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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

**REPLY BRIEF OF
 PEBBLE BEACH COMPANY**

I.
INTRODUCTION

The Pebble Beach Water Entitlement (the "Water Entitlement") is a right to potable water service from California American Water ("Cal-Am"), up to an aggregate of 380 acre feet annually ("afa"), granted by the Monterey Peninsula Water Management District ("MPWMD") and held by Pebble Beach Company ("PBC") and over 500 other landowners who have paid hard money for their portions of the Water Entitlement in order to finance and support the Pebble Beach Wastewater Reclamation Project (the "Reclamation Project"). Since its inception in 1994, the Reclamation Project has conserved and reduced diversions from the Carmel River system by almost 700 afa through 2005, and with the recent improvements of additional storage at the rehabilitated Forest Lake Reservoir and desalination facilities at the Carmel Area Wastewater District ("CAWD") treatment plant, it will further conserve and reduce diversions by an

1 additional almost 300 afa, for a total of approximately 1,000 afa by 2009. This conservation and
2 reduction of diversions from the Carmel River has occurred due to the substitution of reclaimed
3 (recycled) water for potable water previously used for irrigation of golf courses and recreational
4 open spaces in the Del Monte Forest area. The Reclamation Project would not and could not
5 exist without the continuing financial guarantees of PBC to pay the costs of the Reclamation
6 Project, which PBC committed to do in exchange for the granting of the Water Entitlement. As a
7 result of the Water Entitlement and the Reclamation Project, the “net diversions” by Cal-Am
8 from the Carmel River have been and are now substantially less than would have occurred if the
9 Reclamation Project had not been developed.

10 Consequently, the State Water Resources Control Board (the “State Water Board” or
11 “SWRCB”) has consistently supported the Reclamation Project and the Water Entitlement, and
12 has taken the position that Cal-Am may provide water with diversions from the Carmel River to
13 serve the Water Entitlement, up to 380 afa, over-and-above the diversion limits applicable to
14 Cal-Am under SWRCB Order 95-10 (“Order 95-10”) or any modifications thereto.

15 PBC requests in these proceedings, on behalf of itself and the over 500 other owners of
16 portions of the Water Entitlement, only that the State Water Board continue to recognize and
17 affirm its long-held position on the Water Entitlement as having the separate status described
18 above¹, with appropriate findings and modifications to the draft Cease and Desist Order (“CDO”)
19 if, indeed, a CDO is issued at all.

20 The foregoing summarizes the uncontroverted evidence and the position of PBC as
21 presented throughout these proceedings and in PBC’s Closing Brief². Neither the Prosecution
22 Team nor any other proponent of the draft CDO takes any issue, in their Closing Briefs, with the

23 ¹ As used in this brief, the term “separate status” means that the Water Entitlement is a
24 recognized right in accordance with its terms which Cal-Am may serve with diversions from the
25 Carmel River, up to 380 afa, not subject to any diversion limits or other restrictions imposed on
26 Cal-Am by SWRCB.

27 ² Initially, PBC would like to make the following corrections to its Closing Brief. Footnote 11
28 should read “Exhibit PBC – 8, p. 1, emphasis added.” The remainder of text of footnote 11
belongs as footnote 12, with the existing text of footnote 12 deleted. “Facts” should be
capitalized in this text. Poppy Hills Golf Course was inadvertently omitted, and should be
added, as one of the golf courses irrigated with reclaimed water in footnote 13. On page 10, line
6, the word “must” should be “much”; on page 11, line 5, the word “setting” should be
“settling”; on page 13, line 12, the word “of” should be inserted between “thereof” and “the”;
and on page 13, line 15, the word “for” should be “far”.

1 position of PBC with respect to the Water Entitlement. Indeed, the Prosecution Team and the
2 supporters of the draft CDO are not shy about claiming and relying on the benefits that have
3 accrued from the Water Entitlement through its essential support of the Reclamation Project. For
4 example, the Prosecution Team in Exhibit A to its Closing Brief counts on savings-to-come from
5 the Reclamation Project in attempting to prove that the draft CDO's diversion reductions are
6 "reasonable" and achievable. And the Sierra Club and CRSA have consistently noted in their
7 testimony that supplying more water to the Carmel River Lagoon is the top priority for steelhead
8 habitat enhancement³ – a position supported by the Monterey Peninsula Water Management
9 District and National Marine Fisheries Service⁴ – and that surplus reclaimed water from the
10 Reclamation Project has in the recent past been utilized for this purpose and is the best source in
11 the near future to serve this purpose.

