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11 STATE OF CALIFORNIA
12 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
13 CENTRAL COAST REGION

14 In the matters of:

15 MONTEREY REGIONAL STORM WATER
16 MANAGEMENT PLAN,

17 Public Hearing for the Approval of a Storm
18 Water Management Plan, General NPDES
19 Permit No. CAS000004)

20 PROPOSED CEASE AND DESIST
21 ORDERS,

22 Requiring The Pebble Beach Company,
23 Monterey County, and City of Carmel, to
24 Cease and Desist from Discharging Waste to
25 Areas of Special Biological Significance
26 (ASBS) in Violation of Prohibitions
27 Prescribed by the State Water Resources
28 Control Board

MONTEREY REGIONAL STORM WATER
MANAGEMENT PLAN

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

**OPPOSITION TO MONTEREY REGIONAL
STORM WATER MANAGEMENT PLAN
AND CEASE AND DESIST ORDERS**

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 issues before you relate to an area of the Monterey County coast, Carmel
3 Bay. The ocean waters off this portion of the coast were designated in 1975 by the State Water
4 Resources Control Board (“SWRCB” or “State Board”) as an Area of Special Biological
5 Significance (“ASBS”).

6 In 2004, the Pebble Beach Company (“PBC”) and the City of Carmel-by-the-Sea
7 (“Carmel” or “City of Carmel”) received notices that the Regional Water Quality Control Board
8 (“Board” or “Regional Board”) staff was proposing to issue Cease and Desist Orders¹ to the
9 PBC, the City of Carmel, and several other governmental entities, relating to the alleged
10 discharge of “waste” from municipal separate storm sewer systems (“MS4”) into the Carmel Bay
11 ASBS. The proposed CDOs find that MS4s are subject to an absolute prohibition against the
12 discharge of waste to the ASBS. Because stormwater from certain portions of the PBC and
13 Carmel presently flows from their respective areas into the Carmel Bay ASBS, the CDO would
14 require the PBC and Carmel to eliminate such runoff. Of importance, the PBC’s and Carmel’s
15 prior use of these drains was pursuant to all requisite governmental approvals.

16 The proposed CDO raises significant legal and public policy issues that warrant
17 careful and thorough consideration before regulating runoff from the PBC and Carmel. Uniform
18 application of the alleged prohibition against any stormwater discharge into an ASBS would
19 have substantial far-reaching consequences, impacting storm drain systems owned and operated
20 by local governments, public highways, state parks and other improvements on public lands.

21 More importantly, the CDOs simply are not supported by the facts or the law.²

22 **II. ARGUMENT**

23 This opposition to the proposed CDOs sets out multiple reasons necessitating the
24 withdrawal or rescission of the CDOs. However, it is worth noting that in general there is a lack
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26 ¹ Cease and Desist Order Nos. R3-2005-0021 and R3-2005-0022 (the draft Cease and Desist Orders
issued to the PBC and City of Carmel are collectively referred to as “CDOs”).

27 ² Respondents acknowledge that the report from Southern California Coastal Water Research Project
was cited by the Regional Board in these proceedings and we understand that it is part of the
28 administrative record. Respondents will provide a copy of the report upon request.

1 of an analytical linkage between the order, the findings, and the underlying record. Notably, the
2 failure of the evidence to support either the findings or the order is evident throughout the
3 proposed CDO. There are, as well, often great inconsistencies between the findings and the
4 order on one hand, and reality and the law on the other.

5 The proposed CDOs should be withdrawn because the Regional Board did not
6 provide any evidence to demonstrate an undesirable impact on the ASBS, incorrectly applied the
7 ASBS discharge prohibitions, failed to properly consider the relevant statutory and constitutional
8 provisions limiting the regulation of water discharge prohibitions, failed to abide by the
9 provisions of California's Water Code, violated CEQA, and prepared a deficient CDO.

10 **A. The Draft CDO Fails to Properly Consider the Lack of Any "Undesirable**
11 **Alteration" of the Carmel Bay ASBS or The Preservation of Beneficial Uses**
12 **of the Carmel Bay ASBS**

13 **1. The ASBS Discharge Prohibitions Cannot Be Applied to Respondents**
14 **Absent a Showing of Undesirable Alteration of Water Quality**

15 The Ocean Plan³ prohibits waste from being discharged to areas designated as
16 being of special biological significance, an ASBS. According to California Public Resources
17 Code Section 36700(f), an ASBS is a subset of the "state water quality protection areas," which
18 is defined as "a nonterrestrial marine or estuarine area designated to protect marine species or
19 biological communities from an *undesirable alteration* in *natural water quality*, including, but
20 not limited to, areas of special biological significance that have been designated by the State
21 Water Resources Control Board through its water quality control planning process." (emphasis
22 added). Consequently, because Section 36700(f) references an "undesirable alteration," the
23 Public Resources Code implicitly recognizes that there is not an absolute prohibition on
24 discharge into a state water quality protection area. An interpretation that applies the ASBS
25 discharge prohibitions of the Ocean Plan to all discharge whatsoever ignores this provision and
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28 ³ Water Quality Control Plan for Ocean Waters of California, State Water Resources Control Board,
adopted November 16, 2000 and eff. December 3, 2001.

