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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

In the Matter of the Application of
CALIFORNIA-AMERICAN WATER
COMPANY (U210W) for an Order
Authorizing and Imposing a Moratorium
on Certain New or Expanded Water
Service Connections in its Monterey
District.

Application No. 10-05-020
(Filed May 24, 2010, Amended May 27, 2010)

**REPLY OF CALIFORNIA-AMERICAN WATER COMPANY TO THE PROTESTS AND
RESPONSE TO CALIFORNIA-AMERICAN WATER COMPANY'S APPLICATION
FOR A MORATORIUM**

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July 16, 2010

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Pursuant to Rule 2.6(e) of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission" or "CPUC"), California-American Water Company ("California American Water") hereby responds to the protest of the Division of Ratepayer Advocates' ("DRA"), the protests of Quail Lodge, Inc., CVR HSGE, LLC, and Baylaurel, LLP (collectively "Carmel Valley Resorts") and the response of Security National Guaranty, Inc., to the Application.

California American Water filed the Application seeking the authority to impose a moratorium in its Monterey District to comply with State Water Resources Control Board Order WR-2009-0060. The State Water Resources Control Board has prohibited California American Water from serving Carmel River water to new or expanded connections until California American Water is using only its permitted water rights. California American Water seeks from the Commission a moratorium sufficient to comply with the State Water Resources Control Board's mandate and accordingly

California American Water has proposed exceptions to the moratorium where service can be effected without serving Carmel River water, or as otherwise allowed by the State Water Resources Control Board.¹

None of the five protests or responses disputes the critical underlying facts that California American Water must comply with Order WR-2009-0060 and that compliance with that Order means that Carmel River water cannot be delivered to new or expanded connections. As explained more fully below, the Carmel Valley Resorts each contend that the extraordinary relief sought by California American Water goes too far because those resorts would be unable to use “water credits” issued by the Monterey Peninsula Water Management District for past water conservation activities to facilitate new development. Security National Guaranty, Inc. seeks to clarify the exceptions included in the Application to allow California American Water to “wheel” Security National Guaranty’s adjudicated rights water from the Seaside Groundwater Basin (“Basin”) to its proposed development using California American Water’s existing distribution system. The merits of these pleadings are addressed below.

California American Water notes at the outset that the long-term water supply needs of the Monterey Peninsula are being addressed in another proceeding. In proceeding A.04-09-019 California American Water is seeking Commission authorization to develop a long-term water supply solution for the Peninsula. This long-term solution is intended to resolve the State Water Resources Control Board’s orders regarding water appropriations from the Carmel River. Thus, the issues discussed in

¹ While Order WR-2009-0060 was initially stayed by court order, that stay was lifted on April 22, 2010. With the lifting of the stay, California American Water has an immediate compliance issue that requires relief from the Commission.

this proceeding will exist until a long-term water supply solution approved in proceeding A.04-09-019 is operational.

I. DRA'S PROTEST

A. DRA Misstates the Seaside Groundwater Basin Adjudication.

DRA states in its protest that “[u]nder the adjudication, these Subsystems were not awarded any permanent groundwater rights.² This is inaccurate. In the Application, California American Water provided a brief overview of water supply regulation relating to the Carmel River. The Application did not address the other source of supply for the Monterey Peninsula – the Seaside Groundwater Basin (“Basin”) because the Application does not implicate the Basin, making a brief overview of the Basin Adjudication appropriate.

As noted in DRA’s protest, the Basin was adjudicated in 2006, with the operative decision being the product of a February 2007 amendment.³ Despite DRA’s implication otherwise, the Basin Adjudication does not include a physical solution based on water systems. The Basin Adjudication determined the Natural Safe Yield of the entire Basin. In that context, the Court divided the Natural Safe Yield between two different subareas of the Basin – the Coastal subarea and the Laguna Seca subarea. The Court also allocated pumping rights in two stages. First, the Court assigned a volumetric limit to certain parties that own land overlying the Basin, so called “Alternative Production Allocations.” Those volumetric limits are fixed and paramount to the rights of parties without overlying land. Alternative Production Allocations are, however, limited to use on the overlying land. After water reserved for Alternative Production Allocations is

² DRA Protest, p.2.

