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 11 Attorneys for PEBBLE BEACH COMPANY

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BEFORE THE CALIFORNIA  
 STATE WATER RESOURCES CONTROL BOARD

In the Matter of Draft Cease and Desist  
 Order No. 2008-00XX-DWR Against  
 California American Water Company

**PEBBLE BEACH COMPANY'S PRE-  
 HEARING RESPONSIVE BRIEF**

**I.  
 INTRODUCTION**

Pebble Beach Company ("PBC"), as a party to the above-entitled matter, submits this brief in response to the pre-hearing briefs on procedural matters and scope of the proceedings submitted by various parties.

PBC did not submit an initial brief on such matters because the issue presented by PBC is limited and was succinctly framed by PBC in its Notice of Intent to Appear ("NOI"), as follows:

"The primary objective of Peach Beach Company in these proceedings is to assure that the Pebble Beach Water Entitlement of 380 afa is recognized in, and not affected by, any Cease and Desist Order issued by the State Water Resources Control Board ("State Water Board") against California American Water Company ("Cal-Am"). State Water Board staff has previously and consistently recognized that the Water Entitlement of 380 afa annually granted to Pebble Beach Company and other fiscal sponsors of the CAWD-PBCSD Wastewater Reclamation Project is allowed to be served by Cal-Am with withdrawals over and above the 11,285 afa Carmel River withdrawal limit presently set-forth in Order 95-10 (see letters from Edward C. Anton, Chief, Division of Water Rights

1 dated March 27, 1998, and October 18, 2001, attached hereto as Attachments 1 &  
2 2). The same provision should be made in any Cease and Desist Order that may  
3 be issued to Cal-Am ordering reduced withdrawals from the Carmel River.”

4 As the Draft Cease and Desist Order (“Draft CDO”) does not explicitly mention or  
5 recognize the Pebble Beach Water Entitlement, the issue posed by PBC is simply measures  
6 (through modifications to the Draft CDO, if issued, or otherwise) to explicitly recognize what  
7 has already been recognized by the State Water Board with respect to the Pebble Beach Water  
8 Entitlement.

9 **II.**  
10 **THE PEBBLE BEACH WATER ENTITLEMENT**

11 To briefly summarize, the Pebble Beach Water Entitlement (sometimes referred to herein  
12 as the “Water Entitlement”) is a “present vested property right” to potable water granted to PBC  
13 and other “fiscal sponsors” by the Monterey Peninsula Water Management District  
14 (“MPWMD”) as consideration for funding the Carmel Area Wastewater District (“CAWD”) -  
15 Pebble Beach Community Services District (“PBCSD”) Wastewater Reclamation Project (the  
16 “Recycled Water Project”). The Recycled Water Project was designed to provide at least 800  
17 acre feet annually (“afa”) of recycled water for irrigation of Del Monte Forest golf courses and  
18 open spaces, thereby conserving 800 afa of potable water then being used for irrigation.  
19 Pursuant to an extensive set of agreements entered into beginning in 1989, the Recycled Water  
20 Project was completed and commenced operation in the fall of 1994. PBC guaranteed \$33.9  
21 million in debt obligations of MPWMD for the project and in return received its Water  
22 Entitlement of 365 afa for future use of Cal-Am water.<sup>1</sup>

23 Order WR 95-10 specifically recognized this Water Entitlement in Footnote 2 of the  
24 Order.<sup>2</sup> Subsequently, in 1998, the State Water Board through the Chief of the Division of  
25 Water Rights confirmed that “under Footnote 2 of Order WR 95-10, the 380 afa is available to

26 <sup>1</sup> Two other fiscal sponsors, J. Lohr Properties and the Hester Hyde Griffin Trust, received 10  
27 and 5 afa respectively, bringing the total granted Water Entitlement to 380 afa.

28 <sup>2</sup> Footnote 2 of Order WR 95-10 states in pertinent part that “[I]n return for financial guarantees,  
the Pebble Beach Company and other sponsors received a 380 afa potable water entitlement from  
the District, based upon issuance of an appropriative right permit to the District, for development  
within Del Monte Forest.”

1 serve these projects [in Del Monte Forest],” and that use of the Pebble Beach Water Entitlement  
2 was not subject to the 11,285 afa limit on Cal-Am withdrawals from the Carmel River and could  
3 be utilized over and above such limit (up to 380 afa) without violating Order WR 95-10 (letter  
4 from Edward C. Anton, Chief, Division of Water Rights to Darby Feurst, Monterey Peninsula  
5 Water Management District and Larry Foy, California American Water Company, dated  
6 March 27, 1998, a copy of which is attached hereto as Exhibit “A”).

