DEPARTMENT OF DEFENSE
REGIONAL ENVIRONMENTAL COORDINATOR, REGION 9
937 N. Harbor Drive, Box 81
San Diego, California 92132-0058

5090
Ser N40JRR.cs/0011
May 12, 2011

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

SUBJECT: COMMENT LETTER - SSS WDRs REVIEW & UPDATE

I am writing this letter on behalf of all of the military services in California as the Deputy Department of Defense (DoD) Regional Environmental Coordinator (REC) for EPA Region 9. We appreciate this opportunity to engage in public comment on the Sanitary Sewer Systems Waste Discharge Requirements (SSS WDRs) program, as a continuation of the proactive problem-solving that we engaged in with you on Water Quality Order No 2006-0003 (2006 Order) (See Enclosed Letter).

The DoD's concerns with respect to the 2006 Order were related to the fact that the program, at that time, was limited in scope to "public entities." (See 2006 Order Definitions of "enrollee"). The Federal Water Pollution Control Act (Clean Water Act (CWA)), Section 313 (a), provides that the Federal Government is subject to federal, state and local regulations in the "same manner, and to the same extent as any nongovernmental entity". The DoD worked with your technical and legal staff to address this issue and reached an understanding that the DoD in California would not need to file Notice of Intent under the 2006 Order, while avoiding Notice of Deficiencies / Violations or assessments of fines or penalties. The Staff Report for Order 2011 XXXX acknowledges resolution of this issue stating, "regulating private collection systems will bring equity to the SSO Reduction Program because it would be regulating public and private collection systems with an even hand. Regulating private collection systems will also resolve issues with federal facility participation in the SSS WDRs." (Staff Report, page 6) The current revisions to the SSS WDRs satisfactorily resolve the sovereign immunity "discrimination" issue the DoD REC raised with respect to the 2006 Order.

However, the SSS WDRs raise another issue relating to the scope of the state's authority to regulate federal facilities. Specifically, the SSS WDRs broaden the prohibition against spills to "waters of the United States" to a prohibition against spills to "surface waters of the state." Order 2011 XXXX, in the section entitled "Regulatory Considerations" describes the jurisdictional scope of the federal CWA as follows:

> The Federal Clean Water Act largely prohibits any discharge of pollutants from a point source to *waters of the United States* except as authorized under an NPDES permit. In general, any point source discharge of sewage wastewater effluent to *waters of the United States* shall comply with technology-based, secondary treatment standards, at a minimum, and any more stringent requirements necessary to meet applicable water quality standards and other requirements. Hence, the unpermitted discharge of wastewater from a sanitary sewer system to *waters of the United States* is illegal under the Clean Water Act. (Emphasis added)

As you are well aware through our work with the State and Regional Water Quality Control Boards over many years, the DoD has active compliance programs containing permitting requirements that address discharges into "waters of the United States" as defined in 40 C.F.R. § 122.2.

There is a legal issue as to whether the waiver of sovereign immunity within the CWA subjects federal facilities to State regulations respecting discharges into "surface waters of the state." Arguably, the federal government is not subject to requirements to control the discharge of pollutants into "waters of the state." The seminal Supreme Court decision that addressed the scope of the CWA sovereign immunity waiver is *Department of Energy (DOE) v. Ohio*, 503 U.S. 607 (1992). In that case, the Supreme Court stated:

> We start with a common rule, with which we presume congressional familiarity, that any waiver of the National Government's sovereign immunity must be unequivocal.[1]. "Waivers of immunity must be `construed strictly in favor

[1] *United States v. Mitchell*, 445 U.S. 535, 538-39 (1980)

of the sovereign,'[2], and not `enlarge[d] . . . beyond what the language requires.'"[3]

Further, the Supreme Court stated that absent a "[a] clear and unequivocal waiver … a broader waiver may not be inferred."[4]

At present, the federal government complies with requirements prescribed by the CWA governing discharges to "waters of the United States." Without an unequivocal Congressional waiver of sovereign immunity with respect to the regulation of discharges to surface waters of the state, Supreme Court precedent indicates that sovereign immunity has not been waived in this regard.

Based on the Staff Report, it appears that the state was partially motivated to move from regulation of "waters of the United States" to regulation of "waters of the state" in order "to eliminate confusion regarding what constitutes a prohibited spill." (Staff Report page 8).

While this may have provided clarity for compliance from the state's perspective, it creates legal concerns from the DoD's perspective.

Provided that legal concerns are resolved, and once the SSS WDR order is final, DoD will develop compliance plans and request budget allowances for the DoD SSS that trigger the two prong applicability criteria (a. connected pipes greater than 1 contiguous mile, and b. conveys greater than 25,000 gal/day), and discharge into "waters of the United States." DoD requests 12-24 months to submit Sanitary Sewer Management Plans (SSMPs) and associated documents to the State Board for these facilities, rather than 3-12 months in the current draft, to accommodate federal funding timelines.

It is important to note that DoD SSS are currently funded and resourced to manage and operate this infrastructure in support of base operations. These facilities would also be subject to applicable USEPA programs that may be developed at the federal level and referenced in the Staff Report. As you are aware through our relationship for many years, DoD strives

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[2] *DOE v. Ohio*, 503 U.S. 607 at 615 (citing *McNary* v. *Haitian Refugee Center*, 498 U. S. 479, 496, (1991); *United States* v. *Mitchell*, 445 U.S. 535, 538-39 (1980); *McMahon v. United States*, 342 U.S. 25, 27 (1951)).