1 would render it meaningless.⁴ It is a well-established judicial canon of statutory interpretation
2 that an interpretation should not render part of the statute meaningless or inoperative.⁵

3 The Water Code's definition of "pollution" supports the proposition that the
4 Regional Board must inquire as to whether there has been an alteration of the ASBS. According
5 to Section 13050(1)(1), "pollution" means in part "an alteration of the quality of the waters of the
6 state by waste to a degree which *unreasonably* affects" either the waters for beneficial uses or
7 facilities which serve these beneficial uses. (emphasis added).

8 Hence, the focus of the inquiry is on whether there is an *unreasonable* or
9 *undesirable* effect on water quality or beneficial uses.

10 **2. There Is No Evidence That There Has Been An Undesirable**
11 **Alteration of the Carmel Bay ASBS**

12 There is no evidence in the record, or cited in the draft CDOs, that suggests that
13 Carmel Bay has undergone an undesirable alteration due to the runoff from the PBC or Carmel,
14 and there is no finding concerning same. The draft CDOs apparently *presume* harm without any
15 data to support that presumption. Moreover, by incorporating into the CDOs a request for
16 studies under Water Code section 13267, the Regional Board is implicitly recognizing that it
17 does not have the data to support a finding of impacts to water quality. Why are such reports
18 necessary? In part, to evaluate or determine "the impact that ASBS discharges in the interim
19 have on receiving waters."⁶ The Board is asking the PBC, in the draft CDO, to perform a task
20 that should have been conducted by the Regional Board staff prior to any enforcement action.

21 Further, there is substantial evidence in the record to support the conclusion that
22 there are no adverse impacts on the ASBS from the PBC and Carmel. Expert testimony
23 presented by the Respondents demonstrates that golf course developments immediately adjacent
24 to an ASBS do not cause adverse impacts on the natural water quality. Facts supporting that

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26 ⁴ Hassan v. Mercy American River Hospital, 31 Cal. 4th 709 , 715-716 (2003)

27 ⁵ Id.

28 ⁶ Finding 21 of the PBC CDO.

1 testimony are submitted with the affidavit of Dr. Richard Ford, dated February 6, 2005. For
2 more than a decade Dr. Ford studied a golf course development in Orange County that is
3 substantially similar to the PBC and concluded there are no impacts. Dr. Ford will provide
4 further oral testimony in support of this position at the hearing on February 11, 2005.

5 Without a finding by the Regional Board of an actual undesirable alteration, and
6 without evidence to support such a finding, the CDOs lack necessary prerequisites for issuance
7 of the prohibitions.

8 **3. The Regional Board Failed to Consider the Absence of Any Impact**
9 **on Beneficial Uses of the Carmel Bay ASBS**

10 Throughout the California Water Code, provisions establish the principle that the
11 Regional and State Boards must consider the beneficial uses of the water affected by a discharge.
12 For example, Section 13142.5(a) states that wastewater discharges “shall be treated to protect
13 present and future beneficial uses, and, where feasible, to restore past beneficial uses of the
14 receiving waters.” The Regional Board plans and policies, including prohibitions against
15 discharges, then, are means to the general end of protecting such beneficial uses. Hence, those
16 policies and prohibitions should be targeted towards protecting a beneficial use.

17 According to the Water Code, a “beneficial use” includes, but is not limited to,
18 “domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic
19 enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic
20 resources or preserves.”⁷ Therefore, the Board, when enforcing a discharge provision, should
21 consider the effect of the discharge on such uses. In the present case, the record is barren of any
22 facts that suggest the runoff from the PCB and Carmel affect beneficial uses, and the draft CDO
23 fails to present any findings on the issue.

24 In addition, Section 13263(a) of the California Water Code states that a regional
25 board, when implementing “any relevant water quality control plans that have been adopted,”
26 “shall take into consideration the beneficial uses to be protected, the water quality objectives

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28 ⁷ Cal. Water Code § 13050(f).

1 reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and
2 the provisions of Section 13241.”

3 Section 13241 of the Water Code recognizes that, although the Regional Board
4 shall establish water quality objectives in water quality control plans, and in doing so it must
5 exercise its judgment so as to ensure the reasonable protection of beneficial uses, “it may be
6 possible for the quality of water to be changed to some degree without *unreasonably* affecting
7 beneficial uses.”⁸ Here, not only is there no evidence of an unreasonable effect on beneficial
8 uses, there is no evidence that the beneficial uses of the ASBS have been affected at all.
9 Therefore, the draft CDO violates the requirements of Sections 13241 and 13263.

10 **4. Discharge into the ASBS May Have Beneficial Effects**

11 Rain falling on coastal watersheds has always resulted in fresh water storm runoff
12 to the ocean, regardless of the state of local development. Runoff to the ocean carries a number
13 of substances that may be important to local processes and ecosystems. For example, fresh water
14 flows are necessary for the establishment of estuaries, areas of mixing of fresh and saline ocean
15 waters. Runoff often carries sediments, which are necessary for beach maintenance and
16 replenishment, and may also carry nutrients that may be important to local productivity.⁹

17 Because the process by which rainfall becomes runoff to the ocean is a natural
18 one, changing this process and attempting to prevent all runoff to the ocean would alter natural
19 water quality conditions. In addition, achieving this unnatural state would be exceedingly
20 difficult technically, if not impossible and, if possible, would require engineered solutions (e.g.,
21 channelization, detention basins, etc.). Introducing engineered solutions to the coastal
22 environment to prevent fresh water storm flows from reaching the ocean could produce a number
23 of unintended consequences, such as affecting the availability of beach sand and the health of
24 local ecosystems. The feasibility of preventing all runoff from a coastal watershed from entering
25 the ocean has never been proven or achieved, and for all intents and purposes can be considered

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27 ⁸ Cal. Water Code § 13241 (emphasis added).