³ The February 2007 amended decision will hereinafter be referred to as the “Basin Adjudication.”

subtracted from the Natural Safe Yield, the remaining portion of the Natural Safe Yield is allocated on a percentage basis to the “Standard Producer Allocations,” which includes California American Water.

Although the Basin is in overdraft, it is also an essential source of potable water for the Monterey Peninsula. Accordingly, the Court did not require the parties to immediately reduce pumping to the Natural Safe Yield, but instead created an “Operating Yield” that triennially declines ten percent until the Year 2021, at which point the Operating Yield will equal the Natural Safe Yield. Only Standard Production Allocations are subject to the triennial decrease in the Operating Yield.

What DRA attempts to explain in stating that the Laguna Seca satellite systems “were not awarded permanent groundwater rights” is that there will be no water to allocate to California American Water from the Laguna Seca subarea Operating Yield as the Operating Yield declines and after allocations to Alternative Producers are taken into account. But, this does not mean there are no “permanent groundwater rights” for the satellite systems. To the contrary, Section III.M.3 of the Adjudication creates a “one-way street” allowing the export of water from the Coastal subarea to either the Laguna Seca subarea, or outside the Basin. That section states, in part:

- a. Exports Authorized from the Coastal Subarea. Producers may export Water Produced from the Coastal Subarea for reasonable and beneficial uses within another Subarea of the Seaside Basin. Only California American may export water outside the Basin, and then only to provide water to its current customers. This means that, in any Water Year, any Producer may export from the Coastal Subarea up to, but not in excess of, a quantity equal to the sum of that Producer's Production Allocation, plus Stored Water Credits, plus Carryover Credits. Export of Groundwater in excess of a Producer's total rights (Production Allocation, plus Stored Water Credits, plus Carryover Credits), however, is prohibited.

b. Exports of Natural Replenishment Water Prohibited from the Laguna Seca Subarea. Exports from the Laguna Seca Subarea of Natural Replenishment Water and Carryover Credits not caused by Artificial Replenishment are prohibited.

Thus, California American Water has permanent rights to Basin water to serve the Laguna Seca satellite systems.

B. DRA Misstates the Potential Financial Impact To Ratepayers By Increased Consumption In the Monterey System.

DRA states in its protest “[i]f demand on the main system increases, Cal Am ratepayers could be subject to additional fees for overproduction from the Seaside Groundwater Basin.⁴” DRA references the provisions in the Watermaster Rules and Regulations that impose a replenishment assessment for production over the Natural Safe Yield. There are multiple flaws in this claim.

First, each year since the Basin Adjudication, California American Water has produced all or substantially all of its allocation of the Basin Operating Yield. California American Water is required to operate this way by Condition No. 4 of Order 95-10.⁵ It is also the subject of agreement between California American Water, the National Marine Fisheries Service, the Monterey Peninsula Water Management District, and the Department of Fish and Game to protect the Carmel River as habitat. Therefore, California American Water is already incurring the maximum replenishment assessments it can incur under the Adjudication without violating the Court’s order.

Second, as suggested above, the only way for California American Water to materially increase its replenishment assessments is to pump more than its share of the

⁴ DRA Protest, p.2.

⁵ As noted previously, except for deleting the last sentence, Order WR-2009-0060 requires California American Water to continue to comply with Condition No. 4 of Order 95-10.

Operating Yield. California American Water participates in a water budget process pursuant to the Rules and Regulations of the Monterey Peninsula Water Management District. Under the Water Management District's Rules and Regulations, if California American Water were to exceed the Water Budget by ten percent without notifying the Water Management District, California American Water would be violating MPMWD Rule No. 102, which is a misdemeanor and California American Water would be subject to fines. It would also be a violation of the Basin Adjudication, subject to punishment as contempt of court, and could lead to rationing under the Monterey Peninsula Water Management District's Conservation and Rationing Program, and California American Water's tariffs. Thus, it is unlikely that California American Water would exceed those limits in all but the direst circumstances. If those circumstances were to arise, California American Water could seek to extend the moratorium to the Laguna Seca satellite systems at that time pursuant to Water Code Section 350.

Third, the Basin Adjudication grants to California American Water the opportunity to obtain a credit against replenishment assessments for expenditures by California American Water to develop a replacement water supply. In this regard, California American Water has each year sought and obtained from the Seaside Basin Watermaster a credit for its Coastal Water Project preconstruction costs. Accordingly, in addition to the other conditions that would have to be satisfied as described above, the replenishment assessments would have to exceed California American Water's Coastal Water Project preconstruction costs before there could be a financial impact to ratepayers from additional consumption in the Laguna Seca satellite systems.

