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File Number: 17139-00002



November 22, 2006

Via Certified Mail, Return Receipt Requested
Via E-mail

State Water Resources Control Board
Office of the Chief Counsel
P.O. Box 100
Sacramento, CA 95812-0100

Attention: Elizabeth Miller Jennings, Esq.
Senior Staff Counsel

Re: Paradise Cove, Malibu/Kissel Company: Petition for Review

Dear Ms. Jennings:

We represent the Kissel Company, Inc. ("Kissel"). Please find enclosed Kissel's Petition for Review of Order No. R4-2006-0079 issued by the California Regional Water Quality Control Board, Los Angeles Region. Kissel requests that the State Board hold this petition in abeyance pursuant to California Code of Regulations, title 23, section 2050.5(d).

Please contact me if you have any questions. Thank you.

Very truly yours,

A handwritten signature in cursive script that reads 'Sedina L. Banks'.

Sedina L. Banks

SLB/nhs
Enclosure

cc: Jonathan Bishop, Executive Director, LARWQCB (Via Email & U.S. Mail)
Steven F. Dahlberg, President, Kissel Company, Inc.
Roger J. Holt, Esq., Greenberg Glusker Fields Claman & Machtinger LLP

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11 Attorneys for Petitioner Kissel Company, Inc.

12 STATE OF CALIFORNIA

13 STATE WATER RESOURCES CONTROL BOARD

14 In The Matter Of The Petition Of

Petition Number: _____

15 KISSEL COMPANY, INC.

PETITION FOR REVIEW OF THE
LARWQCB ORDER DATED
OCTOBER 24, 2006

16 Petitioner,

17 INTRODUCTION AND SUMMARY

18
19
20 Petitioner Kissel Company, Inc. ("Kissel") respectfully petitions the California State
21 Water Resources Control Board (the "State Board") to review Order No. R4-2006-0079 of the
22 California Regional Water Quality Control Board, Los Angeles Region (the "Regional Board")
23 pursuant to California Water Code Section 13320 and California Code of Regulations, title 23,
24 section 2050. Kissel also requests that the Petition be held in abeyance pursuant to California
25 Code of Regulations, title 23, section 2050.5(d).
26
27
28

1 **PETITION FOR REVIEW**

2 Pursuant to section 2050 of title 23 of the Code of Regulations, Kissel provides
3 the following information in support of the Petition:

4 **1. CONTACT INFORMATION OF PETITIONER**

5 Kissel Company, Inc.
6 P.O. Box 2913
7 Malibu, California 90265
8 Attention: Mr. Steven F. Dahlberg, President
9 Telephone: (310) 396-1826
10 E-mail: steve@paradisecovemalibu.com

11 Roger J. Holt and Sedina L. Banks
12 Greenberg Glusker Fields Claman & Machtinger LLP
13 1900 Avenue of the Stars, Suite 2100
14 Los Angeles, California 90067
15 Telephone: (310) 553-3610
16 E-mail: rholt@ggfirm.com and sbanks@ggfirm.com

17 **2. ACTIONS FOR WHICH PETITIONER SEEKS REVIEW**

18 Kissel seeks review of the Regional Board's "Order No. R4-2006-0079 Amended Time
19 Schedule Order For Kissel Company, Inc. (Paradise Cove Mobile Home Park) (File No. 01-
20 083)" (the "Order"), as revised on October 24, 2006. (A true and correct copy of the October 24,
21 2006 Order is included as Exhibit A in Kissel's Appendix in Support of Petition (the
22 "Appendix," submitted herewith)

23 **3. DATE ON WHICH THE REGIONAL BOARD ACTED**

24 The Order was revised on October 24, 2006. The Regional Board sent a letter enclosing
25 the Order to representatives of Kissel by certified mail on October 26, 2006. (A true and correct
26 copy of the Regional Board's October 26, 2006 letter enclosing the Order is included in the
27 Appendix as part of Exhibit A)
28

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1 **4. STATEMENT OF REASONS WHY THE ACTION WAS**
2 **INAPPROPRIATE OR IMPROPER**

3 The Regional Board Order was inappropriate or improper for the following reasons: (1)
4 the Regional Board abused its discretion by failing to consider substantial, undisputed evidence
5 that compliance with all of the dates contained in the Order is not feasible; (2) the Regional
6 Board abused its discretion by refusing to adopt a schedule for compliance that would be feasible
7 as proposed by Kissel; and (3) the Regional Board abused its discretion by including provisions
8 for civil penalties if Kissel is unable to meet the compliance deadlines, despite substantial and
9 undisputed evidence that compliance was infeasible.