28 ⁹ See Affidavits of Drs. Ford (¶17) and Paulsen (¶18), submitted concurrently herewith.

1 an impossibility.¹⁰

2 Because the draft CDO fails to consider the beneficial aspects of some discharge,
3 it should properly evaluate what, on balance, is in the best interest of the ASBS. This is
4 particularly true where, as here, there has been no showing of any negative impacts from the
5 runoff.

6 **B. The ASBS Waste Prohibitions of the California Ocean Plan Are Inapplicable**
7 **to the Pebble Beach Company and the City of Carmel**

8 The Board contends in its draft CDO that the current Ocean Plan, and its
9 accompanying ASBS rules, applies to all stormwater discharges. However, for reasons set forth
10 below, the ASBS discharge prohibitions are inapplicable.

11 In September of 2000, Assembly Bill 2800 added Section 36710(f) to California's
12 Public Resources Code. Previously, Section 36710(f) stated, "In a state water quality protection
13 area, point source waste and thermal discharges shall be prohibited or limited by special
14 conditions. Nonpoint source pollution shall be controlled to the extent practicable. No other use
15 is restricted." Under this provision, stormwater, if nonpoint, would not be subject to an absolute
16 prohibition.

17 In 2005, the legislature amended Section 36710(f) so that it now reads:

18 In a state water quality protection area, waste discharges shall be
19 prohibited or limited by the imposition of special conditions in
20 accordance with the Porter-Cologne Water Quality Control Act
21 (Division 7 (commencing with Section 13000) of the Water Code)
22 and implementing regulations, including, but not limited to, the
23 California Ocean Plan adopted and reviewed pursuant to Article 4
24 (commencing with Section 13160) of Chapter 3 of Division 7 of
the Water Code and the Water Quality Control Plan for Control of
Temperature in the Coastal and Interstate Waters and Enclosed
Bays and Estuaries of California (California Thermal Plan)
adopted by the state board. No other use is restricted.¹¹

25 The SWRCB adopted the current Ocean Plan in 2000, and it became effective in

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27 ¹⁰ The law proscribes the Regional Board from ordering an impossibility.

28 ¹¹ Cal. Pub. Res. Code § 36710(f).

1 2001. According to Section C of the Introduction, the 2001 Ocean Plan applies in its entirety to
2 point source discharges, and nonpoint sources of waste discharges to the ocean are subject to,
3 *inter alia*, the Implementation Provisions for Areas of Special Biological Significance in Chapter
4 III, Part E and the Discharge Prohibitions in Chapter III, Part H.

5 Part E of the Ocean Plan, applicable to non-point sources, states, "Waste shall not
6 be discharged to areas designated as being of special biological significance. Discharges shall be
7 located a sufficient distance from such designated areas to assure maintenance of natural water
8 quality conditions in these areas."¹² Part H states, "Waste shall not be discharged to designated
9 Areas of Special Biological Significance except as provided in [Chapter III, Part E]." Hence,
10 under the Ocean Plan, then, "waste" cannot be discharged directly into an ASBS, but waste may
11 be discharged if it does not directly flow into the ASBS, but ultimately reaches the ASBS, as
12 long as it does not interfere with the maintenance of the natural water quality.

13 **1. The PBC Is Not A Point Source Under the Ocean Plan and Need Not**
14 **Be Prioritized by the Regional Board for CDO Enforcement**

15 The draft CDO, in its findings section, states that under the 1987 amendments to
16 the federal Clean Water Act, a municipal separate storm sewer system is defined as a point
17 source discharge. Consequently, an MS4 would then be subject to the entire Ocean Plan. Even
18 if an MS4 is presumed to be a point source, that presumption has no applicability here for the
19 PBC.

20 The CDO issued to the Pebble Beach Company states that the PBC "operates a
21 municipal separate storm sewer system which collects storm water runoff." While the other
22 entities issued CDOs by the Regional Board may operate MS4s, the PBC does not.
23 Consequently, its storm drains do not contain municipal runoff.

24 An MS4 is defined by federal regulations, specifically section 122.26 of Title 40
25 of the Code of Federal Regulations. The framework of section 122.26 generally defines an MS4
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27 ¹² The term "natural" is not defined in the Ocean Plan or in the Porter-Cologne Act and should be
28 interpreted to mean those conditions existing in the ASBS at the time of its listing, as the ASBSs were
designated to preserve existing water quality.

1 as a composition of “separate storm sewers.”¹³ A “municipal separate storm sewer,” which may
2 include a conveyance or system of conveyances, must be “[o]wned or operated by a State, city,
3 town, borough, county, parish, district, association, or other public body (created by or pursuant
4 to State law). . . .”¹⁴ These separate sewers, owned by a public entity, comprise the MS4. An
5 MS4, or *municipal* separate storm sewer system, cannot be comprised of privately owned storm
6 drains. The PBC, organized as a general partnership, is not a municipality, does not operate an
7 MS4, and is improperly classified as such in the draft CDO.