II. PROTEST OF QUAIL LODGE, INC., CARMEL VALLEY RANCH (CVR HGSE, LLC), AND BERNARDUS LODGE (BAYLAUREL, LLC).

The Carmel Valley Resorts are requesting the Commission to add an exception to allow new connections or expanded uses by current customers based on “water credits” issued by the Monterey Peninsula Water Management District based on past water conservation improvements.⁶ The Carmel Valley Resorts sought this same exception from the State Water Resources Control Board and the State Water Resources Control Board rejected that request in Order WR-2010-0001.⁷

In summary, when a water user on the Monterey Peninsula makes improvements to their property to reduce water consumption and the water user can demonstrate to the Monterey Peninsula Water Management District that those improvements reduce water consumption by a certain volume, the Monterey Peninsula Water Management District will grant that person a credit for a certain percentage of the reduced water consumption for future use. Thus, water credits reduce actual consumption by some measure.

The merits of the water credit system notwithstanding, if the Commission were to grant the relief sought by the Carmel Valley Resorts, California American Water would have inconsistent obligations – it would have an obligation under its tariffs to provide water service to new or expanded uses in the form of new development at the Carmel Valley Resorts, while it is prohibited by the State Water Resources Control Board from delivering water from Carmel River to those new or expanded uses.

As stated in the testimony of Craig Anthony in support of the Application, the main Monterey system is an integrated system; all users get some Carmel River water

⁶ Baylaurel Protest, p. 3; Quail Lodge Protest, p. 3, CVR HSGE Protest, p.3.

⁷ Order WR-2010-0001 is attached as Exhibit 1.

at some time during the year.⁸ The conflict that would be engendered if the Commission were to grant the relief sought in the protests is particularly acute in the circumstances relating to the Carmel Valley Resorts. As further explained in the attached declaration of Craig Anthony,⁹ California American Water's main Monterey distribution system experiences a hydraulic barrier that prevents water from the Basin, which is in the northern portion of the distribution system, from being delivered to the southernmost reaches of distribution system, which includes the Carmel Valley. Thus, the only water that can be delivered to customers in Carmel Valley – including Quail Lodge, Carmel Valley Ranch resort, and Bernardus Lodge – is water from the Carmel River. Accordingly, California American Water's service to any new or expanded use at the Carmel Valley Resorts can only lead to a violation of Condition No. 2 of Order WR-2009-0060.

III. RESPONSE OF SECURITY NATIONAL GUARANTY, INC.

Security National Guaranty, Inc. filed a response generally supporting California American Waters' application, but seeking to clarify the exceptions to allow service to Security National Guaranty's proposed development on parcels designated Assessor's Parcel Numbers 011-501-014 and 011-501-004.¹⁰

California American Water agrees in principle with Security National Guaranty's response – any order from the Commission should allow California American Water to “wheel” Security National Guaranty its adjudicated water rights to its proposed development. As Security National Guaranty notes, the Sixth District Court of Appeal

⁸ There is one exception in that Security National Guaranty has filed a response seeking an exception to allow California American Water to “wheel” Security National Guaranty's adjudicated groundwater rights to Security National Guaranty's proposed development. That response is discussed in Section III, below.

⁹ The Declaration of Craig Anthony is attached as Exhibit 2 to this Reply.

¹⁰ SNG Response, p. 2.

recently addressed the issue of California American Water serving water from the Basin in the same distribution system that serves Carmel River water.¹¹ The Court of Appeal endorsed the findings of the Monterey County Superior Court that commingling of water from different sources does not transmute the water to be from a different source. Instead, the resolution of any such issue is a matter of proper water distribution system operation and water accounting.¹² California American Water's "front loading" agreement with Security National Guaranty, attached as Exhibit 8 to Security National Guaranty's response, sets the base operational parameters to address concerns relating to the source of water. California American Water has additional operational and accounting mechanisms in place to meet its obligations under the "front loading" agreement and ensure that sufficient water, up to 90 acre-feet per year, is pumped from the Basin in such intervals that Security National Guaranty is served water sourced in the Basin.