10
11 **5. THE MANNER IN WHICH KISSEL IS AGGRIEVED**

12 Kissel wants to comply with all of the deadlines contained in the Order. Kissel is
13 working diligently on ensuring that it complies with the February 1, 2007 deadline to achieve full
14 compliance. However, for reasons beyond Kissel's reasonable control, Kissel has been unable to
15 meet the November 1, 2006 deadline to complete construction of its wastewater treatment plant
16 and will likely be unable to meet the December 1, 2006 deadline to remove or legally abandon
17 the septic tanks that are not part of the new treatment system. (Exhibit A, Order) Penalties
18 should not be imposed against Kissel pursuant to the Order for Kissel's failure to meet the
19 compliance deadlines due to circumstances beyond Kissel's reasonable control.

20
21 **6. SPECIFIC ACTION KISSEL REQUESTS OF THE STATE BOARD**

22 Kissel respectfully requests that the State Board: (1) accept this Petition and (2) vacate
23 the Order's time schedule and corresponding proposed civil penalties if Kissel violates the
24 compliance deadlines and establish new compliance deadlines. However, Kissel requests at this
25 time that the Petition be held in abeyance pursuant to California Code of Regulations, title 23,
26 section 2050.5(d) and reserves its right to supplement the Petition.

1 Due to circumstances beyond Kissel's reasonable control, Kissel has been unable to meet
2 the November 1, 2006 deadline to complete construction of its wastewater treatment plant and
3 will likely be unable to meet the December 1, 2006 deadline to remove or legally abandon the
4 septic tanks that are not part of the new treatment system. (Exhibit A, Order) However, Kissel
5 believes that it will meet the February 1, 2007 deadline to achieve full compliance.

6
7 Kissel wants to comply with the Order to the greatest extent possible without further
8 burdening the State Board or the Regional Board and their staffs. Kissel believes that should it
9 meet the February 1, 2007 deadline, the Regional Board's reasons for seeking civil penalties will
10 be moot. However, should Kissel be unable to meet the February 1, 2007 deadline to achieve
11 full compliance and/or the Regional Board decides to seek civil penalties against Kissel, Kissel
12 will seek active review of this Petition by the State Board and reserves the right to supplement
13 this Petition with additional arguments and evidence.

14
15 7. **STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF**
16 **PETITION**

17 A Statement of Points and Authorities in support of legal issues raised in this Petition
18 follows the Petition and is incorporated herein.

19
20 8. **STATEMENT THAT THE PETITION WAS SENT TO THE REGIONAL**
21 **BOARD**

22 A true and correct copy of this Petition was sent to the Regional Board via electronic mail
23 and First Class Mail on November 22, 2006, to the attention of Jonathan Bishop, Executive
24 Officer. (A true and correct copy of the correspondence reflecting the transmission is included in
25 the Appendix as Exhibit B)

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1 **9. STATEMENT THAT ISSUES WERE RAISED BEFORE THE REGIONAL**
2 **BOARD, AND EXPLANATION WHY PETITIONER WAS UNABLE TO**
3 **RAISE SUBSTANTIVE ISSUES BEFORE THE REGIONAL BOARD**

4 The substantive issues and objections raised in this Petition were raised by Kissel in
5 hearing testimony before the Regional Board during the October 24, 2006 hearing and in prior
6 correspondence with the Regional Board and staff, including a letter sent to Ms. Toni Callaway
7 on October 19, 2006. Additionally, Kissel has been updating the Regional Board and staff on its
8 progress for completing the Wastewater Treatment Plant through written and oral
9 communication for the past five years.

10
11 **10. COPY OF REQUEST FOR RECORD TO THE REGIONAL BOARD**

12 Kissel requests that the Petition be held in abeyance pursuant to California Code of
13 Regulations, title 23, section 2050.5(d) and reserves the right to request that the Regional Board
14 prepare the record.

15
16 **11. REQUEST FOR HEARING**

17 Kissel requests that the Petition be held in abeyance pursuant to California Code of
18 Regulations, title 23, section 2050.5(d) and reserves the right to request a hearing.

19
20 DATED: November 22, 2006

Respectfully Submitted
GREENBERG GLUSKER FIELDS CLAMAN
& MACHTINGER LLP

21
22
23 By: Sedina Banks
24 SEDINA L. BANKS
25 Attorneys for Kissel Company, Inc.