7 From 1994 until 2005, the Recycled Water Project delivered recycled water to the Del  
8 Monte Forest golf courses in the annual average amount of approximately 670 afa (thereby  
9 conserving the same amount of potable water). Because of unanticipated salinity problems with  
10 the recycled water (requiring flushing of the golf course greens) and insufficient storage to meet  
11 peak demand, potable water was required to supplement the recycled water in the average annual  
12 amount of approximately 270 afa. These problems were addressed in 2005 with the adoption of  
13 MPWMD Ordinance No. 109, which provided a funding mechanism for improvements to the  
14 Recycled Water Project. The improvements consist of (1) rehabilitation of Forest Lake  
15 Reservoir in Del Monte Forest to provide substantial storage for the project, completed in 2006  
16 at a cost of approximately \$12.5 million, and (2) installation of desalination facilities at the  
17 CAWD treatment plant to reduce the salinity of the recycled water, presently under construction  
18 with an expected completion this year (2008), at a projected cost of approximately \$21.5 million.

19 The 365 afa PBC Water Entitlement was initially dedicated to use on land owned by  
20 PBC. The funding mechanism for the improvements to the Recycled Water Project in 2005  
21 involved the sale of a portion (up to 175 afa) of PBC’s Water Entitlement to other landowners in  
22 Del Monte Forest pursuant to MPWMD Ordinance No. 109, with the proceeds dedicated  
23 exclusively to the project improvements. The State Water Board was made aware of this plan,  
24 and reiterated in 2001 that service to satisfy the Water Entitlement was permissible over-and-  
25 above the 11,285 afa limit on Cal-Am withdrawals from the Carmel River, and the Water  
26 Entitlement could be used anywhere within the Cal-Am service area (letter from Edward C.  
27 Anton, Chief, Division of Water Rights to Ernest A. Avila, Monterey Peninsula Water  
28 Management District, dated October 18, 2001, a copy of which is attached hereto as

1 Exhibit "B").

2 To date, PBC has sold approximately 115 afa of its Water Entitlement to other  
3 landowners in Del Monte Forest, generating approximately \$23 million which has been applied  
4 to the costs of the project improvements; and PBC has committed to pay the balance of the costs  
5 of the project improvements that are not covered by the proceeds from sales of the Water  
6 Entitlement. These improvements will when fully completed this year result in conservation of  
7 an additional 270 afa annually of potable water/withdrawals from the Carmel River.<sup>3</sup>

8 The Pebble Beach Water Entitlement thus represents the foundation that has supported,  
9 and continues to support, the Recycled Water Project, which in turn has saved hundreds of acre  
10 feet annually in withdrawals from the Carmel River.<sup>4</sup> The Recycled Water Project represents an  
11 investment of almost \$68 million (\$33.9 for the original project and \$34 for the recent project  
12 improvements) that has been made in reliance on the security and assurance of the Water  
13 Entitlement. PBC and many Del Monte Forest landowners have paid hard money for the Water  
14 Entitlement, without which the Recycled Water Project and its consequent savings in  
15 withdrawals from the Carmel River would not exist.<sup>5</sup> The State Water Board has consistently

16 <sup>3</sup> The Forest Lake Reservoir component was completed in 2005. Records of the project show  
17 that for the last two years of full operation, the project delivered 1080 afa and 920 afa of total  
18 water (recycled and potable) for irrigation. On account of the Forest Lake Reservoir, the potable  
19 portion of these amounts was reduced from approximately 30% to 15%. Thus, recycled water  
20 deliveries were increased to approximately 918 afa and 782 afa, respectively, in these two years,  
21 or an annual average of 850 afa, with a consequent reduction of potable water deliveries to an  
22 annual average of 150 afa. With completion and commencement of operation of the desalination  
23 improvements at the CAWD treatment plant this year, this remaining amount of required potable  
24 water will be eliminated.

25 <sup>4</sup> The math showing the benefit to the Carmel River and its public trust resources from the  
26 Recycled Water Project and the Water Entitlement is simple. For a Water Entitlement of 380 afa  
27 requiring withdrawals from the Carmel River, the Recycled Water Project has reduced  
28 withdrawals (through 2005) by 670 afa and with the recent project improvements, will further  
reduce withdrawals to in excess of 900 afa. Thus, the net reduction in withdrawals from the  
Carmel River due to the Water Entitlement (assuming its full use of 380 afa and deliveries of  
recycled water in excess of 900 afa with recent project improvements) is well in excess of 500  
afa. The savings in reality have been much greater over the life of the project, because only a  
small portion of the Water Entitlement has actually been used to date, and indeed the full use of  
the Water Entitlement is not expected to occur for a number of years.