Security National Guaranty has offered multiple suggestions on crafting the clarification it seeks, from expanding the exception for water delivered to the City of Sand City, to an even broader exception for "water served by water entitlements held pursuant to the Seaside Basin Adjudication and pre-pumped prior to service by Cal-Am."¹³ Security National Guaranty justified the latter based on the potential for other holders of adjudicated water rights to request California American Water to wheel water

¹¹ SNG Response, p.5, citing *California-American Water Company v. City of Seaside*, (2010) 183 Cal.App.4th 471.

¹² *California-American Water Company v. City of Seaside*, 183 Cal.App.4th at 482.

¹³ SNG Response, pp.3 and 5.

to those landowners, or the potential for the Superior Court or Watermaster to “order” California American Water to wheel water for purposes of Basin management.¹⁴

California American Water disagrees with the breadth of the suggested exceptions. First, State Water Resources Control Board Order WR-2009-0060 tied its exception for future development in the City of Sand City to the operation of the desalination facility, not to water from the Basin. The exception sought by California American Water in the Application clearly ties new service in Sand City to the water entitlement created for output from the desalination facility, and therefore clearly relates back to the State Water Resources Control Board’s mandates. Second, any wheeling agreements, other than Security National Guaranty’s, or orders from the Superior Court or Watermaster relating to California American Water distributing water from the Basin are speculative at this time. What is evident is that water supply in California American Water’s Monterey district is a very complex and controversial matter. California American Water believes that an exception should be added that allows California American Water to wheel Security National Guaranty’s adjudicated water rights pursuant to their “front loading” agreement and any amendments thereto. This serves Security National Guaranty’s interests but avoids unintended consequences that might arise from creating unnecessarily broad exceptions in such a complex and controversial setting.

IV. CONCLUSION.

As demonstrated in this Application and the supporting testimony, California American Water has a legal obligation to comply with State Water Resources Control

¹⁴ SNG Response, p.5.

Board Order WR-2009-0060. In order to comply with that Order, California American Water seeks to impose, with some exceptions, a moratorium on all new or expanded water service connections in its Monterey District, unless otherwise allowed by Order WR-2009-0060.

California American Water agrees with Security National Guaranty that an exception should be provided to allow California American Water to wheel Security National Guaranty's adjudicated water rights to its proposed development.

The exception requested by Quail Lodge, Inc., CVR HSGE, LLC, and Baylaurel, LLC was sought and rejected by the State Water Resources Control Board. As much as we understand the desire of our customers to access additional water, California American Water respectfully requests the Commission to disregard the Carmel Valley Resorts' request to expand the exceptions sought in California American Water's application to avoid creating inconsistent obligations.

Respectfully Submitted,

Date: July 16, 2010

CALIFORNIA-AMERICAN WATER COMPANY

/s/ Timothy J. Miller

Timothy J. Miller

Attorney for Applicant

CALIFORNIA-AMERICAN WATER COMPANY

EXHIBIT 1

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2010-0001

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

SOURCE: Carmel River

COUNTY: Monterey

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 (State Water Board or Board) for reconsideration of Board Order WR 2009-0060.¹ 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.

¹ 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, subd. (b).) The Sierra Club's request is untimely.

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](#). On July 6, 1995, 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 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.² (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 1995-1996 through water year 2006-2007, 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 credits³ 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 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.)

² 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.)

³ 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.

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 *PBD 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 hearings before the State Water Board 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 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.⁴ 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 above-noted 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 holders. However, the sentence is overly broad. 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

⁴ 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.)

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 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.) On July 6, 1995, 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 it adopted a number of conditions requiring Cal-Am to curtail its diversions from the river. (Order 2009-0060, pp. 34-37, §. 14.2.)

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 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 adverse impacts 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 water diverted, the greater the harm. Insofar as

public trust impacts are concerned, the impacts of illegal diversions used to serve a customer with a PBC entitlement are no different than the impacts 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 from the river without a valid basis of right. 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. The Board adopted Order WR 2009-0060 because Cal-Am is illegally diverting water from the Carmel River. Nevertheless, the fact that the cumulative effects 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 (Petitioners) 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 is not found in the evidentiary record, but instead relies on information provided as attachments to the petitions.⁵ In addition, the 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 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 under penalty 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.

⁵ 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 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.

