-off
25 requirement would completely eviscerate the PBC Water Entitlements. The attributes of the PBC
26 Water Entitlements must be understood in order to illustrate the practical problems created by the
27 CDO. The Water Entitlements authorize the present use of water. Once hooked up, a user of the
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1 Water Entitlements is treated the same as any other existing Cal-Am customer, i.e., he or she is
2 subject to conservation rules and requirements but water service cannot be withdrawn. Under the
3 terms of the December 31, 2016 cut-off provision contained in the CDO, facilities, homes, and
4 other improvements built over the past 15 years (and up through December 31, 2016) in reliance
5 on water from the PBC Water Entitlements would arguably be subject to complete cessation of
6 water use even though new water, in an amount far greater than the Water Entitlements, continues
7 to be provided to the Monterey Peninsula through operation of the Reclamation Project. Such a
8 draconian result cannot be what the Board intended here.

10 The CDO also fails to differentiate between sources of Cal-Am water. The language
11 states categorically that Cal-Am is prohibited from serving PBC with any diversions from the
12 Carmel River – but clearly Cal-Am cannot be prohibited from serving PBC with legal diversions
13 from the Carmel River after 2016. The Board appears to have intended that once Cal-Am has
14 implemented alternate water sources so as to cease its illegal diversions from the Carmel River
15 (assumed to occur by 2016), the Water Entitlements must be served from Cal-Am’s legal supply
16 rather than any further illegal diversions. The language as drafted, however, does not make this
17 intent clear.

19 Finally, PBC and the many purchasers of its Water Entitlements bought a future right to
20 use water under the Water Entitlements for projects that would occur well beyond 2016. As long
21 as the Reclamation Project continues to operate and save significantly more Cal-Am water than
22 the amount of the Water Entitlements, there is no justification for setting an arbitrary deadline on
23 the use of the Water Entitlements for future projects. Many of the purchasers of the PBC Water
24 Entitlements have no immediate plans for improvements that would use such water. But if the
25 policy is that they have to use it or may lose it after 2016, some holders of the Water Entitlements
26 may accelerate their development plans. Public policy would be better served by eliminating
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1 such an artificial incentive, and allowing PBC and its purchasers to use the water when they
2 would otherwise be ready to move forward on their own. In the long run, the Water Entitlements
3 would be used over a longer period, and allow additional time for future water supply projects to
4 become operational.

5
6 For these reasons, PBC respectfully requests that the Board clarify and correct the CDO
7 by deleting the sentence that "Cal-Am shall not divert water from the Carmel River after
8 December 31, 2016, to supply PBC's Water Entitlements from MPWMD."

9 Other minor clarifications and corrections are noted in **Attachment A**. The only other
10 substantive change is to substitute MPWMD for PBC with respect to the reporting requirement
11 for the Water Entitlements. MPWMD, not PBC, tracks the usage of the Water Entitlements and
12 is therefore the appropriate party to make these reports. PBC has no means of making such a
13 report other than by getting the information from MPWMD, which tracks this information on a
14 monthly basis for its Board.
15

16 **IV. CONCLUSION**

17
18 The Board's decision to continue its longstanding recognition of the PBC Water
19 Entitlements in the October 20, 2009 CDO reflects a fair and practical approach to managing
20 Carmel River diversions, one that appropriately recognizes that PBC's contributions are distinctly
21 part of the solution to water management and not part of the problem. Inserting the December 31,
22 2016 cut-off in the final CDO, however, eviscerates the protections which the Board intended.
23 PBC thus respectfully requests that the Board clarify and correct this error, as well as make the
24 other corrections noted herein and shown in **Attachment A** hereto.
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DATED: November 9, 2009

DOWNEY BRAND LLP

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PEBBLE BEACH COMPANY

quantity of water illegally diverted from the river could present an unacceptable risk to public health and safety. On the other hand, modest reductions in the quantity of water Cal-Am diverts from the river that are gradually implemented can be offset by the types of projects and actions previously described in this order⁴⁰ and do not present a threat to public health and safety. Thus, the State Water Board also concludes that Cal-Am should be required to make modest and continuing reductions in the quantity of water diverted from the Carmel River until such time as it has developed a project or projects capable of providing a new source of water to supply the needs of its customers to substitute for its unlawful diversions of water from the Carmel River.

19.0 OTHER MATTERS

19.1 The Pebble Beach Company Water Entitlement should not be Subject to Limitations Imposed upon Cal-Am's Diversions from the Carmel River

The State Water Board strongly supports the use of recycled water for nonpotable water uses where recycled water is available in order to maximize the beneficial use of the state's scarce water supplies. In the past, the State Water Board has required that recycled water be used, instead of potable water for nonpotable uses, such as irrigation, pursuant to Water Code sections 13550 and 13551. (E.g., Decision 1625; see also Decision 1623-Amended; see also Order WQ 84-7 [requiring dischargers in water short areas who propose to discharge treated wastewater to the ocean to evaluate the potential for water reclamation].) Water recycling promotes the constitutional policy that the water of the state be put to beneficial use to the maximum extent possible. (Cal. Const., art. X, § 2; Wat. Code, §§ 100, 275.)