<sup>5</sup> It is noteworthy that the Water Entitlement has benefitted not only the Carmel River but the  
community as well, as it is readily apparent that without the Recycled Water Project substitution  
of recycled water for potable water for irrigation, Cal-Am would have exceeded in most years  
the 11,285 afa limit on withdrawals from the Carmel River, thereby subjecting Cal-Am and  
ultimately the community to potential penalties or remedial measures for violating Order WR 95-  
10.

1 recognized these facts, and has assured that the Water Entitlement may be served by withdrawals  
2 from the Carmel River by Cal-Am notwithstanding other limits that may be applicable to Cal-  
3 Am.

4  
5 **III.**  
**PROCEDURAL ISSUES RELATED TO THE PEBBLE BEACH WATER**  
**ENTITLEMENT**

6 **A. Scope of Hearing.**

7 The issue of the Pebble Beach Water Entitlement as a secure water right (i.e., right to  
8 potable water service from Cal-Am through withdrawals from the Carmel River) is an issue that  
9 can, and should, be eliminated from the hearing by a pre-hearing order. The State Water Board  
10 and Cal-Am, the two principal adversarial parties in the proceeding, have not disputed the status  
11 and validity of the Water Entitlement. The only two other parties with an interest in the issue  
12 (MPWMD, which granted the Water Entitlement, and PBC, which received the Water  
13 Entitlement) fully support the Water Entitlement.

14 The State Water Board's position that the Water Entitlement is not subject to the  
15 limitations otherwise applicable to Cal-Am on withdrawals from the Carmel River is clear, as  
16 evidenced by Order WR 95-10 and the letters attached as Exhibits "A" and "B." The State  
17 Water Board has confirmed that under Order WR 95-10, "380 afa is available" pursuant to the  
18 Water Entitlement. In such case, the matter of the status and validity of the Water Entitlement  
19 has already been decided, and is not subject to any further adjudication under the principle of  
20 collateral estoppel and res judicata ably described in Cal-Am's pre-hearing brief.

21 The status and validity of the Water Entitlement are not a matter of dispute among the  
22 parties who have a direct interest in the matter such that, if it is not disposed of through  
23 principles of collateral estoppel/res judicata, it would be appropriate to eliminate the issue from  
24 the scope of the hearing as an undisputed issue. The Hearing Officer may wish a stipulation to  
25 this effect, but the Hearing Officer's proviso should be that only the consent of those with direct  
26 interest in the matter – namely, The Water Rights Prosecution Team, Cal-Am, MPWMD, and  
27  
28

1 PBC – is required for the stipulation to be effective.<sup>6</sup> The other parties to the proceeding do not  
2 have a interest in the issue, are not in a position to controvert the facts and legal effect of the  
3 Water Entitlement; they do not have any financial or other stake in the matter, and none of them  
4 have mentioned the issue in their pre-hearing briefs. As Cal-Am notes in its pre-hearing brief, as  
5 intervening parties it would be inappropriate to allow any of such intervenors to attempt to  
6 control or prevent resolution of an issue in which they have no interest.

7 **B. Conduct of Hearing.**

8 Several parties in their pre-hearing briefs have requested bifurcation of the hearing into a  
9 “liability” phase and a “remedy” phase. If the status of the Pebble Beach Water Entitlement is  
10 not eliminated at the outset from the scope of the hearing, bifurcation would be appropriate and  
11 favored from PBC’s perspective. PBC has no particular evidentiary light to shed on the question  
12 of whether Cal-Am is in compliance with Order WR 95-10; the status of the Water Entitlement  
13 would not change if Order WR 95-10 is not changed; and PBC would not have to participate in  
14 the “liability” phase of the hearing. However, if “liability” on the part of Cal-Am is found and  
15 Order WR 95-10 is to be superseded by a new Cease and Desist Order, PBC at that point would  
16 definitely actively participate in the “remedy” phase to make sure that the Pebble Beach Water  
17 Entitlement is recognized and protected under the terms of the Cease and Desist Order (or other  
18 remedy) that may be issued or adopted.

