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STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

## ORDER WR 2010-XXXX

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In the Matter of the Petitions for Reconsideration by

**Pebble Beach Company**  
**Quail Lodge, Inc.**  
**CVR HSGE, LLC**  
**Baylaurel, LLC**  
**Del Monte Forest Property Owners**

Regarding Order WR 2009-0060

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SOURCE: Carmel River

COUNTY: Monterey

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## ORDER DENYING RECONSIDERATION

BY THE BOARD:

### 1.0 INTRODUCTION

The Pebble Beach Company (PBC), Quail Lodge, Inc. (Quail Lodge), CVR HSGE, LLC, (CV Ranch), Baylaurel, LLC (Bernardus Lodge), and Del Monte Forest Property Owners (Del Monte Owners) separately filed petitions with the State Water Resources Control Board (Board) for reconsideration of Board Order WR 2009-0060.<sup>1</sup> Order WR 2009-0060 is a cease and desist order directing the California American Water Company (Cal-Am) to take various actions to curtail and reduce its illegal diversions of water from the Carmel River. The Board finds that the petitions for reconsideration fail to raise substantial issues related to the causes for reconsideration set out in California Code of Regulations, title 23, section 768 and denies each petition.

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<sup>1</sup> On December 30, 2009, the Sierra Club filed a letter commenting on the proposed order responding to the petitions for reconsideration and requesting the State Water Resources Control Board (Board) to modify Order WR 2009-0060 in a manner that is outside the scope of the issues raised by the petitions for reconsideration. In substance, the Sierra Club filed a late petition for reconsideration. Petitions for reconsideration must be filed within 30 days of final Board action. (Wat. Code §1126 (b).) The Sierra Club's request is untimely.

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## 2.0 RECONSIDERATION OF A DECISION OR ORDER

Any interested person may petition the State Water Board for reconsideration of a decision or order on any of the following grounds:

- (a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) [t]he decision or order is not supported by substantial evidence;
- (c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) [e]rror in law.

(Cal. Code Regs., tit. 23, § 768.)

Any petition for reconsideration shall be submitted in writing and shall contain the following:

- (1) The name and address of the petitioner.
- (2) The specific board action of which petitioner requests reconsideration.
- (3) The date on which the order or decision was made by the board.
- (4) The reason the action was inappropriate or improper.
- (5) The specific action which petitioner requests.
- (6) A statement that copies of the petition and any accompanying materials have been sent to all interested parties.

(Cal. Code Regs., tit. 23, § 769.)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the regulations. (*Id.*, § 770, subd. (a)(1).) Alternatively, after review of the record, the Board may deny the petition upon a finding that the decision or order was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

## 3.0 FACTUAL BACKGROUND

On October 20, 2009, the Board adopted Order WR 2009-0060, a cease and desist order (CDO). The CDO found that Cal-Am is illegally diverting water from the Carmel River in violation of Water Code section 1052 and State Water Board Order WR 95-10. Fourteen years ago, the Board adopted Order WR 95-10 finding that Cal-Am was diverting about 10,730 acre feet annually (afa) from the river without a valid basis of right. Order WR 95-10 required Cal-Am to diligently implement actions to terminate its unlawful diversions from the river. In Order

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WR 2009-0060 the Board found that Cal-Am had not been diligent in complying with Order 95-10. (Order 2009-0060, pp. 34-37.)

Cal-Am has two major sources of water supply, the Seaside Groundwater Basin and the Carmel River. Commencing in 2009, Cal-Am's diversions from the groundwater basin are limited by court order to 3,087 afa. (Order WR 2009-0060, p.39-40.) Cal-Am has water rights that authorize it to divert no more than 3,316 afa from the Carmel River for non-riparian uses.<sup>2</sup> (Order WR 95-10, pp 14-25.) Any quantities Cal-Am pumps from the river in excess of 3,316 afa for non-riparian uses are illegal diversions. On average, from water year 1995/96 through water year 2006/07, Cal-Am illegally diverted 7,632 afa from the river. (PT-15.)

PBC (and its assignees), Quail Lodge, CV Ranch and Bernardus Lodge hold water entitlements or water credits<sup>3</sup> from the Monterey Peninsula Water Management District (MPWMD) entitling each to receive water supplied by Cal-Am for new service connections or for increased use at existing service addresses. Until it obtains a legal supply of water sufficient to replace its unauthorized diversions from the Carmel River, Cal-Am cannot supply water for new service connections or for increased use at existing service addresses without illegally diverting water from the river.

In Order WR 95-10, the Board found that Cal-Am's diversions "...have historically had an adverse effect on: (1) the riparian corridor along the river below RM [river mile] 18.5, (2) wildlife dependent on riparian habitat, and (3) steelhead and other fish which inhabit the river." (Order WR 95-10, p. 28.) In order WR 2009-0060, the Board took official notice that (1) the steelhead has been declared a threatened species under the Federal Endangered Species Act and that (2) the Carmel River has been listed as critical habitat for the recovery of the steelhead. (Order WR 2009-0060, p. 13.) The Board also found that Cal-Am's diversions from the river continue

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<sup>2</sup> Cal-Am and the Monterey Peninsula Water Management District have additional joint rights to appropriate water from the river for the ASR Project. (Order WR 2009-0060.) The project will yield about another 145 acre feet annually to the supply of water that Cal-Am may legally deliver to persons connected to its water system. (R.T. Phase 1, Vol. 1, pp. 41-42.)

