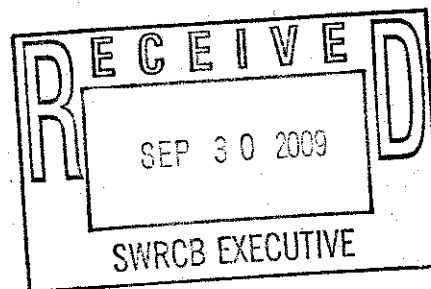


September 30, 2009

VIA E-MAIL COMMENTLETTERS@WATERBOARDS.CA.GOV

Charles R. Hoppin, Chair
State Water Resources Control Board
c/o Jeanine Townsend, Clerk to the Board
1001 I Street
Sacramento, CA 95814



Re: Comments of Pebble Beach Company Regarding 9/16/09 Revised Draft Cease & Desist Order Against California American Water (Carmel River, Monterey County)

Dear Chairman Hoppin and Members of the Board:

This firm represents Pebble Beach Company ("PBC") in the above-referenced proceeding. In accordance with the Notice Re: Proposed Cease and Desist Order dated September 16, 2009, PBC respectfully submits these additional comments regarding the revisions to the draft cease and desist order (the "revised draft Order") against California-American Water Company ("Cal-Am").¹ PBC's proposed revisions to the revised draft Order are attached as Attachment G.

Unfortunately, despite PBC's careful examination and critique of the draft Order, the multiple deficiencies pointed out in PBC's comment letter of August 26, 2009 have been ignored in the revised draft Order. Without including any meaningful response to PBC's comments, the revised draft retains all the factual and legal shortcomings of its predecessor. The result is an Order that punishes arbitrarily, heedlessly scuttles years of Board policy, and institutionalizes an injustice against PBC and others that could, with a modest degree of thought and discrimination, easily have been corrected.

¹In this proceeding, PBC has presented arguments and objections in its pre-hearing brief, orally, in a closing brief, and in a reply to the closing briefs filed by others. In addition, PBC submitted written comments prior to the Board's September 2, 2009 Public Workshop, along with oral comments during the Workshop. PBC incorporates by this reference all of the arguments and objections it has previously raised. Nothing in this comment letter shall constitute a waiver by PBC of any argument or objection previously asserted in this proceeding.

BACKGROUND

As discussed extensively in its (uncontested) testimony and briefs, PBC (and other landowners in the Del Monte Forest) own the Water Entitlements under agreements with, and permits issued by, MPWMD, the agency created by State law specifically to manage water supply on the Monterey Peninsula. The Water Entitlements directly arose from PBC's agreement to underwrite 100 percent of the financial costs to develop the \$68 million Wastewater Reclamation Project jointly undertaken by MPWMD, the Carmel Area Wastewater District ("CAWD"), and the Pebble Beach Community Services District ("PBCSD"). As the single most successful water conservation project in the history of the Monterey Peninsula, the Reclamation Project produces up to 1,100 afa of high-quality recycled water to irrigate the world-renowned golf courses of the Del Monte Forest. Since commencing operation in September 1994, the Reclamation Project has saved over 3.5 billion gallons of potable water from Cal-Am's water supply, primarily from the Carmel River, all at no cost to any public agency or taxpayer due to PBC's private financial support.

In exchange for PBC's agreement to be the sole financial guarantor of the Reclamation Project, MPWMD granted PBC and two other "fiscal sponsors" 380 afa of Water Entitlements, as a vested property right. This Board, in Order 95-10, excluded these Water Entitlements from any cap on Cal-Am's Carmel River diversions. Order 95-10 also gave the Chief of the Division of Water Rights express authority to modify any conservation requirements to the extent such requirements conflicted with any prior commitments by MPWMD, of which the Water Entitlements are assuredly one. On at least four separate occasions since 1995, the Chief of the Division of Water Rights exercised this authority, approving PBC's plans for use of the Water Entitlements, confirming in writing that the Water Entitlements were recognized in Order 95-10, and can be served by Cal-Am over and above any other conservation requirements imposed on Cal-Am. (See letters from Edward Anton dated March 27, 1998, June 5, 1998, and October 18, 2001, and from Victoria Whitney dated April 21, 2004, copies of which were attached to PBC's August 26, 2009 comment letter as Attachments A, B, C, and D, respectively).

In addition, prior to issuing Order 95-10, the Division of Water Rights was fully informed of the Reclamation Project initially, reviewed the Environmental Impact Report for the Project, and offered no substantive comments or any objection or other intercession with respect to the Water Entitlements granted by MPWMD. The Division's March 31, 1989 letter confirming this review is attached as Attachment E. Similarly, the Central Coast Regional Board confirmed by letter dated April 4, 1989 that it had reviewed the Project EIR, stating, "We concur with the Project as proposed." The Regional Board's letter is attached as Attachment F.²

² In 1990, MPWMD also obtained a final judgment of the Superior Court of California validating the contracts entered into with MPWMD, and confirming that MPWMD's obligations were fully enforceable according to their terms. The Division of Water Rights made no appearance or objection, thus furthering PBC's reliance on the Board's approval of its Water Entitlements.

Despite the remarkable conservation achievements of the Reclamation Project, and the consistent, unqualified support for the PBC Water Entitlements by the State Board, the revised draft Order, astonishingly, without warning, and without any legal or factual basis, proposes to retreat from this Board's fourteen-year commitment to PBC, MPWMD, and other Del Monte Forest landowners to honor and respect the Water Entitlements.