8 The Regional Board has selectively enforced its new, broad application of the
9 Ocean Plan. In the Board’s February Response to Comments for the CDOs, the Board indicated
10 that it had prioritized the CDOs based upon the Phase II application for an MS4. However,
11 because the PBC is not an MS4, and is withdrawing from any proceeding where it would be
12 deemed such, there is no urgency to enforcing the discharge prohibitions, as the Phase II permit
13 is not at stake. Accordingly, the CDO should be withdrawn, and, at best, should be delayed until
14 the Regional Board can evaluate and analyze similarly-situated entities.

15 **2. Because “Waste” Does Not Include Stormwater, a Discharger of**
16 **Stormwater is Not Presumed to Be Discharging Waste**

17 Neither the waste prohibition in the Ocean Plan nor the definition of “waste”
18 provided by that same Plan indicate that “waste” encompasses stormwater. In addition, the
19 Porter-Cologne Water Quality Control Act does not include stormwater in the definition of
20 “waste”. Also, the legislative history of the Porter-Cologne definition of “waste” does not
21 support the conclusion that all stormwater is “waste.”

22 The ASBS discharge prohibition of the Ocean Plan states that “[w]aste shall not
23 be discharged to areas designated as being of special biological significance,” but does not
24 specify whether it applies to stormwater. The Ocean Plan defines “waste” as “a discharger’s
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27 ¹³ 40 C.F.R. 122.26(b)(18).

28 ¹⁴ 40 C.F.R. 122.26(b)(8).

1 total discharge, of whatever origin, i.e., gross, not net, discharge.”¹⁵ This definition of “waste”
2 appears to have been developed in response to a 1981 appellate court decision involving cooling
3 water at the San Onofre nuclear plant. At issue in Southern California Edison Co., et al. v.
4 SWRCB, 116 Cal. App. 3d 751 (1981), was whether a NPDES permit regulating metals in
5 cooling water discharges on a gross basis. The Regional Board was proposing to require the
6 utility to remove not just metals it added to the cooling water, but background metals in the
7 ocean water brought in at the intake.¹⁶ The court observed that neither the 1972 nor the 1978
8 California Ocean Plan “authorizes imposition of waste discharge on a gross basis.”¹⁷ The Ocean
9 Plan was amended after this decision in an apparent attempt to enable regulation of cooling
10 water, and similar flows, on a gross basis. The reference to “origin” is relevant to utilities and
11 POTWs that take water from one source, transport it, and release it into a receiving water
12 different from the source of the original water. This process or context is not relevant to
13 stormwater.

14 Nor does the Porter-Cologne Water Quality Control Act define “waste” in a
15 manner that expressly includes stormwater and urban runoff. The Act, as codified at California
16 Water Code §§ 13000 et seq., states:

17 “Waste” includes sewage and any and all other waste substances,
18 liquid, solid, gaseous, or radioactive, associated with human
19 habitation, or of human or animal origin, or from any producing,
20 manufacturing, or processing operation, including waste placed
21 within containers of whatever nature prior to, and for purposes of,
22 disposal.¹⁸

21 This definition establishes essentially four categories of “waste” water:
22 (1) sewage; (2) waste associated with human habitation; (3) waste of human or animal origin; or
23 (4) waste from any producing, manufacturing, or processing operation. Stormwater *per se* does
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25 ¹⁵ 1997 Ocean Plan, at 23. (Respondents' Appendix of Evidence).

26 ¹⁶ Southern California Edison Co. v. SWRCB, 116 Cal.App.3d at 756.

27 ¹⁷ Id. at 757.

28 ¹⁸ Cal. Water Code § 13050(d).

1 not fall into any of these categories.

2 Moreover, the legislative history of the Water Code definition of “waste” does not
3 support the conclusion that all stormwater is “waste.” The most relevant document regarding the
4 legislative history of Section 13050(d) of the Water Code is the Final Report of the Study Panel
5 to the California State Water Resources Control Board (March 1969) (the “Final Report”).
6 However, as discussed below, this document does not support the conclusion that all stormwater
7 is waste, *per se*.

8 An Attorney General Opinion cited by the Final Report further supports the
9 proposition that “waste” does not encompass stormwater. The opinion states that:

10 The current drainage, flow, or seepage into waters of the state of
11 harmful concentrations of all the following listed materials
12 constitutes the discharge of waste over which a regional board has
jurisdiction...

13 Following the above quoted statement is a finite list of constituents, which is
14 limited to: debris resulting from logging operations, earth eroded as a result of logging
15 operations, garbage and refuse from dumps, return irrigation or drainage water from agricultural
16 operations containing materials not present prior to use, and discharges containing harmful
17 materials flowing from water, oil, or gas wells. Noticeably absent from this list is any reference
18 to stormwater or runoff. As the above-referenced material demonstrates, the definition of waste
19 was not intended to include all runoff, regardless of its constituents. It is impossible to imagine
20 that the definition of “waste” was meant to encompass rainfall runoff flowing passively over vast
21 portions of the State of California, which is the logical extension of the interpretation adopted by
22 the draft CDOs.

23 Significantly, the Regional and State Boards cannot avoid the practical
24 implications of declaring stormwater to be waste, *per se*. For example, one of the constituents of
25 concern in urban runoff is bacteria. It is widely accepted that bacteria is present in runoff from
26 open space. It is also widely accepted that bacteria found in runoff at least in part comes from
27 wildlife and birds. Thus, bacteria is likely to be present even in runoff from wilderness and
28 secluded areas. One must ask whether the Legislature intended for the Regional Board to issue a

1 permit for storm water runoff at Yosemite. It proves too much when the agency extends “waste”
2 to cover runoff from every acre of all of the State’s population centers in a way that might be
3 extended to the rest of the land mass in the State.