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 annexation 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 approximately \$800,000 to achieve a water savings of at least 65 afa,⁶ a net water savings of 32 afa. Subsequent development having occurred, the Lodge currently holds 3 afa of the allocation for future development at the subdivision.⁷ Although the Lodge references Decision 1632, which indicates that the Lodge claimed prior rights, the Lodge does not indicate whether anyone has sufficient legal rights for the full amount supplied to the golf course.⁸ 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 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

⁶ Declaration dated December 29, 2009 by Lawson Little, p. 2.

⁷ Declaration dated December 29, 2009 by Lawson Little, p. 2.

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

difficulties being experienced in the hospitality industry. Future development, however, will hinge on the availability of water to supply the allocation from MPWMD.⁹

5.2 CV Ranch.

Petitioner CV Ranch (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. The Ranch is currently served water by Cal-Am. The 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 declaration dated December 29, 2009, David Hunter stated that during 2007-2008, the Ranch replaced its irrigation system and re-landscaped at the cost of approximately \$650,000. The declaration does not state how much water was saved by this effort. The petition states that a water credit of 7.245 afa was obtained for these changes. The declaration also states that in 2007 the Ranch removed 24 spa tubs in resort rooms and one spa in the pool area. How much water was saved by these changes is unstated.¹⁰ It appears that the Ranch 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 1,250 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 the Planning Commission occurred after the evidentiary record was closed; however, the copy of the Planning Commission's actions is not certified as true and correct.

⁹ 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, subd. (b).)

¹⁰ 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, subd. (b).)

5.3 Bernardus Lodge.

Petitioner Baylaurel, LLC (Petitioner) recites that it owns and operates the Bernardus Lodge located in Carmel Valley. Bernardus Lodge 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, Petitioner obtained a 3.74 afa water credit from MPWMD in exchange for the removal of an onsite laundry facility. On December 30, 2009, Bernardus 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 Monterey County Planning Commission for a project to expand the existing lodge.¹¹ 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 the Planning Commission occurred after the evidentiary record was closed; however, the copy of the Planning Commission's actions is not certified as true and correct.

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

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 (1) prior to 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 (2) prior to 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

¹¹ 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, subd. (b).)

water available from the Seaside Groundwater Basin. 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 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 that Order WR 2009-0060 fails to properly balance community interests against impacts on public trust resources. In support of this contention, Quail 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 an 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 diversion 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 from the river without a valid basis of right. 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 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 was 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 and 75 gallons per person per day 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 available 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 by which 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.

Quail Lodge does not argue that the Board failed to give adequate consideration to public health and safety concerns. Its 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 benefits 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 that should be prohibited. (See also Wat. Code, § 1052 [prohibiting both the diversion and use of illegally diverted water].) We conclude, therefore, 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.

Petitioners 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 Petitioners' 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 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 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 recognized PBC's contribution to the non-potable water supply and stated 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 it 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 with 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 staff did not require the Board to make any special allowance for PBC, they were a factor that the Board could legitimately take into consideration in fashioning an enforcement remedy. In the 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 letters commenting on the draft order responding to the petitions for reconsideration, counsel for Quail Lodge, CV Ranch 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 for 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 diverted 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 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 it clear that an unlawful diverter of water cannot 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. (*Id.* 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 party 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. Del Monte Owners 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 does 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 vague requests for reconsideration in three 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).) Del Monte Owners makes three requests, but two are only general statements of concern that do not identify any specific action requested. We conclude that the Del Monte Owners petition should be dismissed for failure to comply with the requirements for filing petitions for reconsideration.

Even if the petition were 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.

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.

CERTIFICATION

The undersigned Clerk to 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: Chairman Charles R. Hoppin
Vice Chair Frances Spivy-Weber
Board Member Arthur G. Baggett, Jr.
Board Member Walter G. Pettit

NAY: None

ABSENT: Board Member Tam M. Doduc

ABSTAIN: None



Jeanine Townsend
Clerk to the Board

EXHIBIT 2

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

In the Matter of the Application of
CALIFORNIA-AMERICAN WATER
COMPANY (U210W) for an Order
Authorizing and Imposing a Moratorium
on Certain New or Expanded Water
Service Connections in its Monterey
District.

