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The Pebble Beach Company, and
6 City of Carmel

7
8 STATE OF CALIFORNIA
9 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
10 CENTRAL COAST REGION

11 In the matter of:
12
13 PROPOSED CEASE AND DESIST
ORDERS,
14 Requiring The Pebble Beach Company,
Monterey County, and City of Carmel, to
15 Cease and Desist from Discharging Waste to
Areas of Special Biological Significance
16 (ASBS) in Violation of Prohibitions
Prescribed by the State Water Resources
17 Control Board

PROPOSED CEASE AND DESIST ORDER
NOS. R3-2005-0021 AND R3-2005-0022

**MOTION TO MODIFY PROCEEDINGS;
OFFER OF PROOF IN SUPPORT
THEREOF**

Hearing Date: February 11, 2005
Time: 8:30 a.m.
Place: Richard W. Nutter Agricultural
Conference Center
1432 Abbott Street
Salinas, CA 93901

1 **I. OPENING STATEMENT**

2 The Pebble Beach Company and the City of Carmel (“Respondents”) hereby
3 respectfully request that the Regional Water Quality Control Board (“Regional
4 Board”) conduct a full adjudicatory hearing with respect to Cease and Desist
5 Order No. R3-2005-0021, presently set for February 11, 2005. The action the
6 Regional Board proposed to take affects the substantive rights of Respondents,
7 constituting formal agency enforcement action, fixing substantive rights, and
8 subjecting Respondents to material risk regarding the Agency’s proposed findings
9 of fact and conclusions of law. Under these circumstances, Respondents are
10 entitled to a full and fair opportunity to prepare and put on a defense, exercising
11 the rights to offer their own witnesses and cross-examine those agency personnel
12 involved in this action. The Regional Board’s proposed approach is woefully
13 inadequate, and violates Respondents’ due process rights. Accordingly, the
14 Regional Board must modify the proceedings pursuant to this motion.¹

15 **II. ARGUMENT**

16 **A. The Time Allocated is Not Adequate**

17 The “Conduct of Meetings and Hearing Procedure” of the Regional Board states:
18 “Speakers should plan to summarize key points within three minutes.”² Presumably, this
19 indicates that Pebble Beach ^(including City of Carmel) might be limited to only three minutes to present its entire case at the
20 hearing. The CDO, however, is complex and lengthy. It represents a significant shift in public
21 policy and has the potential to severely impact Pebble Beach’s substantive and legal rights.
22 Pebble Beach will need time to adequately discuss the impact of the CDO. Unfortunately, three

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25 ¹ Under separate cover, Respondents’ are making a motion for a continuance. In addition,
26 Respondents are subpoenaing Regional Board records relevant to these proceedings. Curing
27 the apparent procedural violation and irregularities will require the Regional Board to grant
28 our motions, set this matter for a later date, and in the meantime produce the documents per
the subpoena and give us a reasonable pre-hearing opportunity to review them.

² California Regional Water Quality Control Board, Central Coast Regional Board Meeting
Agenda, Notice of Public Meeting of February 10-11, 2005, at 7.

1 minutes will not be sufficient or adequate time for Pebble Beach to have a meaningful
2 opportunity to be heard. Pebble Beach accordingly requests that it be given one hour to cross-
3 examine the Review Board staff and one hour to present its own case.

4 The CDOs present a matter of first impression and an issue of statewide
5 importance for the RWQCB. By issuing these CDOs, the Agency is attempting to assert that no
6 entity, not even a private property owner such as Pebble Beach, can allow any storm water,
7 whether point or non-point source, to enter an ASBS. As noted in Finding 6 of the Pebble Beach
8 CDO, the CDOs rely in part upon Senate Bill 512, whose provisions only became effective
9 January 1, 2005. It is not reasonable to issue the CDOs on the basis of the modified regulatory
10 scheme introduced by Senate Bill 512, prohibiting all discharges, without allowing Respondents
11 adequate time challenge the Agency's interpretation and application of the new scheme.
12 Moreover, if the prohibitions in the CDO can be directed towards a private property owner such
13 as Pebble Beach, then this creates an implication that private landowners in the Coastal Zone up
14 and down the California coast could be subjected to these same prohibitions. California
15 landowners adjacent to ASBS zones should not be potentially forced to build a wall or divert
16 runoff from their property away from the ASBS, nor could they in most cases. Because these
17 CDOs have such broad ramifications, more time must be afforded to Respondents.