<sup>3</sup> PBC's papers refer to water "entitlements" and the papers of Quail Lodge, CV Ranch and Bernardus Lodge refer to both water "entitlements" and "credits." The Board does not know if the operative effect of water credits received from MPWMD differs from water entitlements received from MPWMD. As used in the papers filed with the Board the two terms appear to be inter-changeable and are treated accordingly.

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to have an adverse effect on fish, habitat and the riparian habitat of the Carmel River, including the threatened steelhead. (Order WR 2009-0060, pp. 37-37.)

Fourteen years having past and Cal-Am having made no meaningful progress in implementing actions to reduce its unlawful diversions from the Carmel River, the Board adopted Order WR 2009-0060 imposing a number of conditions on Cal-Am. Of interest to the petitioners are the following conditions:

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 connections 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.
3. a. (6) Pebble Beach: Within 90 days following adoption of the order, the *Pebble Beach Company shall certify*, under penalty of perjury, the total quantity water annually used under its water entitlement from MPWMD (for the funding assurances provided for the construction and expansion of the CAWD-PBCSD wastewater reclamation project). 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 entitlements initiated in the following 12 months. Thereafter, the *PBC 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 water entitlement. Increased diversions from the river by Cal-Am 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 service area. *Cal-Am shall not divert water from the Carmel River after December 31, 2016, to supply PBC's water entitlement from MPWMD.*

#### **4.0 PETITION BY PEBBLE BEACH COMPANY**

Petitioner Pebble Beach Company (PBC) participated in the hearing before the SWRCB leading to the adoption of Orders WR 95-10 and WR 2009-0060. Order WR 2009-0060 discusses PBC's interest in the proceeding leading to the adoption of the order. (pp. 50-54.) To

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recapitulate, PBC holds a 365 afa water entitlement 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 financially guaranteed public financing of a wastewater reclamation project. This arrangement was also noted in footnote 2 of Order WR 95-10. During the hearing leading to the adoption of Order WR 2009-0060, PBC sought to have its water entitlement for new growth excluded from any limitation that might be placed upon Cal-Am's illegal diversions from the Carmel River.

The 365 afa PBC water entitlement from MPWMD dates to at least 1989. (PBCMS 2.) Later, in 1995, Board Order WR 95-10 found that Cal-Am did not have a legal right to most of the water it was diverting from the Carmel River. (Order WR 95-10, pp. 24-25.) In addition, the judgment for the Seaside Groundwater Basin determined that the quantity of water Cal-Am had been diverting from the basin must be reduced.<sup>4</sup> MPWMD awarded the water entitlements to PBC prior to these decisions.

#### **4.1 Condition 3. a. (6) of Order WR 2009-0060 Should be Amended and, as Amended, Affirmed.**

The principal focus of PBC's petition is the last sentence of Condition 3. a. (6) providing that "Cal-Am shall not divert water from the Carmel River after December 31, 2016, to supply PBC's water entitlement from MPWMD." Petitioner contends that any interpretation of the order that would revoke PBC water entitlements by ordering that the water supply be cut off after December 31, 2016 is an arbitrary and capricious abuse of discretion which the Board is equitably estopped from enforcing.

The sentence was included to make it clear that Condition 1 of the order, which prohibits Cal-Am from illegally diverting water from the river after December 31, 2016, applies equally to all water being illegally diverted from the river, including water used to serve PBC entitlement

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<sup>4</sup> A judgment has been entered in the Monterey Superior Court case, *California American Water Company v. City of Seaside et al*, Monterey Superior Court, Case No. M66343, dated March 27, 2006. The judgment adjudicated and limited rights to produce groundwater from the Seaside Groundwater Basin and implemented a physical solution for the management and protection of the basin. (SWV-2.)

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holders. The sentence is overly broad, however. On its face, it prohibits Cal-Am from supplying any water diverted from the Carmel River after December 31, 2016, to supply PBC's water entitlement, without regard to whether the water is diverted legally or illegally. Although most of Cal-Am's diversions from the Carmel River are illegal, Cal-Am has water rights that authorize it to divert some water from the Carmel River. To the extent deliveries are made using these rights, which authorize diversion of no more than 3,316 afa from the Carmel River for non-riparian uses, Cal-Am should not be prohibited from making deliveries simply because the use is based on a PBC entitlement. Accordingly, the sentence should be amended to read as follows:

After December 31, 2016, Cal-Am shall not illegally divert water from the river to supply the holders of PBC entitlements.

#### **4.2 PBC Order WR 2009-0060 does not Extinguish Entitlements.**

The entitlements amount to an agreement between MPWMD and PBC for service from the water supplies available to Cal-Am. The entitlements do not provide Cal-Am with the right to supply water illegally diverted from the river. Prohibiting Cal-Am from illegally diverting from the river does not deny PBC anything to which it is legally entitled. Nor does it terminate the entitlements.