Pebble Beach Company (PBC) has a 365 afa water entitlement⁴¹ from MPWMD for developing properties within Del Monte Forest. The entitlement is used for making new service connections to Cal-Am's water system. The entitlement was granted as part of a contractual arrangement wherein PBC agreed to financially guarantee public financing of a wastewater reclamation project. PBC seeks to have its water entitlement for new growth excluded from any limitation that may be placed upon Cal-Am's withdrawals from the Carmel River. (Oct. 14, 2008, Closing Brief of PBC, p. 13, 20-22.). In addition, PBC contends that, during 2005-06, it relied upon findings and representations by the State Water Board when undertaking additional financial

⁴⁰ Section 16.0. Projects and Actions that may Affect Cal-Am's Need to Divert Water from the Carmel River, subsections 16.1 – 16.4.

⁴¹ In addition to PBC's 365 afa, the entitlement includes 10 afa for S. J. Lohr and 5 afa for W. the Griffin Trust, who are subject to conditions contained in shall be treated the same as PBC for purposes of this order.

arrangements to further upgrade the wastewater reclamation plant and when acquiring a reservoir to store reclaimed wastewater.

The Pebble Beach Community Services District (PBCSD) and the Carmel Area Wastewater District (CAWD) operate the CAWD-PBCSD Wastewater Reclamation Project. (PBC-2, p. 1, 25-27.) The project provides reclaimed wastewater for irrigation of the golf courses and other recreational open spaces located in the unincorporated Del Monte Forest area of Monterey County. (PBC 1, p. 2, 7-9.) The project was designed to deliver not less than 800 afa of reclaimed water and to free an equal amount of potable water for other uses. Operationally, some potable water was necessary to control salinity levels in the reclaimed water used for golf course irrigation and to meet irrigation needs during times of peak demand. (PBC-1, p. 2, 16-23.) During 13 years of operation, between 1994-95 and 2006-07, the project supplied an average of 706 afa of reclaimed water; 267 afa of potable water was required for salinity control and to meet peak irrigation demand. (PBC-2, p. 3, 1-28.) Public project financing was facilitated by private financial guarantees. The PBC guaranteed: (a) \$33.9 million in capital costs for the project, and (b) net project operating deficiencies. In return for the financial guarantee, PBC was granted a 365 afa potable water entitlement by MPWMD for future development of lands owned by PBC. (PBC-1, p. 3, 19 – p. 4, 2.) Based on this entitlement, water has been sold to over 500 homeowners in the Del Monte Forest. (RT, Ph. 2, Vol. II, p. 556, 14-15.)

During 2005-2006~~8~~, the project was upgraded through the addition of 325 af of storage for reclaimed water and by improvements to the wastewater treatment plant to reduce the level of salinity in the reclaimed water. During 2009, these improvements should result in the project being able to operate without the need for potable water. (Id., p. 4, 1-17.) The upgraded project cost \$34 million. PBC obtained the funds for the upgrade by selling 175 afa of the entitlement obtained from MPWMD to landowners in Del Monte Forest. (PBC-1, p. 3, 25 – p. 4, 2.)

A footnote in Order 95-10 recognizes the supply of water made available to Cal-Am customers by the project:

In addition to supplies from the Carmel River and pumped ground water in the area of Seaside, reclaimed water is available to some Cal-Am users from the Carmel Area Wastewater District Pebble Beach Community Services District Wastewater Reclamation Project. The Project will provide 800 acre-feet of reclaimed water for the irrigation of golf courses and open space in the Del Monte Forest. In return for

financial guarantees, the Pebble Beach Company and other sponsors received a 380 af of potable water entitlement from the District for development within Del Monte Forest. As of the end of fiscal 1993-1994, the District had not allocated the remaining 420 af of project yield.

(Order 95-10 at p. 6, fn. 2.)

On March 27, 1998, the Chief, Division of Water Rights, wrote MPWMD and Cal-Am concerning the relation of the project to the water being diverted from the river by Cal-Am and Order 95-10.

(PBC-7.) The letter states, in part:

The [State Water Board] has recognized that the Pebble Beach Company and other sponsors were project participants in, and assisted in funding, the wastewater reclamation project which enabled Cal-Am to reduce its delivery of potable water to Del Monte Forest property and thereby reduce the demand on the Carmel River by at least 500 afa and potentially 800 afa. Upon completion of the Del Monte Forest property, 380 afa will be diverted from the Carmel River by Cal-Am for delivery to these lands. Thus, there will be no net increase in Carmel River diversions in the future over the level of past documented diversions as a result of developing these projects. As a result of the reclamation project and especially during the interim period while the Del Monte Forest property is being developed, the net diversion from the Carmel River to serve Del Monte Forest properties will be less than the level that would have occurred if the wastewater reclamation project had not been developed. Thus under Footnote 2 of Order WR 95-10, the 380 afa is available to serve the projects.