18 **B. Additional Time is Required for Pebble Beach to Adequately Present**
19 **Evidence**

20 Pebble Beach intends to use the additional time to present additional evidence in
21 support of its position. It intends to call witnesses and also to cross-examine the Review Board
22 staff regarding the specifics of the CDO. These witnesses include scientific experts who will
23 testify about the impact of and the need for the proposed limitations required by the CDO.

24 Pebble Beach submits the following offer of proof as to the testimony of these
25 witnesses:

26 Respondents' Offers of Proof

27 Dr. Richard F. Ford will offer testimony regarding his experience monitoring
28 water quality at the Irvine Coast ASBS adjacent to the Pelican Hill golf course. Over the course

1 of many years, Dr. Ford has collected data demonstrating that runoff from such areas does not
2 necessarily transport waste into the marine environment, and does not necessarily alter the
3 natural water quality of the receiving waters like the Irvine Coast or Carmel Bay ASBS.

4 Accordingly, Dr. Ford will testify that golf courses with associated low density
5 development in the coastal zone do not result in runoff that affects natural water quality in those
6 areas, that containment, assimilation and transportation of runoff occurs in near shore areas like
7 Carmel Bay, that there are no statistically significant or detectable effects of storm water runoff
8 from golf course communities in the adjacent marine environment, that any alleged impacts from
9 The Pebble Beach Company are non-discernible in relation to overall drainage to the ASBS, that
10 the prohibition of freshwater flows to the Carmel Bay ASBS disrupts natural, historical patterns
11 of freshwater drainage to the ASBS, and that diverting all storm flows from the ASBS is
12 impractical and infeasible from an engineering and cost standpoint. We estimate that it will
13 require 30-40 minutes for this offer of proof.

14 Dr. John List of Flow Science Incorporated, or another member of Flow Science,
15 will offer proof that sampling of storm water varies too greatly to draw conclusions as to
16 improvement from year to year, that containment, assimilation and transportation of runoff
17 occurs in near shore areas like Carmel Bay, that there is no correlation between the presence or
18 absence of development in the coastal zone, and levels of indicator bacteria, that the prohibition
19 of freshwater flows to the Carmel Bay ASBS disrupts natural, historical patterns of freshwater
20 drainage to the ASBS, and that diverting all storm flows from the ASBS is impractical. This
21 testimony is to be based on engineering principles, knowledge of best management practices and
22 treatment technology, and related issues and disciplines. We estimate that it will require at least
23 30-40 minutes for this offer of proof.

24 Respondents also intend to offer expert testimony regarding the implications of
25 the provisions of the CDO requiring the cessation of all dry and wet weather runoff, and the
26 improvement of water quality conditions in the ASBS, such testimony to be based on
27 engineering principles, knowledge of best management practices and treatment technology, and
28 related issues and disciplines.

1 ^{Mark}
Stilwell of Roxayne Spruance will offer proof that The Pebble Beach Company is a General 780
2 Partnership, not a municipality or any variant of a public agency.

3 Respondents' Cross Examination of the Regional Board

4 Information available to Respondents to date does not indicate which personnel at
5 Regional Board played meaningful roles with respect to the CDO. This lack of transparency
6 places Respondents in the position of having to conduct voir dire of various agency personnel
7 that Respondents, on information and belief, assert may have a material role in the issuance of
8 the CDO's, or in the development of the related SWMP. Respondents intend to examine such
9 staff in order to establish their respective roles. Such personnel include, without limitation,
10 Mr. Roger Briggs, Executive Officer; Chris Adair, Senior Water Resources Control Engineer,
11 Northern Non-Point Source/Storm Water; Donette Dunaway, Engineering Geologist, Northern
12 Non-Point Source/Storm Water; Howard Kolb, Jennifer Bitting, and Kimberly Gonzalez, Water
13 Resources Control Engineers, Northern Non-Point Source/Storm Water; ~~and~~ Bruce Paine,
14 Sanitary Engineering Associate, Northern Non-Point Source/Storm Water; *and Matt Thompson.* AD

15 Respondents believe it may be possible to complete voir dire in an hour, but
16 cannot know with any precision in advance, and reserve their rights to examine staff until these
17 basic facts are elucidated on the record. Subsequently, Respondents will cross-examine these (or
18 other) staff members on various aspects of the CDO, including the findings, the Staff Report and
19 the internal agency activities related to the Agency's proposed action. Respondents intend to
20 establish staff's knowledge of the alleged illegal discharge, of water quality conditions in the
21 ASBS, and runoff into it, of any and all engineering and water quality investigations relevant to
22 the ASBS and/or the CDO which staff may have made, and numerous related matters.
23 Respondents intend to probe various assertions made by the Agency, to clarify their bases, and
24 avoid any ambiguities. Respondents intend to probe the Agency's relevance on information
25 received from third parties, including SCCWRP and SWRCB. Respondents intend to probe
26 communications between Regional Board and various special-interest groups that have
27 commented on these proceedings.