19 As such, bifurcation represents the most administratively efficient economical method of  
20 conducting the hearing from PBC’s standpoint.

21 **IV.**  
22 **CONCLUSION**


23 The Pebble Beach Water Entitlement as the means of supporting the Recycled Water  
24 Project has substantially reduced withdrawals from the Carmel River. This is an incontrovertible  
25 fact. The State Water Board has consistently recognized the Pebble Beach Water Entitlement as

26 <sup>6</sup> PBC assumes in this regard that the Water Rights Prosecution Team does not intend to  
27 countermand the consistent position of the State Water Board as to the status and validity of the  
28 Water Entitlement as described above in this brief. Indeed, the Water Rights Prosecution Team  
in its pre-hearing brief “invites comments” from the other parties on stipulations for issues for  
which there are “no material disputes.”

1 a secure right to water that is not subject to the limitations on withdrawals from the Carmel River  
2 by Cal-Am under Order WR 95-10. There does not appear to be any dispute in this proceeding  
3 among the parties with a direct interest in the matter that it should continue to have the same  
4 status. As such, it would be appropriate to eliminate this issue from the scope of the hearing by  
5 one of the methods suggested above.

6 Dated: April 23, 2008

Respectfully submitted,  
FENTON & KELLER

8  
9 By:   
10 Sheryl L. Ainsworth  
11 Attorneys for PEBBLE BEACH  
12 COMPANY

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**Cal/EPA**

**State Water  
Resources  
Control Board**

**Division of  
Water Rights**

**Mailing Address:  
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Sacramento, CA  
95812-2000**

**901 P Street  
Sacramento, CA  
95814  
(916) 657-1359  
FAX (916) 657-1455**

**ATTACHMENT 1**



**Pete Wilson  
Governor**

**MARCH 27 1998**

**Mr. Darby Fuerst  
Monterey Peninsula Water  
Management District  
P.O. Box 85  
Monterey, CA 93942-0085**

**Mr. Larry Foy  
California American Water Company  
P.O. Box 951  
Monterey, CA 93942-0951**

Dear Sirs:

**RECLAMATION PROJECT WATER AVAILABILITY – CARMEL RIVER IN MONTEREY COUNTY**

In response to a November 14, 1997 request by the Del Monte Forest Property Owners organization this letter addresses the availability of 380 afa to serve development under the water entitlement granted by the Monterey Peninsula Water Management District (District) to sponsors of the Carmel Area Waste Water District (CAWD) – Pebble Beach Community Services District (PBCSD) wastewater reclamation project and its relation to SWRCB Order 95-10.

SWRCB Order WR 95-10 refers to the entitlement granted by the District and development of the Del Monte Forest property. Footnote 2 of the Order states:

“The (Wastewater Reclamation) Project will provide 800 af 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 potable water entitlement from the District, based upon issuance of an appropriative right permit to the District, for development within Del Monte Forest.”

The wastewater reclamation facility operated by the CAWD is presently producing more than 800 afa of reclaimed water annually for use upon golf courses and open space areas. Use of treated wastewater has reduced the potable water deliveries of California-American Water Company (Cal-Am) for this irrigation project by at least 500 afa. The SWRCB understands that improvements are being considered that may allow reduction of potable water use by the full 800 afa.

**EXHIBIT “A”**



*Our mission is to preserve and enhance the quality of California's water resources, and ensure their proper allocation and efficient use for the benefit of present and future generations.*



MARCH 27 1999

Mr. Darby Fuerst  
Mr. Larry Foy

-2-

The SWRCB 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 the 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 development project on 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 the 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 these 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 SWRCB 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 SWRCB 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 SWRCB 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 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 wastewater is utilized on lands within the Cal-Am service area.

Footnote 2 of Order WR 95-10 deals only 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 the 380 afa identified in the footnote equals 420 afa) developed by the wastewater treatment facility.

In order to accurately document that only the historic level of diversion has been maintained, the District is requested to advise the SWRCB of both the quantity of potable water obtained from Cal-Am on a monthly and total annual basis to serve these lands. Information on both monthly



MARCH 27 1993

Mr. Darby Fuerst  
Mr. Larry Foy

-3-

and total annual production and beneficial use from the wastewater treatment project should also be included in the submittal. This information should be submitted quarterly, and the annual data should document use during the water year. The water year begins on October 1 of one year and ends on September 30 of the subsequent year.

If you have any questions regarding this matter, I can be contacted at (916) 657-1359.