SPECIFIC COMMENTS ON THE REVISED DRAFT ORDER

The only substantial change to the provisions affecting PBC states:

As a general rule, the State Water Board strongly supports the use of recycled water for nonpotable water uses where recycled water is available in order to maximize the beneficial use of the state's scarce water supplies. In the past, the State Water Board has required that recycled water be used, instead of potable water for nonpotable uses, such as irrigation, pursuant to Water Code sections 13550 and 13551. (E.g., Decision 1625; see also Decision 1623-Amended; see also Order WQ 84-7 [requiring dischargers in water short areas who propose to discharge treated wastewater to the ocean to evaluate the potential for water reclamation].) Water recycling promotes the constitutional policy that the water of the state be put to beneficial use to the maximum extent possible. (Cal. Const., art. X, § 2; Wat. Code, §§ 100, 275.) But the policy of promoting use of recycled water does not suspend other important public policies, including the protection of public trust resources where feasible and the need to take vigorous action to prevent the unauthorized diversion or use of water. (See Wat. Code, § 1825.)

This revision to the draft Order acknowledges the importance of the very recycled water policies that first led the Board to assure that PBC, as a statewide leader in implementing recycled water projects, could rely on its Water Entitlements and their exclusion from Order 95-10's limitations on Cal-Am's diversions from the Carmel River. By citing to the policies of public trust protection and vigorous enforcement, however, the revised draft effectively disregards PBC's situation, along with any pretense of fairness, in favor of a myopically crafted enforcement weapon against new development on the Monterey Peninsula. The inevitable effect of this enforcement will be substantial and wholly unnecessary collateral damage to PBC and others. State water policy by no means requires this outcome. Equity prohibits it.

The revised Order's brief nod toward recycled water policy is an unacceptable affront to PBC's unique circumstances for the following reasons:

- The revised Order assumes an inconsistency between policies where none exists. In fact, no two policies could have more common ground than public trust protection and the

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ATTORNEYS LLP

reclamation of water, the latter serving as one of the most important means of achieving public trust protection. Even if these policies somehow competed, the revised draft Order, like its predecessors, ignores the fact that the increment of Entitlement Water granted to PBC in fact led to the conservation of additional potable water that has helped to improve habitat conditions on the Carmel River for fish and other species.

- The revised Order similarly misplaces its reasoning for disregarding PBC's Water Entitlements on the hazy notion that a strong enforcement effort against Cal-Am requires a direct, negative impact upon the entire Monterey Peninsula.³ Indeed, an unmistakable undertone of the draft and the revised draft is their indiscriminate antipathy toward new development, which seems to inform the rationale for punishing PBC along with Cal-Am by questioning the source of PBC's Water Entitlements and disregarding PBC's net contribution to eliminating Cal-Am's diversions. Instead of recognizing that contribution as part of the **solution** to the problem being addressed, the revised Order continues to treat PBC as simply another component of the overall threat to the Carmel River. Every bit of evidence before this Board demonstrates otherwise.
- The revised draft Order persists in the fiction that repeated letters from the Board's chief enforcement officer, assuring that restrictions on Cal-Am diversions would not curtail PBC's entitlements, were no more than the mere unauthorized pronouncements of the people who happened to be serving as Chief of the Water Rights Division. Indeed, the revision to this portion of the draft Order downplays the significance of these letters even further than before by changing the characterization of these assurances from those of policy, emanating from the Board, to mere letters from individual employees. The draft continues to disregard the authority of the Chief under Board Resolution 97-006, and under the express terms of Order 95-10, to modify conservation requirements. This authority means, categorically, that the cited letters are expressions of Board policy.
- PBC's Water Entitlements have been honored in exchange for a significant net *reduction* in Cal-Am diversions effected by PBC's sole financial support of the Reclamation Project; no dispute about this fact exists. Thus, no justification exists, either, for the harm the revised draft Order will cause to the Board's credibility and reputation. Conversely, to inflict as serious a blow to PBC's Entitlements as the revised draft Order purports to do should in turn be based only on solid evidence that some important course correction will be effected thereby. No such evidence exists.

³ The revised draft Order states, "Because water has been available for growth the peninsula cities and their residents have had little incentive to support or pay for a project or projects to obtain a legal supply of water that can be substituted for the illegal diversions from the river." Revised draft Order at 61-62. This statement captures the essence of the revised draft's enforcement rationale and the dark irony of punishing PBC for its huge financial support of Peninsula water recycling.

- The revised draft Order ignores the issue of equitable estoppel as it applies to the Board's longstanding assurances to PBC concerning PBC's Water Entitlements. As noted above, the revised draft Order continues to deny the authority of the Water Rights Chief to modify conservation measures. Beyond that, however, the reliance interests of PBC that give rise to an estoppel are ignored. This flaw in the revised draft ensures it will not survive a challenge by administrative writ. The Division of Water Rights was not oblivious to the effect that its official positions regarding Order 95-10 might have on those who were undertaking development projects on the Monterey Peninsula. As the Division Chief wrote in 1999: "One issue is whether the agencies involved in [a water conservation proposal] had advanced notification of [the Division's] position." (CAW-35 at page 3.) The Division's position with regard to the water reclamation project—and PBC's financial commitments to that project—was confirmed by staff testimony during the 2008 hearing.⁴

The Division's position has been consistent: that the Chief approved of the reduced water diversions made possible by the water reclamation project and its later expansion, that the Chief assured PBC that no enforcement would take place, and that the Board knew the project was being funded by private dollars. PBC reasonably relied on these approvals and assurances, to its detriment. (See e.g. Exhibit MPWMD-SP8, *MPWMD Ordinance No. 109* (2004) at p. 4, ¶ 15 (discussing correspondence from the Board regarding the project), p. 8 (establishing monitoring and reporting system for MPWMD to comply with conditions set forth by the Board regarding the project, and authorizing PBC to finance project expansion).

