DEPARTMENT OF THE AIR FORCE
AIR FORCE CENTER FOR ENVIRONMENTAL EXCELLENCE
REGIONAL ENVIRONMENTAL OFFICE, WESTERN REGION
333 MARKET STREET, SUITE 625
SAN FRANCISCO, CALIFORNIA 94105-2196

25 Jan 05

SSO Hearing: 2/8/06

Selica Potter, Acting Clerk to the Board
State Water Resources Control Board
Executive Office
1001 I Street, 24th Floor
Sacramento, California 95814

Subject: COMMENT LETTER – 1/19/06 PUBLIC HEARING FOR SSORP

Dear Ms. Potter:

Our office appreciates the opportunity to review Draft Order No. 2006 Statewide General Waste Discharge Requirements for Wastewater Collection System Agencies (Draft Order). Our office has completed a careful legal review of the Draft Order and concluded that the United States has not waived sovereign immunity for many of the provisions contained in this Draft Order. Thus, US Air Force installations in California are not able to comply with those provisions. Enclosure 1 describes our position in greater detail.

Our analysis did indicate; however, that we have a legal obligation to comply with three specific requirements of the Draft Order. These are (1) to report to the Office of Emergency Services any sanitary sewer overflows (SSOs) greater than 1,000 gals that is discharged in or on any waters of the State; (2) to maintain records of SSOs for a minimum of three years; and (3) to allow the Regional Board or its authorized representative to have access to our installations for the purpose of assessing SSO. Unlike the other provisions of the Draft Order, we feel these three requirements are objective, specific standards authorized under the Clean Water Act.

Notwithstanding the issue of sovereign immunity, there are sections of the Draft Order and its accompanying Monitoring and Reporting Program to which we simply request clarification. Enclosure 2 lists these sections in question.

The Air Force believes in the importance of preventing sanitary sewer overflows. Just as our installations are committed to environmental excellence in all of their operations, so are they committed to the proper management, operation, and maintenance of their sewage collection systems. We welcome further dialogue on this issue and would be happy to answer any questions you may have regarding our position. Please contact Maj. George Konoval or Dr. Baha Zarah of my office at (415) 977-8888.

CLARE R. MENDELSOHN
Director

Enclosure: 1. US Air Force Regional Environmental Office – Western Region Comments on Draft Order No. 2006, Statewide General Waste Discharge Requirements for Wastewater Collection System Agencies
2. Additional Comments on the Draft Order and Monitoring and Reporting Program

Enclosure 1: US Air Force Regional Environmental Office – Western Region Comments on Draft Order No. 2006, Statewide General Waste Discharge Requirements for Wastewater Collection System Agencies

There is at least one component of the proposed regulations, California Water Code section 13263, which present a hurdle to compliance by agencies of the Federal Government located within the State. These requirements are imposed without setting any numerical, objective effluent limitations or water quality standards, in accordance with the term "requirements" in 33 USC § 1323.

The doctrine of sovereign immunity bars state regulation against the Federal Government unless Congress has specifically stated its consent to such regulation. This is a common rule, with presumed congressional familiarity, see McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 495 (1991). It holds that any waiver of the National Government's sovereign immunity must be unequivocal, see United States v. Mitchell, 445 U.S. 535, 538 (1980), "construed strictly in favor of the sovereign," McMahon v. United States, 342 U.S. 25, 27 (1951), and "not "enlarged . . . beyond what the language [of the waiver] requires." See Eastern Transportation Co. v. United States, 272 U.S. 675, 686 (1927). Additionally, the Supreme Court has held that a plausible argument for a waiver is not enough if the underlying statute is not unequivocal. See Department of Energy, 503 U.S. at 607,618 (1992). Conversely, a plausible argument that there is not a waiver is enough to establish that the statute is not unequivocal. See United States v. Nordic Village, 503 U.S. 30, 37 (1992).

In this case, section 1323 states, in pertinent part:

> (a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local *requirements*, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any *requirement* whether substantive or procedural (including any recordkeeping or reporting requirement, any *requirement* respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. (emphasis added).

The particular question at issue is the definition of "requirements" under section 1323. While the Clean Water Act (CWA), 33 USC § 1362, does not specifically define the term, it has received substantial consideration in federal district and circuit courts, which has given meaning to the term. Additionally, the Supreme Court has given it some consideration. Ultimately, the applicable case law holds that "requirements" under section 1323 narrowly refers to "an objective, administratively pre-determined effluent standard or limitation or administrative order upon which to measure the prohibitive levels of water pollution." MESS v. Weinberger, 707 F. Supp 1182,