STATEMENT OF POINTS AND AUTHORITIES

Pursuant to California Water Code section 13320 and California Code of Regulations, title 23, section 2050(a)(7), Kissel submits this Statement of Points and Authorities in support of its Petition for Review. The Petition requests that the California State Water Resources Control Board (the "State Board") vacate the California Regional Water Quality Control Board, Los Angeles Region (the "Regional Board") Order No. R4-2006-0079 Amended Time Schedule Order For Kissel Company, Inc. (Paradise Cove Mobile Home Park) (File No. 01-083)" (the "Order") and establish new compliance deadlines for Kissel to complete construction of its wastewater treatment plant and remove or legally abandon the septic tanks. Kissel requests that the Petition be held in abeyance pursuant to California Code of Regulations, title 23, section 2050.5(d) and reserves the right to supplement its Statement of Points and Authorities.

I. INTRODUCTION

Kissel, a family owned business, has owned and operated the Paradise Cove Mobile Home Park located at 28128 Pacific Coast Highway, Malibu, California ("Paradise Cove") since 1964. Paradise Cove is located in an unsewered area of the City of Malibu. No public sewers have been scheduled for construction in the vicinity of Paradise Cove. For the past five years, Kissel has been working with the Regional Board through the process of designing, permitting, installing and implementing a plan for the replacement or upgrade of the wastewater collection, treatment and disposal system for Paradise Cove (the "Wastewater Treatment Plant") in compliance with the Regional Board requirements.

Unfortunately, due to circumstances beyond Kissel's reasonable control, the completion of the Wastewater Treatment Plant has taken longer than anticipated. For that reason, on October 24, 2006, the Regional Board had a hearing to determine whether it should extend the deadlines for Kissel to complete the Wastewater Treatment Plant (the "Hearing"). However, despite being informed that the proposed deadlines of November 1, 2006 to complete construction and December 1, 2006 to remove or legally abandon the septic tanks were infeasible

1 (the "Compliance Deadlines"), the Regional Board ordered that Kissel had to comply with the
2 Compliance Deadlines or face civil penalties for each day that it failed to comply (the "Order").¹
3 As discussed below, the Order should be vacated and new Compliance Deadlines established
4 because the Regional Board acted inappropriately and improperly in establishing infeasible
5 deadlines for completion of the Wastewater Treatment Plant.
6

7 **II. THE ORDER SHOULD BE VACATED AND A NEW COMPLIANCE DEADLINE**
8 **ESTABLISHED**

9 **A. Standard Of Review**

10 Any aggrieved person may petition the State Board to review an action or failure to act
11 by a regional board within 30 days of such action or failure. CAL. WATER CODE § 13320(a).
12 Upon finding that the action of the regional board, or the failure of the regional board to act, was
13 inappropriate or improper, the State Board may take the appropriate action, direct the regional
14 board to take the appropriate action, refer the issue to another state agency with jurisdiction, or
15 any combination of those options. CAL. WATER CODE § 13320(c). The State Board is vested
16 with all the powers of the regional board for purposes of taking such actions. CAL. WATER CODE
17 § 13320(c).
18

19 In determining whether the Regional Board's action was inappropriate or improper, the
20 State Board may consider the record before the Regional Board and any other relevant evidence
21 which should be considered to effectuate and implement the Water Code's policies. CAL.
22 WATER CODE § 13320(b). Thus, the scope of review is "closer to that of independent review."
23 *In re* Petition of Exxon Co., U.S.A., State Board Order No. WQ 85-7, 1985 WL 20026 (Cal. St.
24 Wat. Res. Bd.), at *6. However, while the State Board can independently review the Regional
25

26 ¹ Kissel believes that it will meet the February 1, 2007 deadline to achieve full compliance.
27 Accordingly, at this time, Kissel does not challenge the February 1, 2007 deadline. However,
28 Kissel reserves its right to supplement its Petition in the event that it cannot meet the February 1,
2007 deadline.

1 Board's record, to uphold the Regional Board's challenged action, the State Board must
2 conclude that the action was "based on substantial evidence." *Id.* Here, the Regional Board's
3 Order was not based on substantial evidence.