12 Nevertheless, notwithstanding its awareness of PBC's position, the Prosecution Team
13 simply does not address it in its Closing Brief, asserting generally that the Prosecution Team has
14 carried its burden of proof that Cal-Am is unlawfully diverting water from the Carmel River and
15 that the draft CDO is a reasonable remedy.⁵ Given the facts described above, it is difficult to
16 discern how or why the Prosecution Team would object to the Water Entitlement as having a
17 separate status under the draft CDO, as proposed by PBC, especially since suggesting otherwise
18 would be urging the State Water Board to renege on its previous commitment consistently
19 recognizing the Water Entitlement's separate status under Order 95-10. Indeed, it is perplexing
20 to the point of bordering on the incomprehensible that the Prosecution Team has not conceded

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24 ³ Hearing Transcript Phase 2, Vol. III, Friday, July 25, 2008, p. 665 (Testimony of Dr. John
Williams); CRSA Exhibit 3, pp. 7, 10-11 (Testimony of Roy Thomas and Brian LeNeve).

25 ⁴ See Hearing Transcript, Phase 2, Volume III, Friday, July 25, 2008, p. 910 - 11 (Testimony of
K. Urquhart); Exhibit MPWMD - DF11.

26 ⁵ The Sierra Club, Carmel River Steelhead Association ("CRSA"), and the Public Trust Alliance
27 support the draft CDO principally on the basis that the asserted "illegal" diversions are
28 continuing to harm the steelhead and that further reductions in diversions will benefit steelhead
and related habitat, while the Planning and Conservation League supports the draft CDO to
provide an "incentive" to multiple parties and agencies to come up with a water solution, in each
case without addressing the Water Entitlement.

1 such a modification to the draft CDO in its Closing Brief.⁶

2 That being the case, however, PBC cannot assume that the separate status of the Water
3 Entitlement will not be affected by the Prosecution Team's unreasonable position or otherwise
4 raised in the Reply Briefs. Thus, in this Reply Brief we deal specifically with why the draft
5 CDO is not "reasonable" given its blanket diversion limit reductions without recognition of the
6 separate status of the Water Entitlement, and arguments that we speculate might be raised to
7 support a position that the Water Entitlement does not deserve such a status.

8 **II.**
9 **ELABORATION OF PBC'S POSITION ON THE WATER ENTITLEMENT**

10 **A. Undisputed Facts.**

11 The pertinent facts concerning the Water Entitlement established by the evidence, which
12 facts are uncontroverted, are generally summarized above in the Introduction. Important
13 additional facts include the following:

14 ▪ The Reclamation Project could not have been realized without the granting of the
15 Water Entitlement. No other public or private sources of funds were available to finance the
16 Reclamation Project, and without the Water Entitlement PBC would not have provided the
17 guarantees to finance it.

18 ▪ The Reclamation Project has been \$68 million undertaking, consisting of \$34
19 million for the original project and \$34 million for the recent project improvements. PBC alone
20 has spent almost \$11 million covering its guarantee of the principal and interest on the bonds for
21 the original \$34 million Reclamation Project, a figure that will continue to rise over time, in
22 reliance on the security of the Water Entitlement and the assurances of the State Water Board.
23 Other property owners in Del Monte Forest (over 500 in number) have collectively spent
24 approximately \$24 million to purchase portions of the Water Entitlement, the proceeds of which
25 have been used exclusively to finance the recent improvements to the Reclamation Project, in

26 ⁶ It is assumed that the other proponents of the draft CDO would not oppose the separate status
27 for the Water Entitlement in any CDO, given the obvious steelhead habitat benefits of the
28 Reclamation Project in reducing Carmel River diversions and the potential for enhancing the
lagoon habitat (as well as other important environmental benefits, such as reducing discharges to
the Carmel ASBS). Thus, it is understandable that these proponents do not take on the issue of
the Water Entitlement in their Closing Briefs.

1 reliance on the security of the Water Entitlement and the assurances of the State Water Board.
2 PBC has guaranteed payment of the remaining amount of the \$34 million cost of these
3 improvements.

4 ▪ The benefit of the reduction in diversions from the Carmel River from the Water
5 Entitlement is even greater considering actual use of the Water Entitlement; as of May 2008 only
6 46.323 afa of the Water Entitlement was actually being used⁷, and full use of the Water
7 Entitlement is likely years away and may never actually occur.