The equitable principles of estoppel and laches will apply to the Board's affirmative and repeated representations, and the draft Order cites no persuasive legal authority for the position it now proposes to take with regard to PBC. Even *Feduniak v. California Coastal Commission*, cited on page 28 of the proposed Order during a discussion of estoppel regarding Cal-Am, does not help the Board's position. *Feduniak* is the most recent decision from the Sixth District Court of Appeal on the issue of estoppel against a public agency. (2007) 148 Cal.App.4th 1346. The opinion repeatedly states that the plaintiffs in that case did not rely on affirmative representations by the defendant Commission. *Id.* at 1355 ("Feduniaks did not consult with the Commission or check its files concerning the property or otherwise rely on any representations or information from the Commission in deciding to purchase the property"); 1356 (former Commissioner "was not aware of any statements or representations by the Commission to the Feduniaks that the golf course complied with these conditions"); 1361 ("the Commission made no affirmative representations to the Feduniaks"); 1371 ("[the

⁴ Testimony of K. Mrowka at 5-6 ("the State Water Board had already acted favorably regarding development of the [reclamation project], which sought approval to utilize 380 acre-feet of Carmel River water . . ."); cf. PT-10 (letter from Water Rights Division disapproving proposal to offset Cal-Am's illegal diversion with new water produced at Sand City desalination plant).

Commission] took no affirmative action toward them and made no statements to them that could have induced action" (distinguishing cases where "affirmative conduct and representations" were relied upon)). PBC has set forth its primary arguments regarding estoppel and laches, but the draft Order does not – and indeed cannot – counter such arguments.

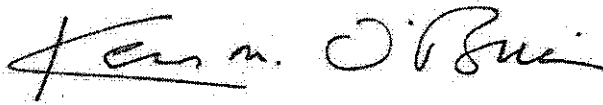
- Subjecting the PBC Water Entitlement to an immediate cap on new water connections will affect PBC and hundreds of individual landowners who recently purchased portions of PBC's entitlement, making their property essentially unusable. The significant expenditures by PBC and these other landowners, in order to secure Water Entitlements that would be available for future use, were based upon reasonable expectations put in place by the State Water Board. Turning these expectations on their head now would amount to a "taking" of private property rights. See *Lucas v. South Carolina Coastal Council* (2002) 505 U.S. 1003; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U. S. 302.

RECOMMENDED ACTION

PBC respectfully requests that the draft Order be modified and re-issued for further public review and comment to provide that the Water Entitlements are excluded from restrictions on diversions of water from the Carmel River, consistent with the terms of Order 95-10, especially Footnote 2, and other applicable law. PBC's proposed revisions to the draft Order are attached as Attachment G.

Very truly yours,

DOWNEY BRAND LLP



Kevin M. O'Brien

KMO:cjb

Attachments

cc: Attached Interested Parties List

STATE OF CALIFORNIA

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL COAST REGION1102 A LAUREL LANE
SAN LUIS OBISPO, CALIFORNIA 93401
(805) 549-3147

April 4, 1989

Rec'd. 4/10/89	
Route	Initial
WZ	11/5
D.D.	J
FILE: _____	



Mr. Michael Zambory
General Manager
Carmel Sanitary District
P. O. Box 221428
Carmel, CA 93922

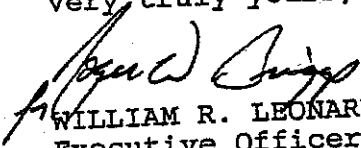
Dear Mr. Zambory:

SUBJECT: CARMEL SANITARY DISTRICT/PEBBLE BEACH COMMUNITY SERVICES DISTRICT

2-1

We received the draft Environmental Impact Report for the Carmel Sanitary District/Pebble Beach Community Services District Wastewater Reclamation Project. Implementation of the proposed project will provide 800 acre-feet/year of reclaimed municipal wastewater for irrigation of golf courses and open spaces on Monterey Peninsula. We concur with the project as proposed.

Very truly yours,


WILLIAM R. LEONARD
Executive Officer

RBA/se

zambory.ltr/23

c: Attention: Richard Andrews, Pebble Beach Community Services District, Forest Lake and Lopez Roads, Pebble Beach 93953

19.1 Pebble Beach Company should Not be Subject to All Limitations Imposed upon Cal-Am's Diversions from the Carmel River

As a general rule, the State Water Board strongly supports the use of recycled water for nonpotable water uses where recycled water is available in order to maximize the beneficial use of the state's scarce water supplies. In the past, the State Water Board has required that recycled water be used, instead of potable water for nonpotable uses, such as irrigation, pursuant to Water Code sections 13550 and 13551. (E.g., Decision 1625; see also Decision 1623-Amended; see also Order WQ 84-7 [requiring dischargers in water short areas who propose to discharge treated wastewater to the ocean to evaluate the potential for water reclamation].) Water recycling promotes the constitutional policy that the water of the state be put to beneficial use to the maximum extent possible. (Cal. Const., art. X, § 2; Wat. Code, §§ 100, 275.) ~~But~~ While the policy of promoting use of recycled water does not suspend other important public policies, including the protection of public trust resources where feasible and the need to take vigorous action to prevent the unauthorized diversion or use of water- (see Wat. Code, § 1825-), those policies are not in conflict in the particular circumstances of the Pebble Beach Company ("PBC") Water Entitlement. Here the State Water Board chose to encourage the development of a water reclamation project that would reduce net diversions from the Carmel River in exchange for assurances that the PBC could use its Water Entitlement in the future independently of any restrictions on Cal-Am.

~~Pebble Beach Company (PBC)~~ has a 365 afa water entitlement⁴⁶ from MPWMD for developing properties within Del Monte Forest. In addition to the expansion of existing service connections,

⁴⁶ In addition to PBC's 365 afa, the entitlement includes 10 afa for S. Lohr and 5 afa for W. Griffin, who are subject to conditions contained in this Order.

