



**SAN FRANCISCO PUBLIC UTILITIES COMMISSION**

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February 20, 2007

VIA EMAIL ([commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov))



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Ms. Tam Doduc, Chair, and Members  
State Water Resources Control Board  
and Ms. Song Her  
Clerk to the Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814

RE: Comments on the Draft Order for Own Motion Review of East Bay Municipal Utility District's Wet Weather Permit (Order No. R2-2005-0047 (NPDES No. CA0038440)) and Time Schedule Order (Order No. R2-2005-0048), San Francisco Bay Region, SWRCB/OCC File A-1771

Dear Ms. Doduc and Members of the State Water Resources Control Board:

The San Francisco Public Utilities Commission (SFPUC) appreciates the opportunity to provide comments on the State Water Board's Draft Order regarding East Bay Municipal Utility District's (EBMUD) wet weather discharge permit (Order No. R2-2005-0047, NPDES No. CA0038440). SFPUC operates one of the few combined sewer systems in California, and thus has a substantial interest in the proper interpretation and application of state and federal regulatory policies for wet weather discharges. We are concerned that the Draft Order, if issued unchanged, could result in significant consequences for other jurisdictions with wet weather treatment facilities and substantially undermine the Environmental Protection Agency's (EPA) efforts to meaningfully control wet weather discharges.

The threshold issue in the Draft Order is which technology-based Clean Water Act (Act) standards apply to discharges from EBMUD's wet weather facilities: the secondary treatment standard imposed on publicly owned treatment works by section 301(b)(1)(B) of the Act, or the best practicable technology standard imposed on non-publicly owned treatment works by section 301(b)(1)(A). The Draft Order's analysis misconstrues the applicable case law by confusing the term "treatment works," a term of art with specific meaning under the Clean Water Act, with generic concepts of "treating" sewage. In essence, the Draft Order concludes that the wet weather facilities are "treatment works" subject to secondary treatment standards merely because they treat and store municipal sewage of a liquid nature and are owned by a municipality<sup>1</sup>.

The opposite conclusion was reached by the Court of Appeals in *Montgomery Environmental Coalition v. Costle*.<sup>2</sup> As noted by the Court, the essence of the controversy was whether overflow points are part of the "treatment works" within the

<sup>1</sup> Draft Order, p. 10.

<sup>2</sup> 646 F.2d 568 (D.C. Cir. 1980).

SFPUC Comments on Draft Order of East Bay  
Municipal Utility District's Wet Weather Permit  
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meaning of section 301(b)(1)(B) of the Act. The Court concluded that the broad and inclusive definition of "treatment works" in section 212 of the Act did not define the meaning of that term for the purposes of applying the technology-based standards of section 301, and that EPA's exclusion of overflow points from that definition was an appropriate interpretation of the Act.<sup>3</sup> Based on this determination, the Court concluded that the proper technology-based standard for regulating wet weather overflows is the same standard that applies to private discharges, rather than the secondary treatment standard applicable to publicly owned treatment works.<sup>4</sup>

Contrary to the Draft Order, the Court's reasoning that secondary treatment standards were not required was not based on an assessment "that the overflow points did not provide storage or treatment, but rather were for the uninhibited discharge of sewage." Indeed, the only reference to such language in the opinion was the Court's description of EPA's argument in the case.<sup>5</sup> Under *Montgomery*, "treatment" of wet weather overflows does not transform such facilities into publicly owned treatment works subject to secondary treatment standards.

Subsequent to the *Montgomery* decision, the same Court reviewed a challenge by the same plaintiffs to the NPDES permit issued several years after its first decision. Plaintiffs contended that EPA failed to impose water quality or technology based limits on overflows from the sewer system. The Court rejected the challenge, finding that

...the Blue Plains permit compels the facility to maximize treatment of the combined sewer overflows by requiring that flows to the facility be maximized, thus limiting the amount of overflow, and by requiring that the majority of any remaining overflow be given "primary" treatment.<sup>6</sup>

EPA clearly understood that "treatment" of wet weather overflows would not transform such facilities into publicly owned treatment works subject to secondary treatment standards.

In truly circular fashion, the Draft Order states that

...even assuming for the sake of argument that the *Montgomery* holding could properly be applied to EBMUD's overflow structures, this would not change the conclusion that discharges from the wet weather facilities must achieve secondary treatment.<sup>7</sup>

And when referring to EPA's 1986 approval of EBMUD's wet weather facilities operations, the Draft Order states that

<sup>3</sup> *Id.*, p. 591.

<sup>4</sup> *Id.*, p. 592.

<sup>5</sup> Quoting Draft Order, p. 11; see *Montgomery v. Costle*, *supra*, p. 590.

<sup>6</sup> *Montgomery Environmental Coalition v. EPA* (D.C. Cir. 1983) 1983 U.S. App. LEXIS 27509, 19 ERC (BNA) 1169.

<sup>7</sup> Draft Order, p. 12.

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Even if that conclusion remained correct today, the wet weather facilities are not overflow structures. Unlike the overflow structures, which allowed the untreated and unimpeded discharge of raw sewage, the wet weather facilities provide treatment and are a POTW.<sup>8</sup>

This misreading of the *Montgomery* decision would render meaningless EPA's efforts to control wet weather discharges, including its Combined Sewer Overflow Control Policy and its current negotiations with dischargers and environmental protection organizations regarding discharges from peak excess flow treatment facilities. Under the Draft Order, almost any effort to control wet weather discharges would mean the flow is no longer "uninhibited," "untreated" or "unimpeded," and thus would be subject to secondary treatment requirements. This result was neither intended nor required by the Clean Water Act and the *Montgomery* court.

We respectfully urge the State Water Board to revise its analysis to reflect an accurate interpretation of the Clean Water Act and the *Montgomery* decision.

Sincerely,



Thomas Franza, Assistant General Manager  
Wastewater Enterprise

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<sup>8</sup> Draft Order, p. 13.