8 **B. SWRCB and PBC Position.**

9 As discussed in PBC's Closing Brief, the State Water Board has found on multiple
10 occasions for multiple reasons that 380 afa is available from the Carmel River system to serve
11 the Water Entitlement. In Order 95-10, the State Water Board specifically found that "[i]n return
12 for financial guarantees, the Pebble Beach Company and other sponsors, received a 380 af
13 potable water entitlement from the District, based upon issuance of an appropriate right permit to
14 the District, for development within Del Monte Forest."⁸ In correspondence in 1998 specifically
15 addressing the issue, it found that "[a]s a result of the reclamation project and especially during
16 the interim period while the Del Monte Forest property is being developed, the net diversions
17 from the Carmel River to serve the Del Monte Forest properties will be less than the level that
18 would have occurred if the wastewater reclamation project had not been developed."⁹ As a
19 result, the State Water Board has found that, under Order 95-10, "the 380 afa is available to serve
20 these projects"¹⁰ and that Cal-Am may serve the 380 afa Water Entitlement "provided that
21 diversions from the Carmel River do not exceed 11,285 acre-feet per year plus the quantity of
22 potable water provided to Pebble Beach Company and other sponsors under this entitlement for
23 use on the Del Monte Forest properties."¹¹ The State Water Board has reiterated this position on
24 multiple occasions, as discussed in PBC's Closing Brief.

25 The importance of the State Water Board continuing to recognize the separate secure

26 ⁷ Exhibit MPWMD – SP10 (Monthly Entitlement Report, CAWD/PBCSD Recycled Water
Project Entitlements).

27 ⁸ Exhibit PBC – 6 (Order 95-10, Footnote 2).

28 ⁹ Exhibit PBC – 7, p. 2.

¹⁰ Exhibit PBC – 7, p. 2.

¹¹ Exhibit PBC – 8, p. 1.

1 status of the Water Entitlement cannot be overemphasized. Anything short of full recognition
2 and protection of the Water Entitlement as an unqualified right to water service from Cal-Am
3 defeats its very purpose. The Reclamation Project would not exist unless PBC had been assured
4 the Water Entitlement; PBC would not have guaranteed the financing without the Water
5 Entitlement, and no other sources were available to finance it. The Reclamation Project has now
6 been built and is operational (indeed with further improvements having been made) and all of the
7 benefits from it are being fully realized. Yet the Water Entitlement has not been fully utilized,
8 and thus the “benefit of the bargain” has not been even close to fully received by PBC and the
9 500+ other landowners who have paid for the Reclamation Project and its already-realized
10 environmental benefits. And the only way that “benefit of the bargain” can be received is to
11 absolutely protect the rights of the Water Entitlement.

12 Recognizing this, MPWMD in creating and granting the Water Entitlement, and PBC in
13 accepting the financial burdens associated with the Water Entitlement, insisted that the right to
14 water service embodied in it would be “iron-clad” and not subject to divestment for any reason.¹²
15 As such, under MPWMD laws and regulations¹³ and the commitments in the agreements
16 granting the Water Entitlement¹⁴, water service (hookups) under the Water Entitlement cannot be
17 denied or cut off on account of any moratorium, water emergency, reallocation of water or other
18 circumstances that could cause a denial of water service.¹⁵ This is an essential attribute of the
19 Water Entitlement which distinguishes it from other “expectations” of water service, and it was
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21 ¹² Except for one reason, which is not applicable, namely (as to PBC’s portion of the Water
entitlement) if PBC failed to carry through on its financial guarantees.

22 ¹³ See Exhibit MPWMD – SP8 (MPWMD Ordinances No. 39 and No. 109).

23 ¹⁴ Exhibit PBC - 4 (Wastewater Reclamation Project Fiscal Sponsorship Agreement dated
10/3/89), p. 24, section 4.4; Exhibit PBC - 13 (Supplemental Financing Agreement dated
December 15, 2004) p. 18, section 4.3 (8).

24 ¹⁵ See MPWMD – SP8, MPWMD Ordinance No. 109, Section Four, Rule 23.5.A (8) at p. 15:
25 “The Water Entitlement ... shall not be subject to reallocation pursuant to MPWMD Rule 30, nor
shall it be terminated or diminished by reason of any water emergency, water moratorium or
26 other curtailment on the setting of meters for the Cal-Am systems, nor shall it otherwise be
subject to diminishment or revocation,” except for events not applicable here. This right
27 encompasses the right to “hookup” to the Cal-Am system through installation of meters, etc., i.e.,
whatever is necessary to establish water service to the property. Once water service is
28 established, the users of the Water Entitlement are subject to the same rules applicable to other
existing customers of Cal-Am with respect to water use, including water rationing in its various
phases.