The entitlement is used for making new service connections to Cal-Am's water system. The entitlement was granted as part of a contractual arrangement wherein PBC agreed to financially guarantee public financing of a wastewater reclamation project. PBC seeks to have its water entitlement for new growth excluded from ~~any limitation~~ limitations on diversions that may be placed upon Cal-Am's withdrawals from the Carmel River. (Oct. 14, 2008, Closing Brief of PBC, p. 13, 20-22.). In addition, PBC contends that, ~~during 2005-2006, it relied upon~~ has presented evidence of its reliance upon

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findings and representations by the State Water Board when undertaking additional financial arrangements to further upgrade the wastewater reclamation plant and ~~when acquiring to~~ rehabilitate a reservoir to store reclaimed wastewater.

The Pebble Beach Community Services District (PBCSD) and the Carmel Area Wastewater District (CAWD) operate the CAWD-PBSCD Wastewater Reclamation Project. (PBC-2, p. 1, 25-27.) The project provides reclaimed wastewater for irrigation of the golf courses and other recreational open spaces located in the unincorporated Del Monte Forest area of Monterey County. (PBC 1, p. 2, 7-9.) The project was designed to deliver not less than 800 afa of reclaimed water and to free an equal amount of potable water for other uses. Operationally, some potable water was necessary to control salinity levels in the reclaimed water used for golf course irrigation and to meet irrigation needs during times of peak demand. (PBC-1, p. 2, 16-23.) During 13 years of operation, between 1994-95 and 2006-07, the project supplied an average of 706 afa of reclaimed water; 267 afa of potable water was required for salinity control and to meet peak irrigation demand. (PBC-2, p. 3, 1-28.) Public project financing was facilitated by private financial guarantees, such that no public dollars were at risk for the project. The PBC

guaranteed: (a) \$33.9 million in capital costs for the project, and (b) net project operating deficiencies. In return for the financial guarantee, PBC was granted a 365 afa potable water entitlement by MPWMD for future development of lands owned by PBC. (PBC-1, p. 3, 19 – p. 4, 2.) Based on this entitlement and on MPWMD's Ordinance No. 109, which was adopted in 2004, water has been sold to over 500 homeowners in the Del Monte Forest. (RT, Ph. 2, Vol. II, p. 556, 14-15; MPWMD-SP8, *Ordinance No. 109*.)

~~During~~ From 2005-2006⁹, and pursuant to Ordinance No. 109, the project was upgraded through the addition of 325 af of storage for reclaimed water in a rehabilitated reservoir, and by improvements to the wastewater treatment plant to reduce the level of salinity in the reclaimed water. During 2009, these improvements should result in the project being able to operate without the need for potable water, reducing Cal-Am's diversions by up to an additional 300 afa.

(*Id.* p. 4, 1-17.) The upgraded project cost \$34 million. PBC obtained the funds for the upgrade by selling ~~175~~ 118 afa of the entitlement obtained from MPWMD to landowners in Del Monte Forest, and advancing \$10 million in funds. (PBC-1, p. 3, 25 – p. 4, 2; MPWMD-SP8, *Ordinance No. 109* at p. 8.)

The 365 afa PBC water entitlement from MPWMD dates to at least 1989 (PBCMS-2), ~~and was based upon what turned out to be an overestimate of the supply of water available to Cal Am.~~

During 1995, subsequent to the entitlement granted by MPWMD, and the construction of the \$33.9 million Phase I of the Reclamation Project, the State Water Board adopted Order 95-10 determining that Cal-Am was diverting about 10,730 afa from the Carmel

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River without a valid basis or right (Order 95-10, p. 39, ¶ 2.)⁴⁷ ~~Still later, during 2006, the~~

⁴⁷ Order 95-10 notes that during 1980 and 1981, on the basis of information then available, the State Water Board was of the opinion that a water right permit would not be required for water

Monterey Superior Court entered an order adjudicating and limiting the quantity of water that could be produced from the Seaside Groundwater Basin.⁴⁸ Among other matters, beginning in 2009, the order requires Cal-Am to reduce the quantity of water it may produce from the basin by 10 percent. Additional restrictions on groundwater production may be ordered, depending upon physical conditions within the groundwater basin.

The original wastewater reclamation project was planned, financed, constructed, and commenced operation in the fall of 1994, before the State Water Board adopted Order 95-10- (PBC-2, p. 2, 11-12; PBC-13; Order 95-10-), but the Division of Water Rights and the Central Coast Regional Water Quality Control Board reviewed the Reclamation Project Environmental Impact Report and raised no issues with the Project, including the provision of a 380 acre-foot Water Entitlement to PBC in exchange for financial commitments to build the Project. The full benefits provided by the Project were not realized until 2009. A footnote in Order 95-10 gives passing recognition to the supply of water that would be made available to Cal-Am customers by the project; PBC as a result of its financial guarantee of the reclamation project:

In addition to supplies from the Carmel River and pumped ground water in the area of Seaside, reclaimed water is available to some Cal-Am users from the Carmel Area Wastewater District Pebble Beach Community Services District Wastewater Reclamation Project. The Project will provide 800 acre-feet of reclaimed water for the irrigation of golf courses and open space in the Del Monte Forest. In return for financial guarantees, the Pebble Beach Company and other sponsors received a 380 af of potable water entitlement from the District, based upon issuance of an appropriate right permit to the District, for development within Del Monte Forest. As of the end of fiscal 1993-1994, the District had not allocated the remaining 420 af of project yield.
(Order 95-10 at p. 6, fn. 2.)

On March 27, 1998, the Chief, Division of Water Rights, wrote MPWMD and Cal-Am

pumped from the wells. (Order 95-10, p. 38.)