All water flowing in known and definite channels surface or subsurface, are waters of the state. (Wat. Code, §§ 1200, 1201.) No right to appropriate the waters of the state can be obtained except in compliance with Division 2 of the California Water Code. (*Id.*, § 1225.) The Board is the exclusive agency responsible for administering the laws pertaining to the appropriation of the unappropriated waters of the state. (*Id.*, §§ 1225, 1225-1259.4.) Fourteen years ago, the Board adopted Order WR 95-10 finding that Cal-Am was diverting about 10,730 afa from the river without a valid basis of right. Order WR 95-10 required Cal-Am to diligently implement actions to terminate its unlawful diversions from the river. In Order WR 2009-0060 the Board found that Cal-Am had not been diligent in complying with Order 95-10 and adopted a number of conditions requiring Cal-Am to curtail its diversions from the river. (Order 2009-0060, pp. 34-37, §. 14.2.)

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Consistent with these principles, it was appropriate and proper for Order WR 2006-0060 to prohibit illegal diversions to serve PBC entitlements after December 31, 2016, effectively requiring that the benefit bestowed by the entitlements be supplied by Cal-Am from a source other than its illegal diversions from the river. (See *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 806 fn. 54 [a party’s contractual entitlement for water deliveries from a water right holder does not provide a basis for an allocation in excess of what the appropriator is entitled to divert. “An appropriator cannot give away more rights than he or she has.”].)

Thus, Order WR 2009-0060 does not contain language extinguishing the entitlements. The Order leaves the entitlements in place; however, the entitlements must be served in a manner consistent with the water rights held by Cal-Am. When Cal-Am develops a new source of water that makes water available for new connections consistent with Order WR 2009-0060, the entitlements will apply to that new supply. We conclude, therefore, that Order WR 2009-0060 does not deprive petitioner of the water entitlements received from MPWMD.

### **4.3 When adopting a Cease and Desist Order Curtailing Illegal Diversions, the Board is not Required to Find that Public Trust Resources will be Benefited.**

PBC contends that Order WR 2009-0060 should be reconsidered because there is no evidence in the record to support a determination that deliveries under PBC entitlements will cause harm to public trust resources. PBC does not offer any legal argument in support of this claim. Nor does PBC offer any identification or analysis of the evidence in the record that might arguably be relevant to the issue, aside from its bald assertion that there is none. In any event, PBC’s argument is unsupported, both factually and legally.

Order WR 2009-0060 prohibits illegal diversions from the Carmel River, including illegal diversions used for deliveries under PBC entitlements, after December 31, 2016. To the extent PBC’s public trust argument is directed at the public trust impacts of deliveries from other sources, it is not relevant to the Order. And the evidence in the record clearly supports the conclusion that illegal diversions from the Carmel River are harming public trust resources and will continue to do so as long as those illegal diversions continue. Order WR 95-10 found that

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Cal-Am's diversions were having an adverse effect on the riparian corridor along the Carmel River below river mile 18.5, the wildlife depending upon riparian habitat and steelhead and other fish inhabiting the river. (pp. 25-29.) These findings are res judicata to Cal-Am and to the Monterey Peninsula Water Management District. Order WR 2009-0060 found that Cal-Am's illegal diversions continue to have an adverse impact on fish, wildlife and the riparian habitat of the river and that the listing of the California Central Coast Steelhead as a threatened species and the river as critical habitat for steelhead recovery underscores the importance of reducing and terminating Cal-Am's illegal diversions at the earliest possible date. (pp. 37-39.) The record may not show clearly how much harm would be caused by allowing illegal diversions to continue where they are used to serve PBC entitlements, but that is because the record does not clearly indicate how much water would be required to serve those entitlements. It is also clear that illegal diversions cause harm, and the more diverted the greater the harm. Insofar as public trust impacts are concerned, the impact of illegal diversions used to serve a customer with a PBC entitlement are no different than the impact of illegal diversions used to serve any other customer.

Moreover, there is no legal requirement that there be any evidence of harm to public trust resources before the Board can require that illegal diversions be eliminated. Water Code section 1052 prohibits the diversions and use of water except in compliance with Division 2 of the Water Code. During 1995, the Board adopted Order WR 95-10 finding that Cal-Am was diverting about 10,730 afa without a valid basis of right from the river. The order required Cal-Am to diligently implement actions to terminate its unlawful diversions from the river. Fourteen years later, in Order WR 2009-0060 the Board found that Cal-Am was in violation of section 1052 and had not been diligent in complying with Order WR 95-10. (Order 2009-0060, pp. 34-37, §. 14.2.) The Board is required to take vigorous action to enforce the laws of appropriation. (Water Code § 1825.) The Water Code does not require the Board to consider the relative benefit of the use being made of illegally diverted water versus the needs of public trust resources prior to adopting an enforcement order or taking other authorized actions such as the imposition of civil penalties, adopting a cease and desist order or seeking injunctive relief (Water Code §§ 1055, 1831 and 1831, 1845.) Put another way, the Water Code does not require the Board to allow the continued illegal diversion and use of water merely because such diversions do not cause harm to public trust resources or no evidence has been introduced on that issue.

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The Board adopted Order WR 2009-0060 because Cal-Am is illegally diverting water from the Carmel River. Nevertheless, the fact that the cumulative effect of Cal-Am's illegal diversions are having an adverse effect on public trust resources underscores the importance of adopting an order curtailing the illegal diversions, and militates in favor of a schedule of compliance that will eliminate those illegal diversions without undue delay and reduce those illegal diversions to the extent reasonably possible in the interim.

