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July 13, 2016

Ms. Felicia Marcus, Board Chair
Mr. Tom Howard, Executive Director
State Water Resources Control Board
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Mr. Matthew Quint
Division of Water Rights
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Re: June 17, 2016 SWRCB Staff "Preliminary Staff Recommendation to Modify Order WR 2009-0060"

Dear Ms. Marcus, Mr. Howard, and Mr. Quint:

This firm represents the Coalition of Peninsula Businesses (Coalition) on the above-referenced matter. On behalf of the Coalition, I write to provide the following comments on the June 17, 2016 recommended staff amendments to WR 2009-0060. In general, the Coalition appreciates and is supportive of the SWRCB's efforts to address Carmel River conditions and the Monterey area's perennial water supply shortage. As explained below, however, the Coalition is very concerned about the proposed amendments to ordering paragraph two, which provide:

> For the purposes of interpreting State Water Board Order WR 2009-0060, ordering paragraph 2, a change in zoning or use is a change made by a local government agency or the Monterey Peninsula Water Management District (MPWMD). For determining an increase in use of water, for past water use, Cal-Am shall use the lesser of the actual average annual metered water use for the five-year period from WY 2008-2009 to WY 2012-2013, or the amount calculated using MPWMD's fixture-unit count method.

This proposed amendment to WR 2009-0060 would constrain the ability of the Monterey Peninsula Water Management District (District) and local jurisdictions to enact fair and flexible land use decisions. As explained in several other comment letters, the time period of 2008-2013 coincides with the worst economic recession since the Great Depression of the 1930's. Businesses throughout the region closed or cut back operations, with a correlating reduction in on-site water use. As well, almost all property owners in the region cooperated in reducing water use during the historic drought that closely coincided with this time period. By pegging the calculation of historic water use for a property to the period of 2008-2013, the proposed amendment would effectively preclude the redevelopment of properties throughout the region.

Suffice it to say, water use and development on the Monterey Peninsula is already heavily regulated. Against this background of intense regulation, the existing wording of ordering paragraph 2 of WR 2009-0060 at least gives the District and local jurisdictions some flexibility in determining historic water use in the context of changes in a property's use or zoning. Retaining this language is crucial not only to economic development of the region, but also for projects that reflect the very best of the Monterey community – such as the Monterey Bay Aquarium's highly anticipated Center for Ocean Education and Leadership and other outstanding redevelopment projects like Project Bella at the American Tin Cannery, the region's first proposed LEED Platinum hotel.

Retaining the existing language of ordering paragraph 2 of WR 2009-0060 is not just sound policy - the proposed amendments are also unlawful. The SWRCB issued WR 2009-0060 under its cease and desist authority defined by Water Code section 1831. Section 1831 authorizes the SWRCB to administratively order the cessation of unlawful diversions of water. Nowhere in that body of law or any of the SWRCB's regulations is the SWRCB empowered to make land use decisions by the terms of its cease and desist orders (CDO). The language proposed in paragraph 3 of the amendments, which would amend ordering paragraph 2 of existing WR 2009-0060 is an unlawful exercise of the SWRCB's CDO power and goes beyond the SWRCB's statutorily-prescribed jurisdiction.

In addition, this proposed language infringes on the statutorily conferred powers of the District to regulate water use on the Monterey Peninsula. Uncodified Act 610 of the California Water Code established the District in 1977. Under the provisions of Act 610, the California Legislature imbued the District with various powers relating to water supply and permitting for the Monterey region. Section 326(c) of Act 610 specifically empowers the District "[t]o establish rules and regulations . . . to provide for the sale, distribution, and use of water, and the services and facilities of the works, to provide that service, facilities, or water shall not be furnished to persons against whom there are delinquent charges, and to provide for charges for the restoration of service." Acting under that delegation of authority, the District has a thorough set of rules and regulations

governing permitting for water use throughout the region. As explained by the District in its comment letter of July 8, 2016, restricting water use at a property based on historic use during an arbitrary 5-year period that coincides with the Great Recession and significant voluntary water conservation is inconsistent with existing laws governing the local water allocation process. Again, those local water allocation laws are pursuant to explicit statutory authority and duly adopted rules of the District. The Legislature has not empowered the SWRCB to issue CDO's that impose land use terms – especially terms that conflict with the express authority of the District.