1 and is within the power and authority of MPWMD to establish this essential right.¹⁶

2 As mentioned, financially the Reclamation Project continues to operate only by virtue of
3 payments by PBC on its guarantee of the principal and interest on the bonds for the original
4 project, since the revenues received from reclaimed water sales fall far short of covering such
5 costs; and the recent project improvements were made possible only by PBC's guarantee of the
6 full costs of those improvements to the extent not covered by the proceeds of sales of portions of
7 the Water Entitlement. The only consideration received and held by PBC for its continuing
8 financial support of the Reclamation Project is the assurance of the Water Entitlement as a vested
9 and secure right to potable water service. While it is acknowledged that in its agreements with
10 MPWMD PBC has agreed that it will not terminate its guarantees, in the event the security of the
11 Water Entitlement is called into question or denied (such as, among other possibilities, to result
12 in a breach of those agreements by MPWMD), the range of remedies that could be pursued by
13 PBC and multiple other parties could become so involved and financially costly that the
14 continued operation of the Reclamation Project could be seriously jeopardized.¹⁷ That is a result
15 that should be assiduously avoided by all available means.

16 **III.**
17 **CONTRARIAN ARGUMENTS WHICH HAVE NO VALIDITY**

18 Arguments conceivably could be advanced to attempt to frustrate the Water Entitlement,
19 and persuade the State Water Board not to honor its long-standing commitment. For example, it
20 may be argued that the Water Entitlement is simply a contractual right established as a matter of
21 contract between MPWMD, PBC and Cal-Am, and SWRCB is not bound by or involved in
22 contractual issues and can ignore it. Aside from the fact that SWRCB has not in the past ignored
23 it but in fact supported it, the characterization of the Water Entitlement as merely a matter of
24 contract is fallacious. MPWMD created the Water Entitlement, not by a contract, but through its

25 ¹⁶ The power and authority of MPWMD to grant the Water Entitlement with all of its rights and
26 incidents as described in the Fiscal Sponsorship Agreement (Exhibit PBC – 4) is not in question,
27 having been validated by the Superior Court in a final Judgment of Validation included as
28 Exhibit PBC – 4. The Judgment of Validation rules that the Fiscal Sponsorship Agreement is
“valid, binding and enforceable in all respects.” This includes the granting of the Water
Entitlement and the obligation to provide water under it.

¹⁷ See Hearing Transcript, Phase 2, Vol. II, Thursday, July 24, 2008, p. 562 (Testimony of Mark
Stilwell).

1 essential regulatory functions under the authority of the law which created MPWMD¹⁸.
2 MPWMD under the MPWMD Law has broad power “to do any and every lawful act necessary
3 in order that sufficient water may be available for any present or future beneficial use or uses of
4 the lands or inhabitants within the district,”¹⁹ including the power “to conserve and reclaim water
5 for present and future use within the district,”²⁰ and in the aid thereof it has the power to
6 “establish rules and regulations ... to provide for the sale, distribution, and use of water ...”²¹
7 That is exactly what MPWMD has done in this case, through the ordinances, rules and
8 regulations adopted by MPWMD creating and defining the attributes and rights associated with
9 the Water Entitlement and regulating Cal-Am pursuant to its powers to require Cal-Am to honor
10 and serve the Water Entitlement. This is what the Legislature created MPWMD to do, with its
11 legislative findings of the need “for conserving and augmenting the supplies of water by
12 integrated management of ground and surface water supplies ... and for promotion of the reuse
13 and reclamation of water.”²² The only item of contract involved is the formal grant of the rights
14 of the Water Entitlement to PBC, in exchange for PBC’s financial guarantees for the
15 Reclamation Project.

16 It may also be argued that the Water Entitlement can and should be served by Cal-Am
17 within the proposed diversion limits of the draft CDO; that the game has now changed and that it
18 no longer deserves its special status. However, it is clear that the Water Entitlement cannot be
19 securely served within the overall diversion limits applicable to Cal-Am. Again, aside from the
20 fact that the SWRCB has recognized the special status of the Water Entitlement for reasons that
21 have nothing to do with what the diversion limits actually are, this argument is based on the
22 faulty assumption that Cal-Am can adequately serve the Water Entitlement within the diversion
23 limits. As pointed out above, the bundle of rights embodied within the Water Entitlement
24 include an absolute right to hookup to the Cal-Am system irrespective of what the water situation

25 ¹⁸ Statutes of 1977, Chapter 527, as amended, found in Deerings Water Code – Uncodified Acts,
26 Vol. 2, Act 610, Monterey Peninsula Water Management District Law, Section 1 et. seq.
(hereinafter cited as the “MPWMD Law”).