As a result, Order WR 95-10 does not preclude service by Cal-Am to the Del Monte Forest property under the 380 afa entitlement granted by the District. As you are aware, the [State Water Board] is requiring Cal-Am to maintain a water conservation program with the goal of limiting annual diversions from the Carmel River to 11,285 afa until full compliance with Order WR 95-10 is achieved. While Cal-Am has been exceeding the limit, it is not the intent of the [State Water Board] to penalize the developers of the wastewater reclamation project for their efforts to reduce reliance upon the potable water supply via utilization of treated wastewater.

Thus, the [State Water Board] will use its enforcement discretion to not penalize Cal-Am for excess diversions from the Carmel River as long as their diversions do not exceed 11,285 afa plus the quantity of potable water provided to the Pebble Beach Company and other sponsors under this entitlement for use on these lands. This enforcement discretion will be exercised as long as the wastewater reclamation project continues to produce as much as, or more than, the quantity of potable water delivered to the Del Monte Forest property, and the reclaimed water is utilized on lands within the Cal-Am service area.

Footnote 2 of Order 95-10 deals with the issue of water use for purposes of projects in the Del Monte Forest. Consequently, the order does not provide discretion to address any projects involving the use of the unassigned 420 afa (800 afa minus 380 afa identified in the footnote equals 420 afa) developed by the wastewater treatment facility

On October 18, 2001, the Chief, Division of Water Rights, sent another letter to MPWMD concerning this subject. The letter stated in part:

You specifically asked whether the use of a portion of the original Pebble Beach Company water entitlement from the CAWD reclamation project can be used on non-Pebble Beach Company properties within (1) the Del Monte Forest and (2) outside the Del Monte Forest. Cal-Am may distribute the new potable water supply anywhere in its service area, subject to the Carmel River diversion requirements of Order 95-10 (and any subsequent modification approved by the State Water Resources Control Board) and requirements (a) and (b) above.⁴²

(PBC-8.)

The letter expresses an intent not to penalize Cal-Am for excess diversions from the Carmel River to supply Pebble Beach as long as their diversions do not exceed 11,285 afa plus the quantity of potable water provided to the PBC and other sponsors under the entitlement from MPWMD.

The letters cannot be understood as a binding commitment that the State Water Board will never take an enforcement action that might affect PBC or others relying on the entitlement from MPWMD. Because the March 27, 1998 letter expressly identifies the State Water Board's action as an exercise of enforcement discretion, it serves as a warning that Cal-Am's excess diversions constitute an ongoing violation and that the State Water Board could take enforcement action. Nevertheless, as noted in the March 27, 1998, letter to MPWMD, the reclamation project constructed with PBC funding guarantees will not result in a net increase in diversions from the Carmel River and, in the interim before while Del Monte property is being developed, the net diversions from the river to serve Del Monte Forest properties will be less than the level that would have occurred if the reclamation project had not been developed.

⁴² The reference to the "requirements of (a) and (b) above" refers to the following: "Continual records must be maintained, on both a monthly and total annual basis, to document that (a) the new use of potable water does not exceed the historic quantity of potable water provided by the California-American Water Company (Cal-Am) to the Del Monte property and (b) the quantity of treated wastewater put to beneficial use equal or exceeds the potable water use."

⁴³ The letter of October 18, 2001, is also problematic. It should be noted, however, that the letter expressly states that Cal-Am's diversions from the river for the PBC are subject to Order 95-10 and any subsequent modification to the order approved by the State Water Board. This order is such a modification.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT Cal-Am shall cease and desist from the unauthorized diversion of water from the Carmel River in accordance with the following schedule and conditions.⁴⁶

1. Cal-Am shall diligently implement actions to terminate its unlawful diversions from the Carmel River and shall terminate all unlawful diversions from the river no later than December 31, 2016.
2. 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 October 20, 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.⁴⁷ The Pebble Beach water entitlement is exempt from this condition as long as the CAWD-PBCSD reclamation project is saving at least 380 afa of Cal-Am water deliveries.
3. At a minimum, Cal-Am shall adjust its diversions from the Carmel River in accordance with the following:
 - a. Commencing on October 1, 2009,⁴⁸ Cal-Am shall not divert more water from the river than the base of 10,978 afa,⁴⁹ as adjusted by the following:
 - (1) Immediate Reduction: Commencing on October 1, 2009, Cal-Am shall reduce diversions from the river by 5 percent, or 549 afa.