⁴⁸ See discussion under Section 16.5, supra.

concerning the relation of the project to the water being diverted from the river by Cal-Am and Order 95-10. (PBC-7.) The letter states, in part:

The [State Water Board] has recognized that the Pebble Beach Company and other sponsors were project participants in, and assisted in funding, the wastewater reclamation project which enabled Cal-Am to reduce its delivery of potable water to Del Monte Forest property and thereby reduce the demand on the Carmel River by at least 500 afa and potentially 800 afa. Upon completion of the Del Monte Forest property, 380 afa will be diverted from the Carmel River by Cal-Am for delivery to these lands. Thus, there will be no net increase in Carmel River diversions in the future over the level of past documented diversions as a result of developing these projects. As a result of the reclamation project and especially during the interim period while the Del Monte Forest property is being

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developed, the net diversion from the Carmel River to serve Del Monte Forest properties will be less than the level that would have occurred if the wastewater reclamation project had not been developed. Thus under Footnote 2 of Order WR 95-10, the 380 afa is available to serve the projects.

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

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

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

On October 18, 2001, the Chief, Division of Water Rights, sent another letter to MPWMD

concerning this subject. The letter stated in part:

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 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.

...

You specifically asked whether the use of a portion of the original Pebble Beach Company water entitlement from the CAWD reclamation project can be used on non-Pebble Beach Company properties within (1) the Del Monte Forest and (2) outside the Del Monte Forest. Cal-Am may distribute the new potable water supply anywhere in its service area, subject to the Carmel River diversion requirements of Order 95-10 (and any subsequent modification approved by the State Water Resources Control Board) and requirements (a) and (b) above.⁴⁹ (PCB-8.)

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~~Significantly,~~ The second letter clearly states that potable water may be diverted from the river, as consistent with but subject to the requirements of Order 95-10 and unaffected by any subsequent modifications approved by the State Water Board.

On the basis of a ~~noncommittal~~ footnote 2 in Order 95-10 and ~~two~~ letters from the Chief, Division of Water Rights, the ~~second of which subjects Cal-Am diversions from the river for PBC properties to future State Water Board decisions,~~ PBC seeks to have its water entitlement from MPWMD continue to be excluded from any limitations on diversions and new service connections placed upon Cal-Am's withdrawals from the Carmel River, as has been the case under Order 95-10. (Oct. 14, 2008, Closing Brief of PBC, p.13, 20 - 22.)⁵⁰ Such an exclusion might have been is reasonable and appropriate under the specific circumstances surrounding the

⁴⁹ The reference to the "requirements of (a) and (b) above" refers to the following: "Continual records must be maintained, on both a monthly and total annual basis, to document that (a) the new use of potable water does not exceed the historic quantity of potable water provided by the California-American Water Company (Cal-Am) to the Del Monte property and (b) the quantity of treated wastewater put to beneficial use equal or exceeds the potable water use."

⁵⁰ In addition to the two letters quoted herein, PBC relies on staff testimony and correspondence similar to the 1998 and 2001 letters, including a 2004 letter from Victoria Whitney, Chief, Division of Water Rights, which discusses the proposed expansion of the wastewater reclamation project.

PBC Water Entitlement, if it appeared the Cal-Am was likely to come into compliance reasonably soon, and if the harm during the period required to come into compliance was relatively small, but that is not the case here.

Order 95-10, To the extent that the letter of March 27, 1998, can be interpreted to assure and subsequent letters by the Chief, Division of Water Rights, provided MPWMD, Cal-Am, and PBC with assurances that the State Water Board would not take an enforcement against PBC, the letter was inappropriate action against the use of PBC's Water Entitlement, since PBC had financed a project that would result in net diversions from the Carmel River being substantially reduced from pre-project levels. In Order 95-10 the State Water Board adopted conditions (1) placing a cap on the total quantity of water Cal-Am could divert from the Carmel River, (2) requiring Cal-Am to diligently implement actions to terminate its unlawful diversions and (3) requiring that Cal-Am reduce its diversions from the river by 20 percent. (Order 95-10, Conditions 1, 2 and 3(b).) Water code section 1052(a) provides that the diversion and use of water other than as authorized in this division is a trespass. Water Code section 1825 declares that "the state should take vigorous actions . . . to prevent the unlawful diversion of water." Contrary to this policy, the letter expresses an intent not to penalize Under the authority set forth in Order 95-10, the Chief, Division of Water Rights, issued the letters with the intent that Cal-Am not be penalized for excess diversions from the Carmel River as long as their diversions do not exceed 11,285 afa plus of the quantity of potable water provided to the PBC and other sponsors under the entitlement from MPWMD.⁵⁰⁻⁵¹

⁵⁰⁻⁵¹ This order constitutes is such a modification of Order 95-10. The State Board did not intend that any such modification would call PBC's Water Entitlement into doubt. That would have defeated the purpose of the Chiefs' letters and the intent of footnote 2 of Order 95-10. Additionally, PBC has relied on the State Water Board's position for 13 years when making investments to help reduce Cal-Am's net diversions from the Carmel River.