4 Even the draft CDO recognizes that not all runoff is waste-containing discharge.
5 According to Finding 13, “Storm water discharge occurs whenever there is enough rain for the
6 *municipal streets* to have runoff that flows to the ocean.” (emphasis added). According to the
7 draft CDO, then, runoff from open space, like a golf course, would not constitute stormwater
8 discharge subject to regulation under the Ocean Plan.

9 Interestingly, no prior State Board order equates stormwater with waste *per se*.¹⁹
10 In the draft CDO, the Board cites SWRCB Order WQ 2001-08 for the rule “that stormwater
11 discharges are subject to the ASBS discharge prohibition in the California Ocean Plan.” This
12 order, however, cannot be construed so broadly as to hold that all stormwater is waste *per se* and
13 is absolutely covered by the ASBS discharge prohibition.

14 In Order WQ 2001-08, regarding a petition made by Caltrans, the State Board
15 declined to make such a broad finding. In that proceeding, the State Board characterized
16 Caltrans’ contention as follows: “Caltrans claims that there is no evidence in the record that
17 shows that storm water discharges from the highway contain waste.”²⁰ The State Board
18 concluded that Caltrans’ claim was “without merit” and that there were wastes in the discharges
19 from the highway.²¹ However, the State Board did not hold that the highway runoff was
20 “waste,” *per se*.

21 Finding that storm water may, in certain circumstances, contain waste, is very
22 different from finding that storm water (or urban runoff) is waste. The latter conclusion opens
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24 ¹⁹ State Water Resources Control Board Order WQ 2001-15 does state that urban runoff may contain
25 waste within the meaning of Water Code Section 13050(f). However, Order WQ 2001-15 applied to
26 an MS4. As discussed elsewhere, this would exclude the PBC. Moreover, unlike the present case,
the record was replete with evidence of the extent of pollutants in runoff (from highways).

27 ²⁰ State Board Order 2001-08, at *5 (emphasis added)

28 ²¹ Id.

1 the door to regulating urban runoff in the same manner as industrial and sanitary wastewater, for
2 under the draft CDO's interpretation of the "waste" provision, all runoff is assumed to be waste
3 even if it has little or no pollutants in it.

4 Finally, the draft CDO itself recognizes that there are discharges that are not
5 significant contributors. One of the conditions for the PBC under the draft CDO is that, within
6 two years from the date of the CDO, the PBC must cease all non-stormwater discharges to the
7 ASBS. However, the draft CDO then incorporates a list of discharges described in the Phase II
8 General Permit, Section D.2.c.6, that are not considered to be significant contributors of
9 pollutants to ASBS. This list includes:

- 10 • water line flusing
- 11 • diverted stream flows
- 12 • rising ground waters
- 13 • uncontaminated ground water infiltration
- 14 • uncontaminated pumped ground water
- 15 • discharges from potable water sources
- 16 • foundation drains
- 17 • air conditioning condensation
- 18 • irrigation water
- 19 • springs
- 20 • footing drains
- 21 • lawn watering
- 22 • individual residential car washing
- 23 • flows from riparian habitats and wetlands
- 24 • dechlorinated or debrominated swimming pool discharges.

25 Clearly, this list demonstrates that not all discharges are significant pollutants to an ASBS. This
26 approach, which recognizes an exception for minimal flows, is appropriate considering the
27 minimal impacts to an ASBS and provides a guideline for the Regional and State Boards with
28 respect to stormwater regulation. The Regional and State Boards should strive for a similar
framework, which would enforce policy through a comprehensive agenda and not a CDO.

29 **3. The Respondents Are Not a Discharger of Waste**

30 As discussed above, "waste" does not include all stormwater. Without evidence
31 that the stormwater constitutes "pollution", the water is not deemed to be a "waste" pursuant to
32 Cal. Water Code § 13050. Because there is no evidence suggesting that the Respondent
33 discharges anything that would be considered "waste" into the ASBS, the Ocean Plan would

1 again be inapplicable.

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6 **4. The Regional Board Failed to Consider Whether the ASBS Can**
7 **Assimilate A Pollutant**

8 Even if the City of Carmel discharges waste, and is considered an MS4, the
9 Regional Board erred by failing to consider whether the receiving water, the ASBS, can
10 assimilate the pollutant without decreasing water quality. The requirement that MS4 discharges
11 not cause or contribute to violations of receiving water quality standards allows for the
12 concentration of pollutants in MS4 effluent to exceed receiving water quality objectives,
13 provided that the receiving water can assimilate the pollutants and not exceed its water quality
14 objectives. As such, the Regional Water Board must review the relevant effluent and ambient
15 data and decide whether the water body can assimilate more of the particular pollutant. The
16 proposed CDO presumes that the ASBS lacks assimilative capacity.

17 **5. The Application of the Ocean Plan to All Discharges Is Erroneous**

18 The draft CDO seeks to enforce a prohibition on all discharges, including sheet
19 flow and similar non-engineered flowpaths (see Finding 14). However, “sheet flow” is not a
20 discharge. Section 502(12) of the Clean Water Act requires a discharge to be from a point
21 source. Nonetheless, California has adopted a much broader definition.²² Under Section 13304
22 of the Water Code, “discharge” means “to relieve of a charge, load or burden; . . . to give outlet
23 to: pour forth: EMIT”²³ Because sheet flow does not require an affirmative action, as even
24 the broader state definition seems to require, it is not “discharge.”