Sincerely,

ORIGINAL SIGNED  
EDWARD C. ANTON

Edward C. Anton, Chief  
Division of Water Rights

cc: / Mr. Robert C. Gross  
Del Monte Forest Property Owners  
P.O. Box 523  
Pebble Beach, CA 93953



ATTACHMENT 2



Winston H. Hickox  
Secretary for  
Environmental  
Protection

State Water Resources Control Board

Division of Water Rights

1001 I Street, 14<sup>th</sup> Floor • Sacramento, California 95814 • (916) 341-3363  
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000  
FAX (916) 341-3400 • Web Site Address: <http://www.waterrights.ca.gov>



Gray Davis  
Governor

*The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov>.*

OCT 1 8 2 001

Mr. Ernest A. Avila  
Monterey Peninsula Water  
Management District  
P.O. Box 85  
Monterey, CA 93942-0085

Dear Mr. Avila:

PEBBLE BEACH PROJECT - USE OF RECLAIMED WASTEWATER FROM THE  
CARMEL AREA WASTEWATER DISTRICT/PEBBLE BEACH COMMUNITY SERVICES  
DISTRICT (CAWD) WASTEWATER RECLAMATION PROJECT - FILE 262.0 (27-01)

By letter dated October 2, 2001, you request clarification regarding use of treated wastewater produced by the CAWD project in lieu of potable water supplies for purposes of developing new projects.

The Division of Water Rights (Division) addressed this issue in our letter of March 27, 1998. The March 27 letter states that it is acceptable to transfer a maximum of 380 acre-feet per annum of potable water supplies freed up through use of treated wastewater on the Del Monte Forest property for new purposes, provided that diversions from the Carmel River do not exceed 11,285 acre-feet per year plus the quantity of potable water provided to Pebble Beach Company and other sponsors under this entitlement for use on the Del Monte Forest properties. 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 Forest property and (b) the quantity of treated wastewater put to beneficial use equals or exceeds the potable water use. The Monterey Peninsula Water Management District is responsible for submitting these records to the Division on a quarterly basis, until full compliance with Order WR 95-10 is achieved.

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 (1) within 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 WR 95-10, (and any subsequent modifications approved by the State Water Resources Control Board) and requirements (a) and (b) above.

EXHIBIT "B"

Mr. Ernest A. Ayala

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OCT 18 2001

Katherine Mrowka is the staff person presently assigned to this matter. If you require further assistance, Ms. Mrowka can be contacted at (916) 341-5363.

Sincerely,



for Edward C. Anton, Chief  
Division of Water Rights

cc: Mr. Anthony Lombardo  
Lombardo & Gillex, PLC  
P.O. Box 2119  
Salinas, CA 93902-2119

1 **PROOF OF SERVICE**

2 I, Jodi Horner, declare:

3 I am a resident of the State of California and over the age of eighteen years, and not a  
4 party to the within action; my business address is 2801 Monterey-Salinas Highway, Post Office  
Box 791, Monterey, CA 93942. On April 23, 2008, I served the within document(s):

5 **PEBBLE BEACH COMPANY'S PRE-HEARING RESPONSIVE BRIEF**

6  by transmitting via email only the document(s) listed above to the email  
7 addresses set forth below on this date from 2801 Monterey-Salinas Highway,  
Monterey, California.

8  by placing the document(s) listed above in a sealed envelope with postage  
9 thereon fully prepaid, in the United States mail at Monterey, California addressed  
as set forth below.

10  by placing the document(s) listed above in a sealed \_\_\_\_\_ envelope  
11 and affixing a pre-paid air bill, and causing the envelope to be delivered to a  
12 \_\_\_\_\_ agent or deposited in a box or other facility regularly  
maintained by \_\_\_\_\_ for delivery.

13 ***SERVED VIA EMAIL ONLY:***

14 California American Water  
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Diepenbrock Harrison  
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18 [jrubin@diepenbock.com](mailto:jrubin@diepenbock.com)

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24 Carmel River Steelhead Association  
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27 [mjatty@sbcglobal.net](mailto:mjatty@sbcglobal.net)

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City of Seaside  
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**VIA U.S. MAIL ONLY:**

Monterey Peninsula Water Management  
District  
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De Lay & Laredo  
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(831) 646-1502

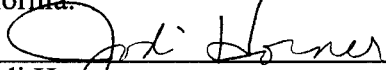
City of Sand City  
James G. Heisinger, Jr.  
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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on 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 April 23, 2008, at Monterey, California.

  
\_\_\_\_\_  
Jodi Homer