4
5 **B. The Regional Board's Order Was Not Based On Substantial Evidence**

6 It was unreasonable and improper for the Regional Board to adopt the Compliance
7 Deadlines, because achievement of these deadlines is infeasible. Not only was the Regional
8 Board's Order not based on substantial evidence, the evidence weighed in favor of extending the
9 deadlines an additional month as requested by Kissel:

- 10
11 • The Regional Board was informed prior to and at the Hearing that Kissel would
12 be unable to comply with the Compliance Deadlines: On October 19, 2006, six days prior to the
13 Hearing, Kissel informed the Regional Board in writing that it would be unable to meet the
14 proposed November 1, 2006 deadline to complete construction.² (A true and correct copy of
15 Kissel's October 19, 2006 letter is included as Exhibit C to the Appendix) Kissel explained that
16 it had "experienced many delays including rain, the unanticipated need for Cal Trans permits,
17 resident cars blocking trenches and broken utility lines." (Exhibit C, October 19, 2006 Letter)
18 Kissel further explained that due to these circumstances, the septic portion of the construction
19 was approximately two weeks behind schedule, which would cause an additional two week delay
20 for the electricity to be completed. (Exhibit C, October 19, 2006 Letter) Although Kissel did not
21 submit these materials within the time period for submitting comments, the Regional Board
22 acknowledged that they had received the materials prior to the Hearing. (True and correct copies
23 of portions of the October 24, 2006 Hearing Transcript is included as Exhibit D to the Appendix,
24 113:7-11³)

25
26 ² Because Kissel was unable to meet the November 1, 2006 deadline to complete construction,
Kissel will likely be unable to meet the December 1, 2006 deadline to remove or legally abandon
the septic tanks.

27 ³ References are to the page and line of the Hearing Transcript.
28

1 During the Hearing, Steven Dahlberg, the President of Kissel, also testified that the
2 delays were due to circumstances beyond Kissel’s reasonable control, including the City of
3 Malibu’s delay in approving the permits for the construction and difficulties from the
4 underground utility lines. (Exhibit D, Hearing Transcript 123:18-126:25) With respect to the
5 utility lines, Mr. Dahlberg testified that “[t]here are a myriad [of] utility lines running every
6 different direction, many of them unknown until [Kissel] finds them with a backhoe.” (Exhibit
7 D, Hearing Transcript 126:3-5) Because of the utility lines, “instead of trenching 200 feet per
8 day, the contractor is only able to do approximately 60 feet per day.” (Exhibit D, Hearing
9 Transcript 126:5-7) Accordingly, the Regional Board was informed that it would be infeasible
10 for Kissel to comply with the Compliance Deadlines, especially because the November 1, 2006
11 deadline was only five business days after the Regional Board adopted the Order.

12
13 • The Regional Board staff acknowledged that the delays occurred due to reasons
14 beyond Kissel’s reasonable control: During the Hearing, the Regional Board staff acknowledged
15 that an extension of the Completion Deadlines were necessary “because of delays that occurred
16 beyond [Kissel’s] control.” (Exhibit D, Hearing Transcript 111:14-16) Ms. Toni Callaway, one
17 of the Regional Board staff members assigned to the Wastewater Treatment Plant’s construction
18 oversight, testified during the Hearing that the City of Malibu “didn’t give [Kissel] approval to
19 finish this last phase of the construction until June 6th, 2006.” (Exhibit D, Hearing Transcript
20 147:23-148:2) Ms. Callaway also testified that a “continuing problem” has been the City of
21 Malibu’s failure to communicate with the Regional Board when a conflict arises between the
22 Regional Board and the City of Malibu. (Exhibit D, Hearing Transcript 150:12-16) Indeed, the
23 City of Malibu failed to even attend the Hearing, despite the Regional Board staff’s request that
24 it attend. (Exhibit D, Hearing Transcript 150:2-16) Ms. Wendy Philips, Chief of the
25 Groundwater Cleanup and Permits Section, also testified that the Regional Board staff “has been
26 unable to compel other agencies involved in this to expedite the permitting process.” (Exhibit D,
27 Hearing Transcript 114:9-11)