25 Additionally, the draft CDO purports to apply to all storm drains on the PBC

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27 ²² See Lake Madrone Water District v. SWRCB, 209 Cal. App. 3d 163, 172 (1989).

28 ²³ Id. at 174 (citing Webster's New Internet. Dict. (3d ed. 1961) p. 644.).

1 property, regardless of their location. However, provisions of the Ocean Plan reject this uniform
2 approach, and also support the PBC's contention that not all discharges are regulated by the
3 Ocean Plan. Chapter III, Part E of the Ocean Plan first provides that waste shall not be
4 discharged to areas designated as ASBS. However, the provision continues, "Discharge shall be
5 located a sufficient distance from such designated areas to ensure maintenance of natural water
6 quality in these areas." This provision necessarily assumes that some discharge reaches the
7 ASBS. For that reason, if the first sentence of Part E is interpreted to prohibit all discharges to
8 an ASBS, as the draft CDO claims (see Finding 8 and 9), then the second sentence is rendered
9 meaningless.

10 The existence of the second sentence in Part E indicates that some discharges may
11 flow into an ASBS but be far enough removed to still assure natural water quality. For example,
12 pipes located above the mean high tide level may be located a sufficient distance away so that
13 any discharge would not adversely impact the ASBS. Therefore, the draft CDO is overly broad
14 in its application.

15 **C. Enforcement of the CDO Constitutes An Abuse of Discretion, Violates**
16 **Due Process, and Improperly Places An Unwarranted Burden on**
17 **Respondents**

18 **1. The Draft CDO Is Not Supported By The Evidence and Is Therefore**
19 **An Abuse of Discretion**

20 As discussed above, the Regional Board's lack of evidence concerning pollutants
21 in the stormwater from the PBC area or Carmel means that such stormwater is not "waste"
22 subject to the Ocean Plan. Additionally, there is no evidence of unreasonable or undesirable
23 effects from the discharges. Hence, the findings and conclusions of the CDOs are not supported
24 by the weight of the evidence, and Board approval of the CDO without any evidence concerning
25 these issues would amount to an abuse of discretion.

26 **2. Enforcing the Draft CDOs Violates Principles of Due Process**

27 Pursuant to well-established principles of due process, the Board cannot lawfully
28 apply the CDO to the Respondents because the prohibitions are so vague and overbroad that they

1 fail to give adequate notice of the conduct which is proscribed. See, e.g., Franklin v. Leland
2 Stanford Junior University, 172 Cal. App. 3d 322, 347 (1985) (“The notion of due process
3 requires the prohibition be clearly defined in order to provide adequate notice or warning of the
4 conduct which is prohibited.”) (citing Grayned v. City of Rockford, 408 U.S. 104, 108 (1972));
5 Citizens for Responsible Behavior v. Superior Court, 1 Cal. App. 4th 1013, 1032 (1992) (“A
6 statute which requires those subject to its provision to guess at its meaning is inherently violative
7 of due process.”) (citing Connally v. General Const. Co., 269 U.S. 385, 391 (1926)). The
8 requirement of specificity is necessary to avoid “arbitrary and discriminatory” application and
9 enforcement of the standard. Valiye v. Dep’t of Motor Vehicles, 74 Cal. App. 4th 1026, 1032-
10 1033 (1999); People v. Townsend, 62 Cal. App. 4th 1390, 1400 (1998).

11 In the draft CDO, Finding 13 states that, to be in compliance with the Ocean Plan,
12 the PBC must either (1) redesign or redirect the storm drain system so that *no runoff enters in or*
13 *near* an ASBS, or (2) apply for an exception. The first option for the PBC is both overbroad and
14 vague.

15 First, the draft CDO states that no runoff can enter in or near an ASBS. As
16 discussed above, this is too broad a reading of the Ocean Plan’s prohibitions. Only “waste”
17 cannot be discharged into an ASBS.

18 Second, the finding disallows any runoff not only *in* an ASBS but *near* one. This
19 requirement is plainly inconsistent with the language of the Ocean Plan itself. Chapter III, Part E
20 of the Plan states that waste “shall not be discharged *to* [an ASBS].” (emphasis added). The
21 Ocean Plan does not even profess to govern discharges that are near an ASBS but do not actually
22 enter into the ASBS. In addition, this draft CDO prohibition against discharges “near” an ASBS
23 is too vague to be enforced. Because the Ocean Plan does not apply to such discharges, it does
24 not offer a definition of what constitutes “near.” Likewise, the draft CDO does not contain any
25 definition or limitation on the scope of this finding. The PBC and Carmel are substantial
26 landholders. They possess or control land that is not adjacent to the Carmel Bay ASBS and does
27 not discharge into the ASBS and would not be subject to the Ocean Plan. The CDOs fail to
28 address the scope of the application of the prohibitions. For example, the PBC is not put on

1 notice what part of the Del Monte forest would be subject to redesign or redirection.

2 Additionally, the prohibition from discharging “near” the ASBS violates
3 California Civil Code Section 3531, which states that “[t]he law never requires impossibilities.”
4 If the “near” requirement is enforced, it will be impossible for the PBC to comply. It is one thing
5 to ask an entity to prevent water on its property from flowing off and into an ASBS. It is quite
6 another to ask that same entity to prevent storm water from ending up on its own property that
7 may be “near” an ASBS.