#### **4.4 The Deputy Director for Water Rights is Instructed to Accept MPWMD Annual Certifications as to the Quantity of Water Supplied to Cal-Am for PBC Entitlement Holders from the Carmel River.**

Condition 3. a. (6) also requires PBC to periodically certify the total quantity of water supplied by Cal-Am for the PBC water entitlements. Petitioner asks that the condition be modified to require MPWMD to certify the quantity of water used under PBC entitlements. Petitioner does not allege that the wording of the condition as it pertains to the reporting requirement is improper. Excepting the correction of the last sentence in subsection 3., a. (6), we do not find that it is necessary to amend the subsection; however, if MPWMD voluntarily provides the certified information required by the paragraph, the Deputy Director for Water Rights is instructed to accept the filing as having fulfilled the PBC reporting requirement.

#### **5.0 PETITIONS BY QUAIL LODGE, CV RANCH AND BERNARDUS LODGE**

Petitioners Quail Lodge, CV Ranch and Bernardus Lodge raise similar issues. Each recites that it possesses an unused water entitlement or credit from MPWMD that may be used for receiving water from Cal-Am and each is affected by condition 2 of Order WR 2009-0060 prohibiting Cal-Am from diverting water from the river for new service connections or for the increased use of water at existing service addresses.

The evidence for each claimed entitlement or credit are not found in the evidentiary record, but instead rely on information provided as attachments to the petitions.<sup>5</sup> In addition, the

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<sup>5</sup> Some of the evidence relied upon in the petitions was included in letters submitted by Quail Lodge and CV Ranch on September 30, 2009, in response to the draft order circulated by the Board after the close of the evidentiary

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evidentiary record does not include the factual recitals regarding each petitioner's location, source of water supply, the nature of the petitioner's business nor how each petitioner might utilize the claimed water credits. The factual basis for any order in this proceeding must be based exclusively on evidence presented or officially noticed as part of the proceeding. (Gov. Code, § 11425.50, subd. (c).) A petitioner may request reconsideration in order to allow additional evidence to be introduced where the evidence could not have been produced in the exercise of reasonable diligence. (Cal. Code Regs., tit. 768, subd. (c).) But petitioners make no claim that these circumstances apply, and nothing in the attachments to the petitions suggests that the petitioners could not have timely submitted evidence to support their claims. Moreover, State Water Board regulations require that where a petition claims that there is additional evidence that could not have been produced at the time of the hearing the petition must include an affidavit or declaration of perjury stating the reasons why the evidence was not produced earlier. (*Id.*, § 769, subd. (b).) None of the petitions includes the required affidavit or declaration. The petitions are defective, and are denied on that basis.

Even if the petitions were not defective, and assuming the factual recitals are true and correct, the petitions would not provide a basis for revising Order WR 2009-0060, for the reasons discussed in the following sections.

### 5.1 Quail Lodge.

According to its petition, Quail Lodge (Lodge) is the owner and operator of the Quail Lodge Resort located off the Carmel Valley Road in the unincorporated area of Monterey County. The Lodge consists of a lodge, dining facilities, health and recreational facilities and an 18-hole golf course. The Lodge is also the developer of Quail Meadow Subdivision. Both the Lodge and the subdivision are within the boundaries of the Monterey Peninsula Water Management District (MPWMD) and are served water by Cal-Am. The Lodge alleges that in 1989 MPWMD conditionally approved the annexations of Quail Meadows into Cal-Am's service area and the Lodge received a water entitlement not to exceed 33 afa. As a condition of approval of the 33 afa entitlement, the Lodge retrofitted the irrigation system at the golf course at the cost of ~~more~~

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hearing. The evidentiary record includes only the testimony and exhibits received into evidence during the 2008 hearing conducted on the proposed cease and desist order against Cal-Am. Order WR 2009-0060 is based only on that evidentiary record. Letters and other submitted papers that address the draft orders to be considered by the Board are not a part of the evidentiary record.

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~~than one million approximately \$800,000~~ dollars to achieve a water savings of at least 65 afa<sup>6</sup>; a net water savings of 32 afa. Subsequent development having occurred, the Lodge currently holds an unspecified portion of the 33 afa of the allocation of the allocation water allocation for the subdivision; presumably, for future development at the subdivision<sup>7</sup>. Although the Lodge references Decision 1632, which indicates that the Lodge claimed prior rights, the Lodge does not indicate ~~indicate~~ whether anyone has sufficient legal rights for the full amount~~sufficient legal rights for the full amount~~ supplied to the golf course<sup>8</sup>. The Lodge further alleges that it holds an unspecified portion of water credits totaling 8.575 afa; presumably for future development at the Lodge. The 8.575 afa water credit was obtained from MPWMD by the permanent reduction of restaurant seating capacity and the permanent reduction of landscaped areas. The petition does not state when the work was performed or what expenses were incurred to change ~~the golf course irrigation system~~, the grounds surrounding the lodge or the restaurant seating capacity. Finally, the Lodge alleges that it has approval for a 40-room hotel and seminar center at the subdivision but that it is unlikely to proceed with the project due to the recession and the difficulties being experienced in the hospitality industry. Future development, however, will hinge on the availability of water to supply the allocation from MPWMD.<sup>9</sup>

### 5.2 CV Ranch.

Petitioner CV Ranch recites that it is the owner and operator of the Carmel Valley Ranch in Carmel Valley, California. The Ranch is located on the Carmel Valley Road within the unincorporated area of Monterey County and within the boundaries of the MPWMD. Petitioner is currently served water by Cal-Am. CV Ranch has unused water credits totaling 16.052 afa obtained from MPWMD. The petition states that 8.807 afa are available from a previously approved un-built subdivision. How the subdivision obtained the water credit is not stated. In a

<sup>6</sup> Declaration dated December 29, 2009 by Lawson Little, p. 2.