27 ¹⁹ MPWMD Law, section 325; Testimony of Darby Fuerst for Phase 1, p.5.

28 ²⁰ MPWMD Law, section 328 (c).

²¹ MPWMD law, section 326 (c).

²² MPWMD Law, Legislative Findings.

1 is – i.e., the right is not subject to whether Cal-Am is within its diversion limits, whether a
2 moratorium is in effect, or similar circumstances curtailing connections to the Cal-Am system.
3 The Prosecution Team itself recognizes that extraordinary actions (including moratoria) may be
4 required to stay within its proposed draft CDO diversion limits; this will not do to protect the
5 security of the Water Entitlement.

6 It may further be argued that the previous commitments made by SWRCB on the Water
7 Entitlement were intended only to apply in the context of Order 95 – 10, and in the supposedly
8 exigent circumstances requiring a CDO, those commitments are not applicable. As pointed out
9 in PBC’s Closing Brief, the exact opposite is true. The written commitments of SWRCB
10 indicate that they were intended to apply to any modifications of the Order 95 – 10 diversion
11 limits and are not dependent on Order 95 – 10. More importantly, perhaps, the reasons given by
12 SWRCB for recognizing the separate status of the Water Entitlement (net diversions are
13 decreased as a result of the Reclamation Project) are applicable and valid irrespective of what the
14 diversion limits actually are and completely independent of Order 95 – 10.

15 Finally, it may be argued that there is no appropriative right permit to support the Water
16 Entitlement. However, Footnote 2 of Order 95 – 10 says that there is an appropriative right
17 permit issued to MPWMD, and the Prosecution Team has not proved that there is not one.
18 Moreover, the question becomes essentially irrelevant when one considers that the State Water
19 Board’s corollary fundamental reason for recognizing the separate status of the Water
20 Entitlement (i.e., net reduction in Carmel River diversions) is not dependant on whether or not a
21 permit exists.

22 **IV.**
23 **THE DRAFT CDO IS NOT JUSTIFIED OR REASONABLE**

24 For the reasons stated herein, the Prosecution Team’s draft CDO cannot be considered
25 justified or reasonable without modification to assure the separate status of the Water
26 Entitlement consistent with PBC’s position.

27 On the more expansive question of whether the Prosecution Team has carried its burden
28 of proof of establishing that Cal-Am is unlawfully diverting water from the Carmel River and

1 that the draft CDO is a reasonable remedy, PBC believes that the Prosecution Team has not
2 carried that burden of proof for a variety of reasons, not the least of which is that the Prosecution
3 Team's argument that the diversion limits of the CDO are reasonable, achievable, and protective
4 of public health and safety are clearly disingenuous and based on evidence that has been shown
5 to be not credible or trustworthy. Lack of available space precludes a greater exposition of
6 PBC's view.


7
8 **V.**
CONCLUSION

9 For the reasons stated herein, PBC respectfully urges the State Water Board to not adopt
10 the draft CDO in its present form and, if a CDO is to be adopted, that it include provisions to
11 recognize and affirm the separate status of the Water Entitlement generally consistent with the
12 Additional Finding and Additional Term of Order set forth in the conclusion of PBC's Closing
13 Brief.

14 Respectfully submitted,

15 Dated: November 10, 2008

FENTON & KELLER

16
17 By: 
18 Thomas H. Jamison
19 Attorneys for Pebble Beach Company

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
5 Box 791, Monterey, CA 93942. On November 10, 2008, I served the within document(s):

6 **REPLY BRIEF OF PEBBLE BEACH COMPANY**

- 7 by transmitting via email only the document(s) listed above to the email
8 addresses set forth below on this date from 2801 Monterey-Salinas Highway,
9 Monterey, California.
- 10 by placing the document(s) listed above in a sealed envelope with postage
11 thereon fully prepaid, in the United States mail at Monterey, California addressed
12 as set forth below.
- 13 by placing the document(s) listed above in a sealed _____ envelope
14 and affixing a pre-paid air bill, and causing the envelope to be delivered to a
15 _____ agent or deposited in a box or other facility regularly
16 maintained by _____ for delivery.

17 ***SERVED VIA EMAIL AND U.S. MAIL:***

18 Division of Water Rights
19 State Water Resources Control Board
20 Attention: Paul Murphey
21 P.O. Box 2000
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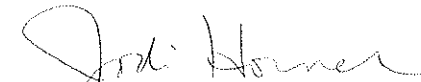
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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course 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 November 10, 2008, at Monterey, California.



Jodi Horner