8 In the same vein as the vagueness problems with respect to the “near”
9 requirement in the CDO, the draft CDO orders the PBC to either file for an exception to the
10 ASBS-discharge prohibition by March 1, 2005, or cease *all wet weather discharges* no later than
11 January 1, 2008 or no later than two years from the date of exception denial notification.
12 However, as mentioned previously, even under the Board’s broadest interpretation of the Ocean
13 Plan, not all discharges by PBC may be regulated, since the Ocean Plan only purports to prohibit
14 waste discharges into an ASBS. Because the CDO makes no distinction between these
15 discharges and those that do in fact flow into the ASBS, the draft CDO, without modification,
16 will place restrictions on the PBC for which the Board lacks any authority from the Ocean Plan
17 or Water Code.

18 The CDO also requires PBC to cease discharging or redirect all discharges from
19 the ASBS. As explained in the testimony of both Dr. Susan Paulsen and Dr. Richard Ford, this is
20 impossible to achieve in practice and would be extraordinarily costly to attempt. Again, the law
21 does not require the impossible.

22 **3. Requiring the PBC to Ensure Yearly Improvement in the Carmel Bay**
23 **ASBS Is Inconsistent with the PBC’s Status, Is Unnecessary, Unfairly**
24 **Places Responsibility on the Respondents, and Is Impossible to**
25 **Achieve in Practice**

26 The draft CDOs require Respondents’ Storm Water Management Plans
27 (“SWMP”) to ensure an improvement in the Carmel Bay ASBS each year. This requirement is
28 plainly inconsistent with the PBC’s status as a non-MS4. Because the PBC will not have an

1 SWMP, it cannot revise it to ensure yearly improvement.

2 Additionally, such a requirement is arbitrary, since the Board has not
3 demonstrated that the Carmel Bay ASBS could be improved, or is in need of improvement.
4 Again, as mentioned throughout this opposition to the CDO, the Board has not presented any
5 evidence that the ASBS is impacted by discharge or even that the ASBS has less than desirable
6 water quality.

7 Finally, placing such a burden on the Respondents is simply arbitrary and unfair.
8 The PBC cannot be responsible for the conduct of other dischargers who could negatively affect
9 the quality of the ASBS. The PBC has no enforcement authority to regulate such conduct or
10 bind others into an SWMP. The draft CDO cites no authority for such a broad obligation.

11 Finally, the PBC's expert engineer testified in an affidavit that it is difficult to
12 demonstrate satisfaction of this condition.²⁴ Further testimony will be given at the hearing on
13 this issue.

14 **D. The Draft CDO Violates Provisions of California's Water Code**

15 **1. The Draft CDO Fails To Address Economic Considerations or the**
16 **Need To Develop Housing**

17 Water Code Section 13241, discussed above, also requires a regional board, when
18 establishing water quality objectives, to consider factors such as economic considerations and the
19 need for developing housing within the region.²⁵ The draft CDO makes no finding that such
20 factors were considered.

21 These factors – economic conditions and housing – are significant elements in the
22 present case. Approval of the CDO would severely impact the PBC economically, as the costs of
23 redesigning its storm drains so as to eliminate any flow to the ASBS would be extremely costly,
24 if it is achievable at all.

25 Moreover, the Regional Board has not considered the effect on housing supplies

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27 ²⁴ See Affidavit of Dr. Paulsen (¶¶ 9-12), submitted concurrently herewith.

28 ²⁵ Cal. Water Code §13241(d) and (e).

1 that will result from its interpretation of the Ocean Plan. The broadest approach, that all
2 stormwater is waste, impacts housing development and other areas similarly. Still, all areas will
3 be subject to costly enforcement actions, which will impede the development of additional
4 housing.

5 ///

6 **2. The State Board Does Not Have Authority to Prohibit Discharges**

7 The State Board modifications and interpretations of the Ocean Plan have
8 effectively prohibited certain discharges. However, the State Board lacks the authority for this
9 action. According to Water Code Section 13243, a “regional board, in a water quality control
10 plan or in waste discharge requirements, may specify certain conditions or areas where the
11 discharge of waste, or certain types of waste, will not be permitted.” There is, then, a lack of
12 express authority for the State Board’s conduct, and the attempt by that board to prohibit the
13 discharges at issue in the CDO is invalid. A canon of statutory interpretation, *expressio unius est*
14 *exclusio alterius*, holds that the expression of one thing is the exclusion of another. See, e.g.,
15 Gikas v. Zolin (1993) 6 Cal. 4th 841, 852 (“The expression of some things in a statute
16 necessarily means the exclusion of other things not expressed”). Hence where, as here, the
17 legislature expressly confers upon a Regional Board the authority to act, there is no implicit
18 authority for the State Board to act on the same issue.

19 **3. The Regional Board Failed to Consider Requisite Factors in**
20 **Determining the Effects of Discharges**

21 Section 13142.5(a) of the Water Code, which generally states that wastewater
22 discharges shall be treated to protect beneficial uses, provides that “[o]cean chemistry and
23 mixing processes, marine life conditions, other present or proposed outfalls in the vicinity, and
24 relevant aspects of areawide waste treatment management plans and programs, but not of
25 convenience to the discharger, shall for the purposes of this section, be considered in determining
26 the effects of such discharges.”