Finally, like the Monterey Bay Aquarium's Center for Ocean Education and Leadership, there are other local properties for which (re)development may be precluded or significantly reduced by the proposed amendment of ordering paragraph 2. In situations where a property went unused or underutilized during the 2008-2013 period, the proposed amendments may preclude any future water use, thus completely eliminating all economic value of the property. Regulations with such an effect violate the Takings Clauses of both the U.S. Constitution and California constitution, and would expose the SWRCB to takings litigation. (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-1016 (1992).)

Even where the proposed amendments do not preclude all economic value of the property, a taking may still occur depending upon the regulation's economic magnitude. Following the seminal *Penn Central* decision of the U.S. Supreme Court, the California Supreme Court applies a 10-factor test to determine whether a regulation constitutes a compensable taking of private property in such circumstances. (See *Kavanau v. Santa Monica Rent Control Board,* 16 Cal.4th 761 (1997).) Although the court notes that this 10-factor test is not a "comprehensive enumeration of all factors that might be relevant to a takings claim," several of these factors would squarely apply if properties in the Monterey Peninsula were unable to develop due to the amendments to ordering paragraph 2 of WR 2009-0060.

One *Kavanau/Penn Central* factor is whether the regulation interferes with interests that are sufficiently bound up with the reasonable expectations of the claimant to constitute property for Fifth Amendment purposes. (*Kavanau* at p. 776.) On the Monterey Peninsula, and as explained in the District's July 8, 2016 comment letter, the District and Cal-Am have an established water use regulatory structure. Decisions to buy property and engage in development on the Peninsula do not occur without careful consideration of those regulatory mandates. Tens of millions of dollars (or more) in properties and projects may be impacted if the proposed amendment to ordering paragraph 2 is implemented. Those impacts to the "reasonable expectations" of regional property owners may be compensable as regulatory takings.

Another factor is whether the regulation affects the existing or traditional use of the property and thus interferes with the property owner's primary expectations. *Ibid.*

With the proposed amendment being so vague on what constitutes a "change" triggering restricted water use, it is very possible that various properties making minor changes to historic operations could be significantly impacted.

Courts also look to whether a regulation is "reasonably necessary" to the effectuation of a substantial public purpose. *Ibid.* Although the Coalition understands the SWRCB's mandate to cease unlawful diversions of water, it is not apparent why it is necessary for WR 2009-0060 to be amended in a manner that regulates how the District and local jurisdictions allocate use of that water. WR 2009-0060 sets a clear limit on the quantity of water that Cal-Am may divert from the Carmel River, and it is not reasonably necessary to further regulate how that quantity is allocated for local land uses.

Another factor is whether the regulation permits the property owner to profit and to obtain a reasonable return on investment. *Ibid.* Other factors include whether the regulation prevents the best use of the land, and whether the regulation extinguishes a fundamental attribute of property ownership. *Ibid.* As explained above, limiting water use based on the 2008-2013 period on properties where there is a "change" in zoning or use will likely have major impacts to numerous properties throughout the region implicating each of the factors cited above.

In summary, the Coalition respectfully requests that the SWRCB decline to adopt the staff recommendation to amend ordering paragraph 2 of WR 2009-0060. Amending ordering paragraph 2 in the manner suggested by staff will create "winners and losers" among area landowners, and on the arbitrary basis of how much water was used during a problematic 5 year period of record. Thank you for your consideration of these comments.

Very truly yours,

Nicholas A. Jacobs
Attorney

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