The letters ~~represented cannot be understood as a binding commitment that an assurance that the State Water Board would never not take an enforcement action that might affect PBC or others relying on the entitlement from MPWMD, however. To the contrary, because the letter expressly identifies the State Water Board's action as an exercise of enforcement discretion, it serves as a warning that Cal Am's excess diversions constitute an ongoing violation and the State Water Board could take~~

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~~enforcement action. The letter's reference to enforcement discretion should also have served as a warning that while the State Water Board was not inclined to take enforcement at the time the letter was issued, the State Water Board could decide to take enforcement at a later time if the violation continues. It is doubtful whether any correspondence from a State Water Board officer or employee expressing how he or she intends to enforce the law may be relied on as a guarantee that the Board will follow that course of action if the Board later determines that doing so would be contrary to law or public policy. Given the highly discretionary nature of enforcement, the nonbinding nature of any expression of how the State Water Board intends to act is highlighted where that intent is expressly identified as an exercise of enforcement discretion. Moreover, even if the letter had purported to promise that there would be no enforcement, it would not be binding. Because the State Water Board had delegated to the Chief, Division of Water Rights, the authority to implement conservation measures under adopted cease and desist orders, PBC was entitled to rely on footnote 2 of Order 95-10 as well as the approvals and assurances provided by the Chiefs between 1998 and 2004. It would violate public policy to enjoin the State Water Board from enforcing the laws it is charged with administering. (See Compare Phelps v. State Water Resources Control Board (2007), 157 Cal.App. 4th 89, 114-115.)⁵⁴ Because of the harm Cal Am's unauthorized diversions are causing~~

⁵⁴ See discussion concerning the same subject under Section 12.0 of this order at p. 27.

~~harm to public trust uses of the Carmel River, not taking enforcement action or exempting deliveries to PBC would also be inconsistent with the Although the State Water Board's affirmative has a duty to protect public trust resources. (See generally *National Audubon Society v. Superior Court* (1983) 33 Cal. 3d 419, 441:). PBC's investment in reducing net diversions from the Carmel River—in amounts that far exceed its Water Entitlement—indicates that Cal-Am's diversions to serve the PBC Water Entitlement have not caused notable harm to public trust resources.~~

~~The Federal Endangered Species Act (ESA) prohibits the taking of threatened species. (16 U.S.C. §§ 1531, et seq; 1538 (a) & (g).) The South Central California Central Coast steelhead has been declared as threatened, and the Carmel River has been declared as critical habitat for the species. (See Section 6.1 Request for Official Notice by the Sierra Club, subsections (1) through (3) of this order.) "Taking" includes "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding, or sheltering."⁵² (50 C.F.R. § 222.10217.3.) We find that increased diversions from the river by Cal Am will further aggravate an already substantial degradation to the habitat of the river for the threatened steelhead. Although the State Water Board is not directly compelled to implement the prohibitions of the ESA, the State Water Board should take ESA requirements into account in the exercise of its public trust responsibilities.~~

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~~In *National Audubon Society v. Superior Court* (1983) 33 Cal. 3d 419, 441, the court held that~~

⁵² This definition is upheld in *Babbitt v. Sweet Home Chapter of Communities for A Great Oregon* (1995), 515 U.S. 687.

~~"the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when abandonment of that right is consistent with the purposes of the trust." Allowing increased dewatering of the Carmel River for new growth is incompatible with the State Water Board's affirmative duty to protect the public trust when the river is critical habitat for the threatened steelhead. And just as no party can obtain a vested right to appropriate water in a manner harmful to the uses protected by the public trust doctrine (id. at p. 445-446), no prior statement from the State Water Board indicating it would forego enforcement gives any party an entitlement to avoid or be exempted from any enforcement order the State Water Board later determines is necessary to carry out its public trust responsibilities. PBC's expectation that it could count upon undiminished deliveries from Carmel River, notwithstanding the illegality of those diversions and the harm those diversions were causing to the public trust, is understandable, but honoring that expectation would amount to an abdication of the State Water Board's responsibilities for proper administration of water rights. (See Imperial Irrigation Dist. v. State Wat. Resources Control Bd. (1990) 225 Cal.App.3d 548, 573 [rejecting claims that reasonable use requirements should not be applied based on the reliance of the water right holder in the certainty of its rights, observing that water law "has passed beyond traditional concepts of vested and immutable rights."])~~

We conclude, therefore, that the State Water Board should ~~prohibit any increased diversions from the river by Cal-Am, and should not exclude any deliveries made under PBC's entitlement from MPWMD. Nor should~~ Once connected to the Cal-Am system, any water users who receive water under the PBC entitlement should not be exempted from any conservation program or

other effort to reduce Cal-Am's unauthorized diversions. In reaching this conclusion we are particularly mindful that (a) the lower 69.5 miles of the Carmel River bed is dry for 5 to 6 months of the year, (b) the steelhead is threatened, (c) the river has been declared to be critical habitat for the steelhead, and (d) the earliest date which Cal-Am's illegal diversions may be brought to an end is 2016, some 21 years after the adoption of Order 95-10 requiring Cal-Am to diligently implement actions to terminate its illegal diversions from the river.

PBC and approximately 500 landowners in the Del Monte Forest have privately undertaken all of the financing for recent improvements to the wastewater reclamation project, which will result in a permanent reduction of at least 267 afa of potable water supplied by Cal-Am from the Carmel River. These expenditures were made in reliance on the State Board's representations that the Wastewater Reclamation Project conformed to the spirit and the requirements of Order 95-10. MPWMD's Ordinance No. 109 makes reference to the State Board's communications with MPWMD and with PBC regarding the Board's conditions for the wastewater reclamation project (MPWMD-SP8, Ordinance No. 109 at pp. 4, 8.), and PBC has presented evidence that these conditions have been met.

We find that under the unique circumstances surrounding the recent upgrade and expansion of the wastewater reclamation project, PBC's recent commitment of \$34 million for the upgrade project, including the sale of up to 175 afa of its water entitlement for residential use in the Del Monte Forest area, cannot be impaired without severe detriment to PBC and private landowners in the Del Monte Forest. Because PBC has offset its Water Entitlement with a permanent reduction in potable water use, there will be no harm to public trust resources from allowing new service connections in order to fulfill PBC's Water Entitlement. The Board emphasizes the unique nature of PBC's Water Entitlement, including PBC's extensive financial investment in

the Water Reclamation Project and its reliance on repeated written assurances from Board officers, who specifically possessed the legal authority to limit the Board's enforcement discretion by approving of the continued operation and subsequent expansion of the Water Reclamation Project.

