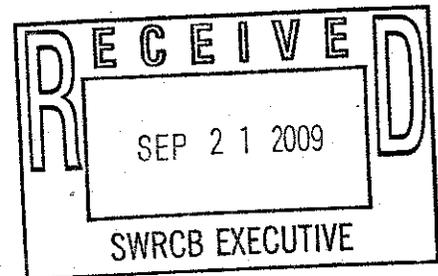




September 21, 2009

VIA ELECTRONIC MAIL
commentletters@waterboards.ca.gov
AND FACSIMILE (916) 341-5620

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Re: Comment Letter - Enforcement Policy

Dear Ms. Townsend:

On behalf of KB Home Greater Los Angeles Inc. ("KB Home"), I am submitting these comments on the State Water Resources Control Board's proposed statewide Water Quality Enforcement Policy draft dated July 14, 2009 ("proposed Policy"). Specifically, KB Home's comments will address the following topics:

1. Defining a Discharge Monitoring Report When There Is No Discharge to Surface Waters (pages 29-30).
2. Multiple Instances of the Same Violation (page 19)
3. Multiple Day Violations (pages 19-20)

I. Defining a Discharge Monitoring Report When There Is No Discharge to Surface Waters

We agree with the proposed Policy's analysis that where there has been no discharge, the failure to file a discharge monitoring report is not a "serious violation" within the meaning of Section 13385.1(a)(1) of the California Water Code. A report of the lack of a discharge is not a "discharge monitoring report" because there is nothing to monitor, so such a report would not ensure compliance with effluent limitations. The legislature specifically limited the application of this section, providing that "for the purposes of this section [13385.1] . . . 'effluent limitations' means a numeric restriction or a numerically expressed narrative restriction . . ." on pollutants that may be discharged. Absent a discharge, numeric discharge restrictions are irrelevant: thus effluent limitations are not implicated by reports of no discharge.

II. Multiple Instances of the Same Violation

The proposed Policy (at page 19) sets forth the circumstances in which multiple violations are treated as a single violation, such as a single operational upset that leads to simultaneous violations of more than one pollutant parameter. The proposed Policy lists other situations in which a single base liability amount can also be assessed for multiple violations at the discretion of the Water Boards. Two of those circumstances are:

"c. The violation occurs on separate days, but the violation is one that continues for more than one day;

d. When violations are not independent of one another or are not substantially distinguishable"

The failure to file a required report during a period when there has been no discharge should be treated as a single violation. Such violations should qualify under subparagraph "c," above, because they are essentially single violations that continue from day-to-day. They should also qualify under subparagraph "d" above, because the continuing omission of filing a required report results in daily violations that are neither independent, nor substantially distinguishable. It would be helpful if the Board would clarify that failure to file a report when there has been no discharge should be treated as a single violation.

If the Board believes that the foregoing listed circumstances do *not* apply to the failure to file a report of non-discharge, KB Home respectfully requests the Board to add that category to the list.

KB Home's situation at its Fillmore project (Tract 5353) in Ventura County provides an example of why failure to file a report of non-discharge should be treated as a single violation. In a nutshell, KB Home's predecessor obtained groundwater discharge permits for the Fillmore project in December 2005. In March 2006, KB Home took title to the project. Except for a single instance, KB Home avoided discharging. Although the permits allowed the project to discharge groundwater to the Santa Clara River, KB Home instead piped the extracted groundwater to irrigate a watercress field. KB Home's only discharge – in August/September 2006 – was reported by KB Home's contractor, Rincon. In August 2006, Rincon pre-notified the Board of an anticipated discharge from Tract 5353, and provided baseline groundwater quality data. On December 18, 2006, Rincon reported that discharge. In November 2006, KB Home's project manager asked Rincon to close out the dewatering permits. All of the permits instruct the permittee (at page 2) that "[i]n order to avoid future annual fees, please submit written notification when the project has been completed and the permit is no longer needed." In Rincon's December 18, 2006 letter to the Board, entitled "Final Report of Groundwater Discharge Sampling," Rincon wrote that "[n]o further reporting is required as no additional discharges are anticipated." On December 18, 2006, Rincon emailed KB Home a copy of the December 18 report to the Board, and informed KB Home that "[t]his final report will close out the dewatering permit for the project." KB Home was never invoiced by the Board for the

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period from July 2007 through June 2008, further confirming KB Home's belief that the permits had in fact been closed (fees for permits paid in November 2006 covered the period through June 2007). More than a year later, the Board informed KB Home that it had to submit reports under the permits that KB Home had believed were closed, and KB Home promptly submitted the reports.

The final Policy should acknowledge that – in circumstances like those described above – the failure to file a report of non-discharge should be treated as a single violation. This modification is important, because the proposed Policy provides that “If the violations do not fit the above categories, each instance of the same violation shall be calculated as a separate violation.” Accordingly, the final Policy should either provide an interpretation of this situation, or add a new category that includes failure to file a discharge report when no discharge has occurred.

3. Multiple Day Violations

Under the proposed Policy, for violations that last longer than 30 days, the daily assessment can be less than the calculated daily assessment if the Water Board makes one of three findings. The Water Board must find either that the violation:

- a. Is not causing daily detrimental impacts to the environment or the regulatory program;
- b. Results in no economic benefit from the illegal conduct that can be measured on a daily basis; or,
- c. Occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation.

KB Home believes that these criteria make sense, and should be retained to avoid the assessment of penalties that grossly exceed the nature of the violation. Although KB Home believes that the events described above involving KB Home should qualify as a single violation, if for some reason they do not, the foregoing 30-day limitation should certainly apply.

Conclusion

Thank you for the opportunity to submit these comments. If you would like more information, please feel free to contact me.

Sincerely,

KB HOME GREATER LOS ANGELES INC.



Stephen J. Ruffner
President