<sup>7</sup> Declaration dated December 29, 2009 by Lawson Little, p. 2.

<sup>8</sup> Decision 1632 also shows that Quail Lodge has an application to appropriate water pending for the same for water for which prior rights area claimed. Such applications are not filed, usually, unless the applicant has doubts about the validity of the claimed prior rights.

<sup>9</sup> A December 29, 2009 declaration by Lawson Little supplementing the petition for reconsideration is not accompanied by an affidavit under penalty of perjury, as required by Board regulations, explaining why the information contained in the declaration was not timely presented to the Board during the evidentiary hearing. (Cal. Code Regs., tit. 23, 769(b).)

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declaration dated December 29, 2009, David Hunter stated that during 2007-2008 the resort replaced its irrigation system and re-landscaped at the cost of approximately \$650,000 dollars. The declaration does not state how much water was saved by this effort. The petition does not state how or when 8.807 afa of the credits were obtained. The Petition states a water credit of 7.245 afa was obtained for these changes. The declaration also states that in 2007 Petitioner also removed 24 spa tubs in resort rooms and one spa in the pool area. How much water was saved by these changes is unstated.<sup>10</sup> ~~In 2006, petitioner obtained another 7.245 afa credit from MPWMD in exchange for the removal of 6,000 square feet of landscaped area, the implementation of a new irrigation system and permanent restrictions on future landscaping. CV Ranch also claims an additional unquantified water credit based upon the removal of 24 spas from hotel rooms and toilet retrofitting at a hotel. It appears that petitioner has plans to use 8.807 afa of its water credits at a subdivision for which the county has approved a tentative map to subdivide 212 acres into 12 parcels. In addition, after the adoption of Order WR 2009-0060 on December 9, 2009, the Monterey County Planning Commission approved the construction of a new fitness/spa facility by remodeling existing buildings and by the addition of 1250 square feet to existing buildings. Included in the approval are dressing rooms, a new deck, pool area, Jacuzzi, and a café. (Resolution No. PLN090322) The Board recognizes that the action of Planning Commission occurred after the evidentiary record was closed; however, the copy of the planning commission's actions is not certified as a true and correct.~~

### 5.3 Bernardus Lodge

Petitioner recites that it owns and operates the Bernardus Lodge located in Carmel Valley. Petitioner is located on Carmel Valley Road within the unincorporated area of Monterey County and the boundaries of MPWMD and is currently served water by Cal-Am. In 2008, the petitioner obtained 3.74 afa water credit from MPWMD in exchange for the removal of an onsite laundry facility. ~~The petition does not state that Petitioner has any need or plan for using the water credit other than for an unspecified future use.~~

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<sup>10</sup> The December 29, 2009, declaration by David Hunter supplementing the petition for reconsideration is not accompanied by an affidavit under penalty of perjury, as required by Board regulations, explaining why the information contained in the declaration was not timely presented to the Board during the evidentiary hearing. (Cal. Code Regs., tit. 23, 769(b).)

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On December 30, 2009, the lodge submitted a declaration providing the following information: (1) Petitioner spent approximately \$ 140,000 to remove the onsite laundry facility; (2) Petitioner estimates that it spends approximately \$80,000 per year more to operate an offsite laundry facility in Salinas, California than was spent at its onsite laundry facility; and (3) On July 29, 2009, petitioner obtained approval from the County of Monterey Planning Commission for a project to expand the existing lodge.<sup>11</sup> Resolution No. 09037 of the Monterey County Planning Commission describes the project as including the construction of 16 additional hotel units and a 3,000 square foot maintenance, storage and office building. The Board recognizes that the action of Planning Commission occurred after the evidentiary record was closed; however, the copy of the planning commission's actions is not certified as a true and correct.

### **5.4 Petitioners Request that They be Exempt from Condition 2 of Order WR 2009-0060**

The petitioners request that they be exempt from Condition 2 of Order WR 2009-0060 prohibiting Cal-Am from supplying water illegally diverted from the river for new service connections or for increased use at existing service addresses.

#### **5.4.1 Order WR 2009-0060 does not deprive petitioners of water credits.**

Petitioners contend that Condition 2 improperly deprives them of vested water credits obtained from MPWMD. Quail Lodge's water credit was obtained from MPWMD prior to (1) Board Order WR 95-10 determining that Cal-Am was diverting about 10,730 afa from the Carmel River without a valid basis of right and prior to (2) the judicial determination that Cal-Am must curtail pumping from the Seaside Groundwater Basin. Bernardus Lodge obtained its water credit from MPWMD after the adoption of Order WR 95-10 and the judicial decision reducing the supply of water available from the Seaside Groundwater Basin. Petitioner CV Ranch obtained at least 7.245 afa in water credits from MPWMD after the adoption of Order WR 95-10; it is not clear whether this credit was obtained before or after the judicial decision reducing the supply of

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<sup>11</sup> Petitioner's declaration was not accompanied by an affidavit under penalty of perjury, as required by Board regulations, explaining why the information contained in the declaration was not timely presented to the Board during the evidentiary hearing. (Cal. Code Regs., tit. 23, 769(b).)