[3] *DOE v. Ohio*, 503 U.S. at 615 (internal citations omitted)(citing *McNary* v. *Haitian Refugee Center*, 498 U. S. 479, 496, (1991); *United States* v. *Mitchell*, 445 U.S. 535, 538-39 (1980); *McMahon v. United States*, 342 U.S. 25, 27 (1951); *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927)); See also *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-86 (1983).

[4] *DOE v. Ohio*, 503 U.S. at 619-20; See *Ruckelshaus*, 463 U.S.,at 685-86.

to protect water quality through many of its programs and policies as a good neighbor within California.

If you have any questions feel free to contact Mr. Michael Huber, DoD REC Program Manager at 619-532-2303.

Sincerely,

C. L. STATHOS
By direction

Enclosure: 1. DoD REC 9 SSS letter of 29 March 2007

Copy to: Ms. Shelia Vassey, Senior Staff Counsel

DEPARTMENT OF THE NAVY
COMMANDER NAVY REGION SOUTHWEST
937 N. HARBOR DRIVE
SAN DIEGO, CA 92132-0058

IN REPLY REFER TO:
4600
Ser N02/152
March 29, 2007

Ms. Sheila K. Vassey
Senior Staff Counsel
Legal and Public Affairs Office
California Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Dear Ms. Vassey:

On behalf of the Department of Defense Regional Environmental Coordinator for the military services in U.S. Environmental Protection Agency Region 9. In this capacity, my staff and I enjoy working cooperatively with the California Environmental Protection Agency and other state and local environmental agencies. In the past, our corroborations have enabled the exchange of information on environmental issues and the coordination of projects and initiatives in which our organizations have shared interests. This has helped us to avoid conflicts where possible and resolve differences amicably and efficiently, all toward the goal of greater compliance with environmental regulations.

I write regarding Water Quality Order No. 2006-0003 (Order). While the military services in California work to comply with state and local environmental laws and regulations, this particular order presents obstacles to federal agency compliance that cannot be overcome. As you are aware, the U.S. Congress must specifically authorize state regulatory authority over federal facilities through a clear statement of that intent in federal statute. In the case of the subject order, the Clean Water Act (CWA) does not contain such Congressional authorization.

The Order addresses Waste Discharge Requirements (WDRs) for Sanitary Sewer Systems. In the Order, the State Water Resources Control Board (SWRCB) exempted private entities from regulation, while explicitly regulating public agencies, including federal agencies. This makes the Order discriminatory against the federal government. I note the definition of enrollee under the WDRs:

ENCLOSURES (1)

A federal or state agency, municipality, county, district, and other public entity that owns or operates a sanitary sewer system, as defined in the general WDRs, and that has submitted a complete and approved application for coverage under this Order[1]

While this definition specifically includes federal entities, private entities are, on the face of the Order, entirely unregulated. For the waiver of sovereign immunity to apply under the CWA, regulation of federal facilities must be conducted "in the same manner and to the same extent as any nongovernmental entity."[2] Because the Order does not regulate private entities at all, it is discriminatory and any attempt to enforce its provisions against the federal government would be in violation of federal law.

The fact sheet for the Order makes clear that private entities were considered for regulation and rejected. The fact sheet groups collection systems into four categories, two of which are private. It goes on to state: "Privately owned systems (categories 3 and 4) are not subject to the WDRs . . ." and that regulating categories 3 and 4[3] on a statewide basis "would be unmanageable and impractical (because of the extremely large number and lack of contact information and other associated records)."

The waiver of sovereign immunity under the Clean Air Act, which has identical waiver language as the CWA, was analyzed in detail in a memorandum recently issued by the Chief Counsel for the California Air Resources Board, *Applicability of Clean Air Act Waiver of Sovereign Immunity to Enforcement of ARB's Public and Utility Fleets Regulation Against Federal Fleets When Private Fleets are Generally Not Subject to the Regulation*, Nov. 9, 2006, a copy of which is attached. The analysis contained in that memorandum persuasively demonstrates that the federal government cannot be compelled to comply in circumstances where regulatory requirements are not equally applicable to agencies of the federal government and private entities.

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[1] Order, Definition A. 3.
[2] 33 USC section 1323(a), CWA section 313(a).
[3] Category 1 covers publicly-owned treatment works, 2 covers publicly-owned satellites, 3 covers private laterals, and 4 covers privately owned treatment works.

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I must note that the DoD installations in California to which the Order purports to apply have made every effort thus far to comply with its applicable regulatory requirements. This is in accordance with the DoD's proactive policies on environmental compliance and stewardship. However, federal law simply prohibits further recognition of the authority of the Order until the Board adequately addresses this question of disparate treatment.

Thank you for your consideration of this matter. My point of contact should you have any questions or wish to discuss this matter in further detail is Mary Kay Faryan who can be reached at 619-532-4301.

Sincerely,

RENE TREVINO
Executive Director
Commander,
Navy Region Southwest

Copy to: Eric Maag, Staff Engineer