5/1/07 BdMtg Item 6
EBMUD
Deadline: 4/20/07 5pm

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Via Facsimile (916-341-5620) and Email (commentletters@waterboards.ca.gov)

Ms. Song Her
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor (95814)
P.O. Box 100
Sacramento, California 95812-0100

Re: Comments to A-1771 – May 1, 2007 Board Meeting
State Water Resources Control Board (SWRCB) Own Motion Review of East Bay Municipal Utility District (EBMUD) Wet Weather Facilities (WWFs) NPDES Permit (Order No. R2-2005-0047; NPDES No. CA0038440) and Time Schedule Order (TSO No. R2-2005-0048), San Francisco Bay Regional Water Quality Control Board (RWQCB)

EBMUD Comments on SWRCB Staff's March 21, 2007 Revised Draft Order

Dear Ms. Her:

EBMUD hereby submits the following comments concerning the SWRCB staff's March 21, 2007 Revised Draft Order (RDO).

Revisions to Section II.A.1: The RDO revises the SWRCB staff's January 12, 2007 Draft Order (DO) discussion of *Montgomery Environmental Coalition et al. v. Costle*, 646 F.2d 568 (D.C. Cir. 1980) [*Montgomery I*]. Significantly, the revisions include no response to the following points from EBMUD's February 20, 2007 letter commenting on the DO:

- The wet weather facilities in *Montgomery I* are functionally identical to EBMUD's wet weather facilities. Both (1) maximize flows to the main (secondary) treatment plant, (2) give primary treatment to the majority of any overflows and (3) allow untreated discharges only in extreme wet weather events. *Montgomery I*, 646 F.2d at 585; *Montgomery Envtl. Coalition v. Citizens Coordinating Comm. on Friendship Heights*, 1983 U.S. App. LEXIS 27509 (D.C.

Cir. 1983) [*Montgomery II*] at *12 (the RDO omits any reference to *Montgomery II*).

- The *Montgomery I* court's holding – that wet weather overflow points providing either primary or no treatment are not POTWs and therefore not subject to secondary treatment – was based on the function of the wet weather facilities, not the nature of the feeder sewer system (combined or separate).

- The RDO notes the difference between combined and separate systems and then baldly asserts that *Montgomery I* does not apply to the latter, without identifying any language in the case suggesting the difference has any legal significance.

New Section II.A.4: The RDO adds a new section 4 to the Findings, inviting the SWRCB to direct the RWQCB to include in the EBMUD permit "effluent limitations based on secondary treatment standards," and in the TSO endpoints by which EBMUD must "achieve secondary treatment standards or cease discharge" from its WWFs.

The RDO fails to resolve the resulting practical problem pointed out in EBMUD's February 20, 2007 comment letter: "secondary treatment" is not defined for intermittent flow facilities such as the WWFs. The only regulatory definition of the term provides, for example, that the 30-day average for BOD shall not exceed 30 mg/L. 40 CFR §133.102(a)(1). The definition of "30-day average" requires the "arithmetic mean of ... samples collected in a period of 30 consecutive days." 40 CFR §133.101(b). The WWFs have never had 30 consecutive days of flow.

This reinforces the conclusion (based on *Montgomery I*) that secondary treatment does not apply to these facilities. Moreover, it shows that, in the unlikely event that *Montgomery I* is ever over-ruled, EPA would have to engage in notice-and-comment rule-making – to define "secondary treatment" for intermittent flow facilities – before there would be a standard that could legally be applied to the WWFs.

Additions to Section II.B.1 regarding Ammonia: The RDO concedes there is no effluent monitoring data for ammonia. Nevertheless, the RDO asserts ammonia in the effluent has a "reasonable potential" for causing an exceedance of the ammonia objective for the receiving water, citing a March 1991 EPA technical support document (TSD).[1] The TSD, however, notes that the permitting authority must consider, among other things, "the dilution of the effluent in the receiving water." 40 CFR 122.44(d)(1)(ii), cited at TSD p. 50. The TSD further notes that:

> whereas a majority of NPDES permittees nationwide discharge to areas during annual mean flow ranging in dilution from 100 to 1,000, the majority of dischargers fall into the 1 to 10 dilution range during low-flow conditions.

[1] "Technical Support Document For Water Quality-based Toxics Control" (March 1991), EPA/505/2-90-001, section 3.2, at p. 50 (cited in RDO footnote 91).

TSD, p. 50. Here, the WWFs discharge only during and shortly after severe wet weather events, when the receiving water flows (and attendant mixing and dilution levels) are neither "low" nor "mean [i.e., average]" but "high." Thus, the very document cited by the RDO suggests that the applicable dilution rate is greater than the "100 to 1,000" range found to be average. This is significant because the TSD also says:

> If an effluent's concentration at the edge of a mixing zone in a receiving water is expected to reach 1 percent or higher during critical or worst-case design periods, then such an effluent may require a toxicity limit....

TSD, p. 50 [emphasis added]. This implies that where, as here, dilution will drive effluent concentration below 1 percent, this factor militates against a toxicity limit.

Another factor listed in the TSD is whether the receiving water has been listed under Clean Water Act section 303(d) as being impaired for the constituent in question. TSD, p. 51. The receiving water here has not been listed for ammonia.

Moreover, the TSD directs permit-writers to exercise caution before imposing permit limits without effluent monitoring data:

> Regardless, the regulatory authority, if it chooses to impose an effluent limit after conducting an effluent assessment without facility-specific monitoring data, will need to provide adequate justification for the limit in its permit development rationale or in its permit fact sheet. A clear and logical rationale for the need for the limit covering all of the regulatory points will be necessary to defend the limit should it be challenged. In justification of a limit, **EPA recommends that the more information the authority can acquire to support the limit, the better a position the authority will be in to defend the limit if necessary**. In such a case, the regulatory authority may well benefit from the collection of effluent monitoring data prior to establishing the limit.

TSD, p. 51 (**bolding** in original; underscoring added).

The SWRCB should heed this admonition. As noted in EBMUD's February 20 comment letter, EBMUD is already collecting un-ionized ammonia data. The decision as to whether to impose ammonia limits should be deferred until appropriate and sufficient data have been collected and analyzed.

Addition to Footnote 114: The language added to footnote 114 notes that a statewide policy on compliance schedules is still under development and thus in a state of flux. This effectively concedes that (a) EBMUD's permit is the wrong procedural vehicle for the SWRCB to articulate policies of such sweeping state-wide importance and (b) using that vehicle amounts to illegal under-ground rule-making, in violation of the Administrative Procedures Act.

Matters not addressed: The RDO wholly ignores the procedural due process issues enumerated at pages 14-22 of EBMUD's February 20 comment letter. In particular, SWRCB has provided no explanation as to why these proceedings have involved improper ex parte communications, inadequate separation of the agency's prosecutorial and adjudicative functions, an incomplete administrative record, and the lack of any proposed (much less approved) "own motion."

For the foregoing reasons, the RDO should be withdrawn, and the permit and TSO should not be disturbed.

Very truly yours,

Brian S. Haughton

BSH/af