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water available from the Seaside Groundwater Basin was entered. Finally, it is not clear when CV Ranch's remaining 8.807 afa credit was obtained.

As discussed in Section 4.2, credits allocated by MPWMD do not provide Cal-Am with the right to supply water illegally diverted from the river. Nor does Order WR 2009-0060 extinguish the credits. It simply recognizes, consistent with California water right law, that agreements entitling a party to receive deliveries from Cal-Am do not authorize Cal-Am to divert any more water than it has valid water rights to divert, and requires Cal-Am to curtail its illegal diversions accordingly. We conclude, therefore, that Order WR 2009-0060 does not deprive petitioners of the water credits received from MPWMD.

### **5.4.2 The Board properly considered community interests when adopting Order WR 2009-0060.**

Petitioners contend Order WR 2009-0060 fails to properly balance community interests against impacts on public trust resources. In support of this contention, the Lodge cites *National Audubon Society v. Superior Court of Alpine County* (1983) 33 Cal.3d 419, 447 (*Audubon*), arguing that under *Audubon* the Board has an obligation to balance economic needs against public trust concerns when considering action to protect the public trust. This argument mischaracterizes Order WR 2009-0060. Unlike the action in *Audubon*, which was an action to apply the public trust doctrine to an existing, legal diversion, this is an enforcement proceeding in response to illegal diversions. (See Order WR 2009-0060 at p. 16 [application of the public trust doctrine to Cal-Am's legal diversions was beyond the scope of the proceeding].) As explained in Section 4.3, there is no requirement that there be any evidence of harm to public trust resources before illegal diversions may be curtailed.

Water Code section 1052 prohibits the diversions and use of water except in compliance with Division 2 of the Water Code. During 1995, the Board adopted Order WR 95-10 finding that Cal-Am was diverting about 10,730 afa without a valid basis of right from the river. The order required Cal-Am to diligently implement actions to terminate its unlawful diversions from the river. Fourteen years later, in Order WR 2009-0060 the Board found that Cal-Am was in violation of section 1052 and had not been diligent in complying with Order WR 95-10. (Order 2009-0060, pp. 34-37, §. 14.2.) The Legislature has directed the Board to take vigorous action

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to enforce the laws of appropriation. (Wat. Code, § 1825.) The Water Code does not require the Board to consider the relative benefit of the use being made of illegally diverted water in communities versus the needs of public trust resources prior to adopting an enforcement order or taking other authorized action such as the imposition of civil penalties, adopting a cease and desist order or seeking injunctive relief (Wat. Code, §§ 1055, 1831 and 1831, 1845.) The Board adopted Order WR 2009-0060 because Cal-Am is illegally diverting water from the Carmel River and not because the diversions were adversely affecting public trust resources. (See generally *People v. Shirokow* (1980) 26 Cal.3d 301, 308-309 [the statutory prohibition against unauthorized diversions is in furtherance of the constitutional prohibition against waste or unreasonable use of water].)

Although this is not an *Audubon* like proceeding to apply the public trust doctrine, the Board did consider relevant evidence, including both impacts on public trust resources and community needs, in fashioning a remedy. In this respect, the fact that the illegal diversions are having an adverse effect on public trust resources underscores the importance of adopting an order curtailing Cal-Am's illegal diversions and curtailing those illegal diversions without undue delay. The Board also considered the needs of the community. (See Order WR 2009-0060, pp. 47-50.) Board regulations provide that between 55 to 75 gallons per person per day (gppd) are reasonably necessary to supply the needs of fully plumbed homes. (Ca. Code Regs. tit. 23, § 697 (b).) During water year 2006-2007, Cal-Am diverted 10,433 af from the river and 3,625 af from the Seaside Aquifer for a total of 14,068 af, an amount sufficient to serve each person 112 gallons per day for a population of 112,000. There is no evidence in the record that public health and safety was a problem during water year 2006-2007. Much of the water diverted during water year 2006-2007, and other years, is used for non-domestic commercial purposes such as the hospitality industry. Under Order WR 2009-0060, there will be 106 gallons per person per day for use by Cal-Am customers, a 5 percent reduction from the quantity of water available to Cal-Am during water year 2006-2007. If the Board had not considered local community needs, the Board would have ordered an immediate cessation of all illegal diversions from the river. Instead the Board required that the illegal diversion be discontinued after December 31, 2016, a date that testimony indicates an alternative supply should be available, and required that in the interim the level of diversions be reduced by amounts that should be easily achievable.

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Quail Lodge does not argue that the Board failed to give adequate consideration to public health and safety concerns. The claim that the Board failed to properly balance community concerns is based solely on economic impacts, with particular emphasis on the economic impacts of the Board's conclusion that illegal diversions should not be used to provide water for new service connections. In view of the serious impact low flow and no flow conditions have on public trust resources and the role of illegal diversions in causing those conditions, the public trust impacts of deliveries based on illegal diversions from the Carmel River clearly outweigh the economic benefits of new service connections using those illegal diversions. Even if there were no impacts on public trust resources, the community benefit of authorizing new connections that do not have a reliable supply of water are questionable. (Cf. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2009) 40 Cal.4th 412, 434 [for purposes of environmental analysis, "the burden of identifying likely water sources for a project varies with the stage of project approval involved; the necessary degree of confidence involved for approval of a conceptual plan is much lower than for issuance of building permits."].) As a matter of state water policy and in the absence of compelling reasons to the contrary, such as a serious threat to public health and safety, the practice of authorizing new service connections in reliance upon an illegal diversion of water is an unreasonable use of water which should be prohibited. (See also Wat. Code, § 1052 [prohibiting both the diversion and use of illegally diverted water].)