1198 (1988 ED CA),[1] citing N.Y. v. United States, 620 F. Supp 374 (E.D.N.Y 1985). The issue in MESS was certain reporting requirements under the California Water Code (CWC), which were triggered by substantive standards which were "extremely vague. . ." and could not otherwise be considered section 1323 requirements. Id. For example, CWC section 13260 required reporting from "Any person discharging waste . . .that could affect the quality of waters of the state," while title 23, section 2520 of the California Administrative Code required water suppliers to "protect the water resources under their control" and to "assure a supply of potable water to users." Id. at 1197. The court found that federal facilities "cannot be required to file reports based on those vague standards." Id. at 1198. Compare Draft Order No. 2006, proposed CWC Section 13263, (C)(7-10). For example the language of section 13263(C)(10): "the Enrollee shall provide adequate capacity to convey base flows and peak flows, including flows related to wet weather events. . ." is vague and non-specific. Additionally, CWC section 13263(C)(9) requires the allocation of "adequate resources" a standard that is not only vague, but also not a measurable indicator of the protection of water quality under the CWA. These are the types of regulations contemplated by MESS as not applicable to federal facilities under section 1323. In Kelley v. United States, 618 F.Supp. 1103 (W.D. MI 1985), the court reviewed two sections of the Michigan Water Resources Commission Act. Mich. Comp. Laws 323.6(a) made it unlawful to "discharge into the waters of the state any substance which is or may become injurious to the public health, safety and welfare. . ." and section 323.6(c) provided that any violation of section 6(a) constituted "prima facie evidence of the existence of a public nuisance." Id. at 1108. Regarding these statutory provisions, the Kelley court held: "neither of these State statutes provide objective, quantifiable standards subject to uniform application. For that reason, neither constitute 'requirements' for the purposes of section 313 of the Clean Water Act. Since the federal government has not consented to be sued under these statutes. . . [the] plaintiffs' complaint must. . .be dismissed." Id. at 1108.

Similarly, other courts have considered the question of what is meant by requirements in other federal environmental regulations and have come to the same conclusion. In Romero-Barcelo v. Brown, 643 F.2d 835 (1st Cir. 1981), the court examined a Puerto Rico public nuisance statute which proscribed "anything . . . injurious to health. . .indecent. . .offensive to the senses, or. . . an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons." Id at 856. The court held that the term "requirements" under the Federal Noise Control Act, 42 USC § 4911(a), meant "relatively precise standards capable of uniform application to similar sources of sound, and found the subject law inapplicable to agencies of the federal government under principles of sovereign immunity. Id. at 855. The term "requirements" under the Resource Conservation and Recovery Act received identical treatment in Florida Dept. of Env. Reg. v. Sivex Corp, 606 F.Supp. 159, 164 (M.D. FL 1985).

Supreme Court Jurisprudence does not appear to provide the same range of consideration of the term "requirements," at least within the context of sovereign immunity analysis. However, in

[1] The long subsequent appellate history of this case does nothing to displace its central holding. See MESS v. Cheney, 763 F.Supp. 431 (E.D. Cal 1989) (summary Judgment granted in part by, denied by, in part, *Sub nominee*), MESS v. Cheney, 1991 U.S. Dist LEXIS 21674 (E.D. Cal Apr. 26, 1991) (judgment entered), MESS v. Perry, 47 F.3d 325 (9th Cir 1995) (vacated, remanded), MESS v. Perry, 516 U.S. 807 (1995) (*cert.* denied).

1976, EPA v. California held that federal facilities were not required by CWA section 313 to obtain state pollution discharge permits. EPA v. California, 426 U.S. 200 (1976). In response to that ruling, Congress amended section 313 to make clear that federal facilities were so subject. However, in EPA, the court also indicated that "requirements" defines an objectively quantifiable standard. Id. at 215. Subsequent congressional action has not overturned this standard.

Ultimately, under the standard defined by three federal courts, we must conclude that, with the exception of the three standards identified in the cover letter, the subject regulations are not "requirements" under section 1323, and therefore Air Force Facilities located in California are unable to comply, in accordance with the principle of sovereign immunity.

Enclosure 2: Additional Comments on the Draft Order and Monitoring and Reporting Program

Draft Order

1. Section C Provisions, Item 6, discusses those factors the State and/or Regional Boards will consider in any enforcement action. Clarify if degree of impact or risk is one of these factors. For example, are SSOs from sanitary sewer systems located in areas with low impact to human health and the environment (i.e., remote desert regions of California) less likely to be addressed by enforcement action than SSOs from systems located in high impact areas (i.e., beach communities)?
2. Section C Provisions, Item 14, mentions that both the SSMP and the Enrollee's program to implement the SSMP must be certified to be in compliance with the requirements set forth by the appropriate governing board and must be presented to the board at a public meeting. Please indicate if all Enrollees are subject to this provision, or if the Draft Order gives some discretion for certification only of those programs that either have a high frequency of SSOs and/or pose a higher risk to public health and the environment.
3. Section C Provisions, Item 15, indicates that the SSMP must be updated every five (5) years and must include any significant program updates. Please define or clarify the term "significant updates."

Monitoring and Reporting Program

1. A section should be added explaining "Monitoring". The Monitoring and Reporting program only discusses reporting with no mention of monitoring. It is confusing if "Monitoring" is monitoring of the overall Spill Management Program or monitoring of and area a spill has occurred in.
2. Section B Record Keeping, Item 4, mentions a "prescribed monitoring program". Please explain what a monitoring program should include.
3. Section B Record Keeping, Item 5, n, discusses record keeping documentation of "performance" and "implementation measures". Can you clarify or give examples of what documentation of "performance" and "implementation measures" you are looking for.
4. Section B Record Keeping, please define or give examples of items 5.c. spill calls, and 5.d. spill records and how they are different from 5.b.