Application No. 10-05-020
(Filed May 24, 2010, Amended May 27, 2010)

**DECLARATION OF CRAIG ANTHONY IN SUPPORT OF CALIFORNIA-
AMERICAN WATER COMPANY'S REPLY TO THE PROTESTS TO
CALIFORNIA-AMERICAN WATER COMPANY'S APPLICATION FOR A
MORATORIUM**

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July 16, 2010

Attorney for
CALIFORNIA-AMERICAN WATER
COMPANY

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

In the Matter of the Application of CALIFORNIA-AMERICAN WATER COMPANY (U210W) for an Order Authorizing and Imposing a Moratorium on Certain New or Expanded Water Service Connections in its Monterey District.

Application No. 10-05-020
(Filed May 24, 2010, Amended May 27, 2010)

DECLARATION OF CRAIG ANTHONY IN SUPPORT OF CALIFORNIA-AMERICAN WATER COMPANY'S REPLY TO THE PROTESTS OF QUAIL LODGE, INC.; BAYLAUREL, LLC; AND CVR HSGE, LLC TO CALIFORNIA-AMERICAN WATER COMPANY'S APPLICATION FOR A MORATORIUM

I, Craig Anthony, declare as follows:

1. I am employed by California-American Water Company ("California American Water") as the General Manager of the Coastal Division, which includes the Monterey Peninsula, Ryan Ranch, Hidden Hills, Ambler Park, Bishop, Toro, Ralph Lane and Chualar. I am responsible for water delivery and wastewater services including customer service, regulatory compliance, safety, personnel management and development, the construction, maintenance, and operations of facilities and infrastructure, and the administration of the operating and capital investment budgets.

2. The main Monterey distribution system provides water service and fire protection to the Monterey Peninsula and adjacent areas in Monterey County. The transmission and distribution system includes numerous

pressure gradients that have been constructed over the years to provide water service throughout the mountainous terrain of Monterey. Elevations range from sea level to over 1,300 feet above sea level, requiring multiple "lift-zones" to distribute water to the higher elevations of the distribution system. Approximately 70 percent of the water system users reside in a main pressure gradient that includes the sources of supply, major transmission mains, pumping facilities and water storage facilities that form the backbone of the Monterey distribution system. Water is pumped from this main pressure gradient by booster stations to first lift, second lift, third lift and in some cases, a fourth lift zone.

The existing Monterey water system has unique operational conditions and requirements; but essentially one main pressure zone serves the Lower Carmel Valley and the Monterey Peninsula. Supply for this zone is provided entirely by Upper and Lower Carmel Valley Wells. In general, because of distribution system hydraulics (i.e., how the water is transferred within the system pipes from various well sources and storage tanks), the water supplied from the Upper and Lower Carmel Valley Wells flows into Monterey and into Seaside (under certain conditions and times of the year). However, because of ground elevation differences and the height of certain distribution storage facilities, water is unable to be transferred very far into the distribution system from the Seaside Wells. There is basically a hydraulic "barrier" in the vicinity of the Naval Postgraduate School that prevents water pumped from the Seaside Wells

from being transferred any further into the distribution system. The existence of this hydraulic condition thereby prevents any water produced from the Seaside Wells from moving into Monterey, Pacific Grove, Pebble Beach, or even further up into Carmel Valley.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: July 16, 2010

/s/ Craig Anthony
Craig Anthony

PROOF OF SERVICE

I, Monica Trejo, declare as follows:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is California-American Water Company, 333 Hayes St., Suite 202, San Francisco, California 94102. On July 16, 2010, I served the within:

Reply of California-American Water Company to the Protests and Response to California-American Water Company's Application for a Moratorium

on the interested parties in this action addressed as follows:

See Attached Service List

(BY PUC E-MAIL SERVICE) By transmitting such document electronically from California-American Water Company, San Francisco, California, to the electronic mail addresses listed above. I am readily familiar with the practice of California-American Water Company for transmitting documents by electronic mail, said practice being that in the ordinary course of business, such electronic mail is transmitted immediately after such document has been tendered for filing. Said practice also complies with Rule 1.10(b) of the Public Utilities Commission of the State of California and all protocols described therein.

(BY U.S. MAIL) By placing such document(s) in a sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at California-American Water Company, San Francisco, California following the ordinary business practice. I am readily familiar with the practice of California-American Water Company for collection and processing of correspondence for mailing with the United States Postal Service, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 16, 2010, at San Francisco, California.

/s/ Monica Trejo
Monica Trejo

CPUC E-Mail Service List
A1005020, Updated July 14, 2010

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