We conclude that the Board properly considered community interests and other relevant factors when adopting Order WR 2009-0060.

### **5.4.3 Order WR 2009-0060 properly prohibits Cal-Am from illegally diverting water from the river for new service connections and for increased use of water at existing service addresses resulting from a change in zoning or use.**

Quail Lodge, CV Ranch and Bernardus Lodge argue that the Board allows Cal-Am to continue supplying water illegally diverted to satisfy PBC water entitlements but arbitrarily prohibits Cal-Am from illegally diverting water from the river for petitioner's credits. As noted above, however, there is a critical distinction between PBC and petitioners. PBC participated as a party in the proceeding and timely submitted specific evidence about its entitlements and in support of allowing deliveries based on those entitlements. Quail Lodge, CV Ranch and Bernardus Lodge

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did not. And even assuming the evidence petitioners now rely on had been timely submitted, the circumstances presented by petitioners would differ substantially from those presented by PBC.

Until December 31, 2016, when all illegal diversions from the Carmel River must cease, Order WR 2009-0060 treats new service connections based on the PBC entitlement differently from other new service connections. The Board's decision to do so but was based on evidence concerning the PBC entitlements. Order WR 95-10 recognized that PBC had facilitated an 800 afa increase in the non-potable water supply available within the boundaries of MPWMD. (p. 6, fn. 2.) Subsequently, a number of letters written by Board staff recognize PBC's contribution to the non-potable water supply and state that the Board would use its enforcement discretion to not penalize Cal-Am for illegal diversions from the river to satisfy PBC water entitlements. (Order WR 2009-0060, pp. 52-53, § 19.1.) PBC alleges that it relied upon these letters when in undertook to financially guarantee an additional \$34 million upgrade of the original wastewater reclamation project during 2005-2006. In recognition of the correspondence from Board staff and the subsequent financing of the reclamation project upgrade, the provisions of Order WR 2009-0060 prohibiting use of Carmel River Water for new service connections do not apply to connections based on PBC water entitlements. In view of the strong public policy against illegal diversions, the need to reduce illegal diversions from the Carmel River as soon as reasonably possible, and testimony that a new source can be obtained before 2017, all service connections are subject to the provisions of the order requiring that illegal diversions cease after December 31, 2016. (RT, Ph. 2, Vol. VI. P. 953, 7 – p. 254, 23.)

The circumstances relied on in Order WR 2006-0060, treating PBC entitlement based service connections differently from other new service connections, are not the same as the circumstances alleged by Quail Lodge, CV Ranch and Bernardus Lodge. Significantly, Board staff did not provide Quail Lodge, CV Ranch or Bernardus Lodge written assurances as to how the Board would exercise its enforcement discretion. Unlike PBC, Quail Lodge, CV Ranch and Bernardus do not claim that they relied on written representations from State Water Board staff. While the representations that had been made by State Water Board did not require the State Water Board to make any special allowance for PBC, they were a factor that the State Water Board could legitimately take into consideration in fashioning an enforcement remedy. In the

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absence of facts supporting a valid argument that MPWMD water credit holders have detrimentally relied upon representations of Board staff concerning how the Board would use its enforcement discretion, it is appropriate and proper for the Board to apply the provisions of Order WR 2009-0060 concerning new water service connections and increased use of water at existing service addresses to MPWMD water credit holders.

In their letters commenting on the draft order responding to the petitions for reconsideration, counsel for the Quail Lodge, Baylaurel and Bernardus Lodge contends that the Board's failure to take enforcement action against MPWMD for issuing water credits for future development is one reason why the Board should not prohibit Cal-Am from illegally diverting water from the river for new service connections or for increased use at existing service connections due to a change in zoning or use. When implementing the provision of the Water Code respecting the unauthorized diversion or use of water, the Board's enforcement authority extends only to persons diverting or using water illegally diverted from known and definite channels. (Wat. Code, §§ 1052, 1831, subd. (d)(1); see *id.*, §§ 1200, 1201.) Because MPWMD is not the person illegally diverting or using water from the Carmel River, the Board has no legal authority to take enforcement action against MPWMD from carrying out programs it is legally authorized to implement. Thus, the Board's failure to take enforcement action against MPWMD in response to MPWMD's awarding water credits for development is not grounds for the Board to set aside its prohibition that Cal-Am cease diverting water for new development or for expanded use at existing service connections due to a change in zoning or use.