28

1 The Regional Board staff report also provided evidence that the delays were due to
2 reason's beyond Kissel's reasonable control. (A true and correct copy of the Regional Board
3 Staff Report (the "Staff Report") is included as Exhibit E to the Appendix) First, the Staff
4 Report stated that "agency negotiations [between the California Department of Housing and
5 Community Development and the City of Malibu,] extended for nearly one year and delayed
6 construction." (Exhibit E, Staff Report 13-1⁴) Second, the City of Malibu's "[e]ngineering
7 review decisions resulted in the rejection of the initial engineering plans that had been approved
8 by Regional Board staff and the California Department of Health Services." (Exhibit E, Staff
9 Report 13-1) The revisions of the "engineering plans and treated effluent disposal methods and
10 the subsequent request for a mounding study and rejection of the initial study resulted in
11 additional delays on completing construction." (Exhibit E, Staff Report 13-2) Finally, the Staff
12 Report acknowledged that approvals of the final engineering design plans for the Wastewater
13 Treatment Plant from the California Department of Housing and Community Development and
14 the City of Malibu were not received until June 2006. (Exhibit E, Staff Report 13-3)
15 Additionally, the City of Malibu "did not approve replacement seepage pits to replace those that
16 had failed until recently." (Exhibit E, Staff Report 13-2)

17
18 • The Regional Board staff acknowledged that construction of a wastewater
19 treatment plant at Paradise Cove is difficult: During the Hearing, the Regional Board staff
20 acknowledged that the construction of a wastewater treatment plant at Paradise Cove was
21 difficult due to the characteristics of the site. First, Paradise Cove has difficult topography for
22 construction of a wastewater treatment plant. (Exhibit D, Hearing Transcript 104:8-12) The
23 wastewater treatment plant and disposal equipment cannot be placed on steep slopes and bluffs.
24 (Exhibit D, Hearing Transcript 104:8-10) However, "almost one-third of the 72 acres bedrock
25 crops out on slopes and bluffs." (Exhibit D, Hearing Transcript 104:10-12) Second, difficult
26 soils exist for percolating wastewater. (Exhibit D, Hearing Transcript 104:19-20) At Paradise

27 _____
28 ⁴ References are to the page number of the Staff Report.

1 Cove there is “a thin veneer of soil, some marine deposits and tight bedrock, composed of dense
2 interbedded shale, siltstone, and dirty sands” . . . “through which it’s difficult to percolate
3 wastewater.” (Exhibit D, Hearing Transcript 104:22-105:2) Finally, there is shallow
4 groundwater in parts of Paradise Cove, which makes construction difficult. (Exhibit D, Hearing
5 Transcript 105:3-4)

6
7 For the foregoing reasons, the Regional Board’s decision to adopt the Completion
8 Deadlines was not based on substantial evidence. The Regional Board was presented with
9 evidence both from Kissel and the Regional Board staff that the delays in the completion of the
10 Wastewater Treatment Plant were due to reasons beyond Kissel’s reasonable control. The
11 Regional Board was also informed that Kissel could not meet the November 1, 2006 deadline to
12 complete construction of the Wastewater Treatment Plant and thus, likely could not meet the
13 December 1, 2006 deadline to remove or legally abandon the septic tanks. However, despite this
14 evidence, the Regional Board ordered that Kissel must comply with the Completion Deadlines or
15 be subject to civil penalties of up to \$3000 per day. (Exhibit A, Order)

16
17 As Kissel stated in its October 19, 2006 letter and during the Hearing, Kissel already has
18 an economic incentive to complete construction of the Wastewater Treatment Plant. Kissel is
19 losing approximately \$25,000 in revenue for each month that the Wastewater Treatment Plant is
20 not completed. (Exhibit C, October 19, 2006 letter; Exhibit D, Hearing Transcript 125:14-22)
21 Kissel should not be forced to pay civil penalties in addition to its lost rent-revenue when the
22 failure to complete the construction of the Wastewater Treatment Plant is due to circumstances
23 beyond its control.

24
25 **III. CONCLUSION**

26 For the reasons set forth above, in the supporting documents submitted herewith and in
27 the administrative record Kissel respectfully requests that the State Board: (1) accept this Petition
28

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& MACHTINGER LLP
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1 and (2) vacate the Order's time schedule and corresponding proposed civil penalties and
2 establish new Compliance Deadlines.

3
4 However, Kissel requests that the State Board hold this Petition in abeyance pursuant to
5 California Code of Regulations, title 23, section 2050.5(d). In the event that its becomes
6 necessary to pursue this appeal, Kissel reserves the right to supplement this Petition, request a
7 hearing in this matter and to request a stay of the Order.

8
9
10 DATED: November 22, 2006

Respectfully Submitted,

11 GREENBERG GLUSKER FIELDS CLAMAN
12 & MACHTINGER LLP

13 By: 
14 SEDINA L. BANKS
15 Attorneys for Petitioner KISSEL COMPANY
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