⁴⁶ Attachment 1 to this order, "Table 1, Projected Reductions in Illegal Diversions from the Carmel River," shows the reductions in illegal diversions from the Carmel River that should result from conditions 1, 2 and 3 of this order.

⁴⁷ Multiunit residential, commercial or industrial sites may currently be served by a single water meter. The installation of additional meters at an existing service will not be viewed as a new service connection provided that the additional metering does not result in an increase in water use. Metering each unit of a multiunit building tends to increase accountability in the use of water and the effectiveness of water conservation requirements.

⁴⁸ Each water year runs from October 1 to September 30 of the following year.

⁴⁹ Cal-Am diverts 3,376 afa under legal rights and, on average, 7,602 afa without a basis of right. (3,376 + 7,602 = 10,978 afa).

(2) Annual Reductions: Commencing on October 1, 2011, the base shall be further reduced by 121 af per year through savings that will accrue from reduced system losses, the retrofit program, the reduction of potable water used for outdoor irrigation, demand reduction and similar measures. The 121 af reduction shall be cumulative. For example, 121 af shall be reduced in the first year and 242 af shall be reduced in the second year. Commencing on October 1, 2015, annual reductions shall increase to 242 af per year. The 242 af per year reduction shall also be cumulative. Annual reductions shall continue until all unlawful Cal-Am diversions from the river have been terminated.

(3) ASR Project: The amount of water diverted to underground storage under Permit 20808A (Application 27614A) as of May 31 of each year and which will be supplied to Cal-Am customers after that date shall be subtracted from the base.⁵⁰ On June 1 of each year, Cal-Am shall submit an operating plan to the Deputy Director for Water Rights specifying the quantity of water it intends to supply from ASR Project for its customers after May 1 of each year. Water pumped from the project for delivery to customers should be consistent with the requirements of paragraph "c" below.

(4) Sand City Desalination Plant: Once the Sand City Desalination Plant becomes operational, 94 af shall be subtracted from the base. In addition, based on actual production from the plant, any other water that is produced and not served to persons residing within the City of Sand City shall be subtracted from the base amount for each water year.

(5) Small Projects: Water produced from new sources developed pursuant to Condition 4 of this order shall be subtracted from the base.

(6) Pebble Beach: Within 90 days following adoption of the order, ~~the Pebble Beach Company~~ MPWMD shall certify, under penalty of perjury, the total quantity of water annually used under ~~its~~ the PBC water entitlement from MPWMD (for the funding assurances provided for the construction and expansion of the CAWD-PBCSD

⁵⁰ This condition shall apply to Phase I and Phase II of the ASR project.

wastewater reclamation project).⁵¹ Ten percent (10%) of the amount reported shall be added to the adjusted base to allow Cal-Am to divert water from the river to supply water for PBC water entitlements initiated in the following 12 months. Thereafter, the PBC MPWMD shall annually submit, on September 30, a report to the Deputy Director for Water Rights accounting for any additional water that is diverted from the Carmel River as the result of an increased use of ~~its MPWMD the~~ PBC water entitlement. Increased diversions from the river by Cal-Am to satisfy PBC entitlements from MPWMD shall be added to the adjusted base, and are not subject to section 2 of this order. Water Diverted from the river by Cal-Am for PBC entitlements can only be served to properties that have received a PBC entitlement from MPWMD and which are located in the Cal-Am's service area. ~~Cal-Am shall not divert water from the Carmel River after December 31, 2010, to supply PBC's water entitlement from MPWMD.~~

- b. Either Cal-Am or the MPWMD may petition the State Water Board Deputy Director for Water Rights for relief from annual reductions imposed under condition 3., a (2). No relief shall be granted unless all of the following conditions are met: (a) Within 18 months of the adoption of this order, Cal-Am has imposed a moratorium on new service connections pursuant to Water Code section 350 or has obtained an order prohibiting new connections from the PUC pursuant to Public Utility Code section 2708 or MPWMD has imposed a moratorium on new service connections under its authority; (b) the demand for potable water by Cal-Am customers has been reduced by 13 percent;⁵² and (c) a showing is made that public health and safety will be threatened if relief is not granted. Any relief granted shall remain in effect only as long as (a) a prohibition on new service connections remains in effect, and (b) the 13 percent conservation requirement remains in effect.
- c. ASR project water stored in the Seaside groundwater basin under Permit 20808A (Application 27614A) should be used to mitigate the effect of Cal-Am's illegal diversions from the river. ASR water should be supplied to Cal-Am customers only during months when water is most needed in the river to preserve steelhead.

⁵¹ Water currently diverted from the river by Cal-Am to supply PBC entitlements is accounted for in the existing base.

⁵² For purposes of measuring compliance, the 13 percent reduction shall be measured against the adjusted base required by this condition for the year in which the conservation requirement is imposed.