28 In addition, we intend to call Dominic Gregorio, State Water Resources Control

1 Board, Division of Water Quality, Ocean Standards Unit, because he has been the primary point
2 of contact for the State Board on ASBS matters. Respondents will cross-examine Mr. Gregorio
3 on his knowledge of various aspects of the CDOs, including the findings, the Staff Report and
4 the internal agency activities related to the Agency’s proposed action, and any role the State
5 Board may have played in the issuance of the CDO. Respondents will inquire about the State
6 Board’s current policy on ASBS, its interpretation of the Ocean Plan provisions and other
7 relevant regulations and statutes, and numerous related matters. Respondents intend to probe
8 various assertions and interpretations made by the State Board, to clarify their bases and avoid
9 any ambiguities. Respondents intend to probe the Agency’s assessment of the relevance of
10 information received from third parties, including SCCWRP. Respondents intend to probe
11 communications between State Board and various special-interest groups that have commented
12 on ASBS proceedings. We estimate that it will require approximately 30-40 minutes for this
13 offer of proof.

14 **C. The Proceedings Must Be Modified in Order to Protect Pebble Beach’s**
15 **Constitutional Right to Due Process**

16 Constitutional due process consists of two aspects: notice and a right to be heard.
17 As noted in its attached Motion for Continuance, the “fundamental requisite of due process of
18 law is the opportunity to be heard.”³ “An elementary and fundamental requirement of due
19 process in any proceeding which is to be accorded finality is notice reasonably calculated, under
20 all the circumstances, to apprise interested parties of the pendency of the action and afford them
21 an opportunity to present their objections.”⁴

22 Without additional time, Pebble Beach will not have a substantive “opportunity”
23 to present its objections. A sham hearing, or even a hearing that does not give adequate
24 opportunity to present a side’s case is the same as no hearing at all. The U.S. Constitution
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27 ³ Grannis v. Ordean, 234 U.S. 385, 394 (1914). See also Green v. Lindsey, 456 U.S. 444, 449-
50 (1982).

28 ⁴ Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

1 guarantees that the opportunity to be heard be meaningful.⁵

2 This CDO could substantially impair Pebble Beach's legal rights. Consequently,
3 Pebble Beach has a heightened due process right that requires a higher degree of care and
4 consideration by the Regional Board.⁶ In Goldberg v. Kelly,⁷ a case where the government tried
5 to strip an individual of valuable property rights, the U.S. Supreme Court imposed the following
6 requirements on governmental entities regarding the nature of the required hearing:

- 7 1. Timely and adequate notice detailing the reasons for proposing action;
- 8 2. An effective opportunity to defend by confronting any adverse witnesses;
- 9 3. An opportunity to present arguments and evidence orally;
- 10 4. Allowing the recipient to retain an attorney if desired;
- 11 5. Basing a conclusion as to the decision solely on the legal rules and evidence
12 adduced at the hearing;
- 13 6. A statement of reasons for the determination indicating the evidence relied on;
14 and
- 15 7. An impartial decision maker.

16 As stated previously, Pebble Beach has real and substantial rights, including
17 property rights that are at stake with this CDO. It will not prejudice the Review Board to allow
18 Pebble Beach to put on witnesses, present evidence, and to cross-examine the staff regarding the
19 provisions of the CDO. With a substantial property interest at stake to Pebble Beach and a
20 minimal burden on the Review Board, constitutional principles mandate that Pebble Beach's due
21 process rights be fully protected—not merely swept aside.

22
23 ⁵ See Matthews v. Eldridge, 424 U.S. 319, 333 (1972) (“The fundamental requirement of due
24 process is the opportunity to be heard at a meaningful time and in a meaningful manner.”)
25 (citations omitted).

26 ⁶ See Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961) (“What procedures due process
27 may require under any given set of circumstances must begin with a determination of the
28 precise nature of the government function involved as well as of the private interest that has
been effected by governmental action.”)

⁷ Goldberg v. Kelly, 397 U.S. 254 (1970).

1 **III. CONCLUSION**

2 For the foregoing reasons, Respondents respectfully request that the Board modify
3 the CDO proceedings in accordance herewith.

4 Dated: February 7, 2005

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