27 Here, the Regional Board did not consider any effects of the discharges, as it
28 simply assumed that the discharge by the PBC and City of Carmel affected the ASBS when it

1 sought to enforce an absolute ban on all discharge. Therefore, the Regional Board did not
2 consider ocean chemistry, mixing processes and the other statutorily-mandated factors in
3 Section 13142.5. Expert testimony to be provided by the PBC and City of Carmel at the hearing
4 will illustrate the importance of these elements.²⁶

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6 **4. The Regional Board Is Taking Unreasonable Enforcement Steps**

7 Section 13000 of the Water Code states, “activities and factors which may affect
8 the quality of the waters of the state shall be regulated to attain the highest water quality which is
9 reasonable, considering all demands being made and to be made on those waters and the total
10 values involved, beneficial and detrimental, economic and social, tangible and intangible.”

11 If the Regional Board had considered the non-existent or minimal impact to the
12 ASBS that the PBC and Carmel have, as well as economic and social values involved with
13 allowing the PBC and Carmel to continue without enforcement of the CDO, the Board would
14 conclude that the proposed CDO represents an unreasonable regulation, resulting in a violation
15 of Section 13000.

16 **E. The Regional Board Violated the California Environmental Quality**

17 **Act**

18 The California Environmental Quality Act (“CEQA”) provides specific
19 mandatory procedures whereby state agencies must consider the environmental and societal
20 impacts of their discretionary decisions. Cal. Pub. Res. Code § 21100, et seq. The Regional and
21 State Boards have effectively circumvented CEQA by transitioning the program applicable to
22 industrial and other discharges into a regulation of ordinary stormwater runoff without
23 undergoing the requisite environmental review. As a result, the PBC and City of Carmel did not
24 receive the opportunity to fully appreciate the implications of the recent, more expansive
25 application of the Ocean Plan because of the absence of the more substantial notice and
26 evaluation that is provided by CEQA review. Hence, the Regional Board should withdraw the

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28 ²⁶ See Affidavits of Dr. Ford (¶¶ 10, 14), submitted concurrently herewith.

1 CDOs and ask the State Board to initiate appropriate CEQA review.

2 **F. The Draft CDO Issued to the Pebble Beach Company Is Deficient**

3 **1. The Pebble Beach Company Is Not a Municipality**

4 The draft CDO continuously and repeatedly references the PBC as a
5 “municipality.” The PBC is not a municipality but a general partnership organized under the
6 laws of California.

7 **2. The Pebble Beach Company Is Not A Municipal Separate Storm**
8 **Sewer System**

9 The draft CDO also continuously references the PBC as an MS4. As discussed
10 above, the PBC is not an MS4.

11 **3. The PBC and City of Carmel Need Not Disclose Their Financial**
12 **Analysis For Implementation of the CDO**

13 The draft CDO requires the PBC, within six months of the CDO taking effect, to
14 submit an updated financial analysis for development and implementation of time-scheduled
15 items in the CDO. However, the draft CDO fails to state any authority for such a requirement.
16 As a partnership, PBC’s financial information is confidential and proprietary. Disclosure of this
17 type of information can result in a competitive disadvantage for PBC.

18 Besides the lack of authority in the proposed CDO for the required financial
19 disclosure, compliance with this provision is irrelevant to the issue of whether PBC and City of
20 Carmel are complying with the CDO. Providing financial information does not satisfy any
21 requirements in the Ocean Plan or Water Code, and requiring it constitutes an arbitrary and
22 capricious act. Moreover, if the Regional Board is concerned about feasibility and cost issues,
23 the time to address that is now, before the proposed CDO is enforced.

24 **4. The Draft CDO Contains Arbitrary Identification and Reporting**
25 **Requirements**

26 The draft CDO, in paragraph 10 of the order section, requires the PBC to initiate
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1 appropriate steps to identify the sources of pollutants and the appropriate BMPs.²⁷ Upon
2 completion, the PBC shall submit a report to the Executive Officer for approval. The PBC must
3 then amend its SWMP to include the proposed changes, and the SWMP changes will go into
4 effect immediately “unless otherwise directed by the Executive Officer.”

5 This draft CDO provision again highlights the vague and arbitrary nature of the
6 conditions of the CDO. The Executive Officer has no standard for approval, only unconditional
7 discretion. Respondents may take all reasonable steps to comply, and the Executive Officer can
8 require further, unspecified actions. Such unlimited authority does not provide Respondents with
9 sufficient notice or protections.

10 **G. Even If the PBC Seeks an Exception to the ASBS Discharge Prohibition, the**
11 **Scripps Institute of Oceanography Is Not An appropriate Model**

12 In Finding 15 of the draft CDO, the Regional Board states that the Scripps
13 Institute of Oceanography (“Scripps”) recently received an ASBS-discharge exception and
14 would be an appropriate model of the requirements expected from the ASBS-discharge MS4s.²⁸
15 However, because Scripps is part of the University of California, a state entity, it is inappropriate
16 to consider that exception a proper model for other entities that do not possess such a favorable
17 relationship.

18 **III. CONCLUSION**

19 For the foregoing reasons, respondents respectfully request that the California
20 Regional Water Quality Control Board, Central Coast Region, withdraw Cease and Desist Order
21 Nos. R3-2005-0021 and R3-2005-0022.

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27 ²⁷ We renew our argument that the PBC is not polluting the ASBS.

28 ²⁸ We renew our argument that the PBC is not an MS4.

1 Dated: February 7, 2005

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