19.2 Any Monterey Peninsula Community that Wishes to Develop Water from a New

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Source for Growth Must First Apply Water from the New Source to Reduce its Share of the Water Being Illegally Diverted by Cal-Am; Only after its Share of Illegal Diversions from the River is Ended may Water from the New Source be Used for Growth

Some additional water has been developed for growth in Cal-Am's service area since entry of Order 95-10. The City of Sand City independently made an effort to develop water for growth within its jurisdiction. The city sought assurances from the State Water Board that any new water it developed would not be reduced to offset Cal-Am's illegal diversions from the river. (Sand City -1, Attachment A.) Whatever assurances may have been provided in the past, such assurances should not be provided in the future. All communities receiving water from Cal-Am are obtaining some portion of that water from illegal diversions from the river. With the exception of the PBC water entitlement, which is discussed in the preceding section and which effectuated a permanent reduction in potable water use of at least 800 afa, any community or combination of communities seeking to develop a new source supply must first apply water from a new source to reduce its share of the water being illegally diverted by Cal-Am. Water from a new source of supply should not become available for growth until after the community has fully substituted water from the new source for its share of the water being illegally diverted from the river by Cal-Am. Monterey Peninsula communities and their residents have little incentive to support efforts to develop new water supplies to replace the water being illegally pumped from

the river by Cal-Am if water can be obtained for growth without having to reduce their pro-rata share of water illegally pumped from the river. Nearly 14 years after the adoption of Order 95-10, Cal-Am is unable to tell the State Water Board what project may be built to end its illegal diversions, when a project will be approved or when construction might be commenced. Indeed, there is no assurance that any project will be approved during the next several years.

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Thus, Cal-Am has not diligently implemented actions to terminate its unlawful diversions under Condition 2. Cal-Am's only action reducing its illegal diversions has been the work done on two projects yielding small amounts of water: the ASR project and the Sand City Desalinization Plant. Significantly, these projects are in place due largely to the efforts made by other agencies, i.e., MPWMD, PBC, and the City of Sand City.

[...]

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ORDER

NOW, THEREFORE, IT IS ORDERED THAT Cal-Am shall cease and desist from the unauthorized diversion of water from the Carmel River in accordance with the following schedule and conditions:⁵⁴

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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. Diversions to serve the 380 afa Water Entitlement held by Pebble Beach Company

⁵⁴ Attachment 1 to this order, "Table 1, Projected Reductions in Illegal Diversions from the Carmel River," shows the reductions in illegal diversions from the Carmel River that should result from conditions 1, 2 and 3 of this order.

and its successors and assigns shall not be considered an unlawful or illegal diversion under this Order so long as the Wastewater Reclamation Project operated by the Carmel Area Wastewater District and Pebble Beach Community Services District is operating as designed and saving at least 380 afa of potable water.

2. Cal-Am shall not divert water from the Carmel River for new service connections or for any increased use of water at existing service addresses resulting from a change in zoning or use, except that Cal-Am may divert water for new service connections or for any increased use of water at existing service addresses to serve the 380 afa Pebble Beach Company Water Entitlement, so long as the Wastewater Reclamation Project operated by the Carmel Area Wastewater District and Pebble Beach Community Services District is operating as designed and saving at least 380 afa of potable water. For other users, 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 September 2, 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.

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3. At a minimum, Cal-Am shall reduce its unlawful diversions from the Carmel River in accordance with the following:

a. Commencing on October 1, 2010,⁵⁶ Cal-Am shall not divert more water from the river than the base of 10,978 afa,⁵⁷ as adjusted by the following:

(1) Immediate Reduction: Commencing on October 1, 2009, Cal-Am shall reduce

⁵⁶ Each water year runs from October 1 to September 30 of the following year.

⁵⁷ Cal-Am diverts 3,376 afa under legal rights and, on average, 7,6032 afa without a basis or right. (3,376 + 7,6032 = 10,978 afa).

diversions from the river by 5 percent, or 549 afa.

(2) Annual Reductions: Commencing on October 1, 2010, the base shall be further reduced by 121 afa per year through savings that will accrue from (1) reduced system losses, (2) the retrofit program, and (3) the reduction of potable water used for outdoor irrigation. The 121 af reduction shall be cumulative. For example, 121 af shall be reduced in the first year and 242 af shall be reduced in the second year. Commencing on October 1, 2015, annual reductions shall increase to 242 af per year. The 242 af per year reduction shall also be cumulative.

(3) ASR Project: The amount of water diverted to underground storage under Permit 20808A (Application 27614A) as of May 31 of each year and which will be supplied to Cal Am customers after that date shall be subtracted from the base.⁵⁹ On May 1 of each year, Cal Am shall submit an operating plan to the Deputy Director for Water Rights specifying the quantity of water it intends to supply from ASR Project for its customers after May 1 of each year. Water pumped from the project for delivery to customers shall be consistent with the requirements of paragraph "c" below.

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

⁵⁹ This condition shall apply to Phase I and Phase II of the ASR project.

the base amount for each water year.

