

April 20, 2007

Ms. Tam Doduc, Chair, State Water Resources Control Board
Members, State Water Resources Control Board

Ms. Song Her, Clerk to the Board
1001 I Street, 24th Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100

**SUBJECT: A-1771—MAY 1, 2007 BOARD MEETING
DRAFT STATE WATER BOARD ORDER REGARDING EBMUD
WET WEATHER PERMIT AND TIME SCHEDULE ORDER**

The National Association of Clean Water Agencies (NACWA) appreciates this opportunity to provide additional comments regarding proposed changes to the National Pollutant Discharge Elimination System (NPDES) permit and time schedule order issued to the East Bay Municipal Utility District (EBMUD) for its peak excess flow treatment facilities (PEFTFs). NACWA provided previous comments dated February 20, 2007 to the State Water Resources Control Board (State Board) regarding this matter. However, upon review of the revised draft order issued by the State Board on March 21, 2007, NACWA continues to have significant concerns with the legal basis for the proposed order, specifically regarding the State Board's interpretation of *Montgomery Environmental Coalition v. Costle*, 646 F.2d 568 (D.C. Cir. 1980).

The State's Board's interpretation of the *Montgomery v. Costle* decision in the proposed order is inconsistent with the holding of the case, which found that collection systems are a separate entity from a treatment plant and that EPA properly excluded sewage overflow points from the definition of "treatment works." Specifically, the court in *Montgomery* stated that "the appropriate standards for setting effluent limitations are derived from the best practicable technology requirement of section 301(b)(1)(A) (as well as any more stringent state limits under section 301(b)(1)(C)), instead of the secondary treatment standards of section 301(b)(1)(B)." 646 F.2d at 592. Furthermore, the *Montgomery* court held that Clean Water Act (CWA) section 212's definition of treatment works was inapplicable to CWA section 301, which lays out the secondary treatment requirement. The court noted that the approval of the section 212 definition was "not a determination that attaching a sewer system to a treatment facility would require secondary treatment at formerly independent overflow points." *Id.* at 591.

This holding in *Montgomery* was reinforced by the Environmental Protection Agency (EPA) almost two decades later, when EPA's proposed SSO regulation contained a lengthy discussion about creating a separate permitting program for collection

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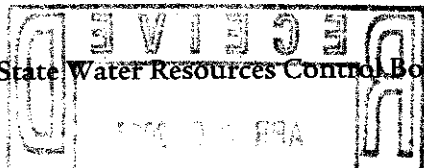
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systems. In making such a proposal, the Agency endorsed the *Montgomery* ruling that collection systems are separate from treatment works and must be permitted separately. In line with this approach is the understanding that collection systems cannot be required to meet secondary treatment unless specifically required to under a separate permit, something which neither EPA nor the State Board has done with the EBMUD collection system.

The State Board's analysis of the *Montgomery* decision in the proposed EBMUD order, while extensive, is flawed and misinterprets a critical component of the D.C. Circuit's opinion. The State Board's primary argument as to why *Montgomery* does not apply in the EBMUD situation is because the *Montgomery* case only applies to combined overflow systems (CSOs), whereas the EDMUD system is a sanitary sewer overflow (SSO) system. However, this distinction misses the key point of the *Montgomery* holding, which is that points within the collection system cannot be considered part of the treatment works as defined in CWA Section 212. Whether the collection system is part of a combined sewer system or a separate sewer system is irrelevant. Accordingly, the PEFTFs operated by EBMUD, which are part of the collection system, fall squarely within the holding of *Montgomery* and should not be required to meet secondary treatment standards.

As the national representative of almost 300 of the nation's public wastewater utilities, including over 30 in the State of California, NACWA is committed to helping our members achieve the highest levels of environmental stewardship. We are also committed to fair and uniform implementation and enforcement of clean water policies and regulations, and we strongly encourage the State Board to reconsider its analysis of the *Montgomery* decision. The case remains one of the most important interpretations of the CWA, and NACWA is concerned that the misinterpretation of *Montgomery* in the State Board's proposed order will not only affect EBMUD, but will also set an unfortunate precedent for other progressive clean water agencies in California. For these reasons, we invite the State Board to revise its analysis of the *Montgomery* decision.

Sincerely yours,

Alexandra Dapolito Dunn
General Counsel