Finally, when commenting on the draft order, counsel contends that because the Board has not previously acted to prohibit Cal-Am from using water illegally diverting water from the river for new service connections it should not do so at this time. Counsel cites no authority in support of his contention. The Board determined in Order WR 95-10 that Cal-Am was diverting illegally, and that the illegal diversions should be terminated. To the extent Quail Lodge, CV Ranch and Bernardus Lodge relied on the assumption that the State Water Board would not take further enforcement action to restrict new service connections based on unauthorized diversions from the Carmel River even if those diversions were not terminated within a reasonable period after the Board issued Order WR 95-10, that reliance was unreasonable. The Board is required to take vigorous action to prevent the unlawful diversions. (Wat. Code § 1825.) The Board has

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statewide responsibilities over the diversion and use of water from known and definite channels, finite staff resources and many competing priorities for the use of staff. Any delays that may occur before the Board takes enforcement action in response to an illegal diversion cannot be equated with affirmative assurances that the Board would not take enforcement action. Case law makes is clear that an unlawful diverter of water can not prescript the state. (People v. Shirokow (1980) 26 Cal.3d 301.) And the defense of laches – an equitable defense based on a party's delay in asserting its rights – is not available as a defense in a proceeding by the state against the unauthorized diversion or use of water. (Ib. at p. 311.) There is no basis in law or equity for a claim that the Board's failure to take enforcement action sooner entitles a part to rely on illegally diverted water as the water supply for new development

### **6.0 PETITION BY DEL MONTE OWNERS**

Petitioner Del Monte Owners filed a letter requesting the Board to reconsider the CDO adopted on October 20, 2009, Order WR 2009-0060. Petitioner appears to be an informal association of persons and businesses who own property in an unincorporated portion of Monterey County known as Pebble Beach. The letter does not satisfy the legal requirements for filling a petition for reconsideration.

The Board may be petitioned for reconsideration on the grounds that: (1) there was an irregularity in the proceedings, (2) an order is not supported by substantial evidence, (3) the order is based upon an error in law, or (4) additional relevant evidence should be admitted into the record and considered. (Cal. Code Regs., tit. 23, § 768.) Del Monte Owners do not allege any of the foregoing grounds for requesting reconsideration. A petition must also include a statement that copies of the petition have been sent to interested parties. (Cal. Code Regs., tit. 23, § 769.) The petition does not include this statement. The petition should have been sent to the Prosecution Team, Cal-Am and 16 other parties who participated in the proceeding leading to the adoption of Order WR 2009-0060. (See Order WR 2009-0060, p. 4.)

In addition, a petition must state the reason why the action petitioned for reconsideration is inappropriate or improper, and be accompanied by a statement of points and authorities in support of legal issues in the petition. (Cal. Code Regs., tit. 23, §§ 769, subs. (a)(4) & (c).) The Del Monte Owners petition includes only include vague requests for reconsideration in three

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areas, and is not accompanied by a statement of points and authorities. Finally a petition for reconsideration must identify the specific action the petitioner requests. (*Id.*, § 769, subd. (a)(4).) Petitioners make three requests, but two are only general statements of concern that do not identify any specific action requested. We conclude that Del Monte Owners' petition should be dismissed for failure to comply with the requirements for filing petitions for reconsideration.

Even if the petition was not defective in other respects, reconsideration would not be appropriate in one area where the petition is not specific enough to identify what specific action is being requested. The petition requests "extending the time of second tier of reductions," which appears to be a reference to condition 3. a. (2) of Order WR 2009-0060. The condition requires that on October 1, 2011, diversions from the river be reduced by 121 afa. Fourteen years have passed since Order WR 95-10 required Cal-Am to diligently implement actions to terminate its unlawful diversion from the river. (P. 40, Condition 2.) The reductions in Cal-Am illegal diversions have been too small to satisfy the requirements for diligence. (Order WR 2009-0060. p.37.) Seven more years will pass before Cal-Am must terminate its illegal diversions from the river. (*Id.*p.57, Condition 1.) Cal-Am's illegal diversions continue to have an adverse impact on the fish, wildlife and riparian habitat of the river. (*Id.* p. 39.) Given the impact the illegal diversions are having on fish and wildlife, the Board should require that Cal-Am reduce its illegal diversions to the maximum practical extent. Thus, we conclude that delaying the effective date of condition 3. a. (2) would be inappropriate.

### **7.0 CONCLUSIONS**

With regard to the PBC petition, the last sentence condition 3. a. (6) of Order WR 2009-0060 should be amended to prohibit Cal- Am from delivering illegally diverted water for PBC entitlements after December 31, 2016. Further, if MPWMD voluntarily provides the certified information required by condition 3. a. (6), the Deputy Director for Water Rights is instructed to accept the filing as having fulfilled the PBC reporting requirement. In all other matters, the petitions of PBC, Quail Lodge, CV Ranch, Bernardus Lodge and Del Monte Owners fail to raise substantial issues related to the causes for reconsideration set out in California Code of Regulations, title 23, section 768 and should be dismissed.

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## ORDER

### IT IS HEREBY ORDERED THAT

1. The last sentence condition 3. a. (6) of Order WR 2009-0060 should be amended to read as follows: After December 31, 2016, Cal-Am shall not illegally divert water from the river to supply the holders of PBC entitlements.
2. If MPWMD voluntarily provides the certified information required by condition 3. a. (6), the Deputy Director for Water Rights is instructed to accept the filing as having fulfilled the PBC reporting requirement.
3. In all other respects, the petitions of PBC, Quail Lodge, CV Ranch, Bernardus Lodge and Del Monte Owners fail to raise substantial issues related to the causes for reconsideration set out in California Code of Regulations, title 23, section 768 and are hereby dismissed.

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## **CERTIFICATION**

The undersigned Clerk of the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 5, 2010.

AYE:

NAY:

ABSENT:

ABSTAIN:

**DRAFT**  
Jeanine Townsend  
Clerk to the Board