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

b. Either Cal-Am or the MPWMD may petition the State Water Board Deputy Director for Water Rights for relief from annual reductions imposed under condition 3., a

(2). No relief shall be granted unless all of the following conditions are met: (a)

Within 18 months of the adoption of this order, Cal-Am has imposed a moratorium on new service connections—excluding the Pebble Beach Company's Water Entitlement as discussed above—pursuant to Water Code section 350 or has obtained an order prohibiting new connections from the PUC pursuant to Public Utility Code section 2708 or MPWMD has imposed a moratorium on new service connections under its authority, excluding the Pebble Beach Company's Water Entitlement as discussed above; (b) the demand for potable water by Cal-Am customers has been reduced by 13 percent⁶¹ and (c) a showing is made that public health and safety will be threatened if relief is not granted. Any relief granted shall remain in effect only as long as (a) a prohibition on new service connections remains in effect, and (b) the 135 percent conservation requirement remains in effect.

c. ASR project water stored in the Seaside groundwater basin under Permit 20808A (Application 27614A) should be used to mitigate the effect of Cal-Am's illegal diversions from the river. ASR water should be supplied to Cal Am customers only during months when water is most needed in the river to preserve steelhead. Commencing June 1 of each year, Cal-Am should use stored groundwater to supply the needs of its customers and

⁶¹ For purposes of measuring compliance, the 13 percent reduction shall be measured against the adjusted base required by this condition for the year in which the conservation requirement is imposed.

reduce diversions from the river. Consistent

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with Cal Am's operating plan, water should be pumped from the groundwater basin at the maximum practicable rate for as long as possible. Cal-Am's illegal diversions from the river shall be reduced at the same rate water is pumped from the groundwater basin for as long as stored water is available under the operating plan. This condition shall apply to both Phase I and Phase II of the ASR project. The river's habitat and fish may receive greater benefits from a substitution regime that differs from that called for by this condition, a regime requiring that

substitution commence at a different date, at a different rate or be coordinated with the level of flow in the river. In addition, it may be desirable to hold stored water from one year to the next to assure that more water is available for the steelhead and its habitat in years when the potential for steelhead survival may be greater. Several substitution trials may be necessary to determine which regime will have the greatest benefit. The National Marine Fisheries Service and the California Department of Fish and Game are encouraged to negotiate different substitution regimes with Cal-Am. The State Water Board will honor such agreements, provided Cal-Am submits the written agreement to the Deputy Director for Water Rights no later than May 1 of each year and the written agreement is approved by the Deputy Director.

4. Cal-Am shall implement one or more small projects that, when taken together, total not less than 500 afa to reduce unlawful diversions from the river. Within 90 days of entry of this order, Cal-Am shall identify to the Deputy Director for Water Rights the projects that it will implement and shall implement the projects within 24 months of entry of this order. Cal-Am may petition

the Deputy Director for additional time in which to implement the projects. However, no time extension shall be considered unless the petition is accompanied by detailed plans and time schedules for each project. Detailed justification shall be provided for additional time. No additional time may be granted in order to allow Cal-Am time to obtain prior approval from the PUC. To the maximum practicable extent, small projects shall be operated to reduce illegal diversions from the river during the months when surface flow in the river begins to go dry and through the months when surface flow in the river disappears below river mile 69.5.

5. Starting three months following adoption of this order, Cal-Am shall post quarterly reports on its website and file the quarterly reports with the Deputy Director for Water Rights. The quarterly reports shall include the following:

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(a) Monthly summaries of the quantity of water it diverts from the river.

(b) Monthly summaries of the quantity of ASR project water diverted from the river under Permit 20808A and stored in the Seaside ground water basin.

The monthly reporting shall also state the quantity of water beneficially used under Permit 20808A and the current balance of water in storage.

(c) Monthly summaries of the quantity of water being produced by the Sand City desalinization plant. The reporting shall identify new service connections within Sand City and thereafter report the quantity of water being delivered to the new connections. The monthly reports shall specify the quantity of water used to reduce diversions from the river during the reporting period.

(d) Monthly summaries of the quantity of water saved by reducing system losses.

(e) Monthly summaries of reductions in demand for potable water due to

conservation actions such as increased water rates, MPWMD's retrofit program, efforts to reduce potable water for outdoor water use and demand reduction initiatives.

(f) Monthly summarizes identifying all new service connections. The report shall include the Cal-Am account number, the service address, the name of each authority granting any approval required for connecting to Cal-Am' system and the name of each authority granting any approval required before commencing construction; the issuer of the each approval and the date of each approval shall be separately listed for each service address; if a new service connection is made pursuant to the Water Entitlement held by the Pebble Beach Company or its successors and assigns, the report shall so note.

(g) Monthly summaries identifying existing service addresses that receive an increased supply of water due to a change in zoning or use. The report shall include Cal-Am account number, the service address and the name of each authority authorizing a change of use or of zoning and the date of such change; if an expanded water use is made pursuant to the Water Entitlement held by the Pebble Beach Company or its successors and assigns, the report shall so note.

[END OF PROPOSED REVISIONS]

1 **STATEMENT OF SERVICE**

2 I, Terri D. Kuntz, am a resident of the State of California, over the age of eighteen years,
3 and not a party to the within action. My business address is Downey Brand LLP, 621 Capitol
4 Mall, 18th Floor, Sacramento, California, 95814-4731. On September 30, 2009, I served the
5 within document(s):

6 **Comments of Pebble Beach Company Regarding Revised Cease
7 & Desist Order Against California American Water for
8 Unauthorized Diversion of Water from the Carmel River in
9 Monterey County**

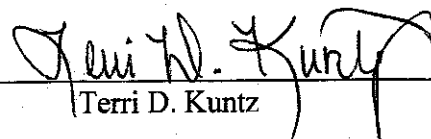
- 10 **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax
11 number(s) set forth below on this date before 5:00 p.m.
- 12 **BY HAND:** by personally delivering the document(s) listed above to the person(s)
13 at the address(es) set forth below.
- 14 **BY MAIL:** by placing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

26 ***See Attached Interested Parties List***

27 I am readily familiar with the firm's practice of collection and processing correspondence
28 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 September 30, 2009, at Sacramento, California.



Terri D. Kuntz

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