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February 20, 2007

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SUBJECT: **A-1771—MARCH 6, 2007 BOARD MEETING**
DRAFT STATE WATER RESOURCES CONTROL BOARD ORDER REGARDING EBMUD WET WEATHER PERMIT AND TIME SCHEDULE ORDER

The National Association of Clean Water Agencies (NACWA) appreciates this opportunity to provide comments on the proposed change to the National Pollutant Discharge Elimination System (NPDES) permit and time schedule order issued to the East Bay Municipal Utility District (EBMUD) regarding its peak excess flow treatment facilities (PEFTFs). The proper regulation of PEFTFs is one which affects not only EBMUD, one of NACWA's member agencies, but other municipal clean water utilities in California and across the nation.

NACWA represents over 300 of the nation's public wastewater utilities, including over 30 in the State of California, and 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. NACWA and its member utilities view the protection of water quality and public health as core values and the central component of their mission. Some of the most significant challenges to meeting water quality and public health goals result from problems caused by wet weather. NACWA and its member agencies have been actively engaged on the many policy questions surrounding the regulation of sanitary sewer overflows (SSOs), PEFTFs, and peak flow blending for decades. We are committed to obtaining consistent national policy for these categories of wet weather related events and practices.

The proposed order regarding EBMUD's PEFTFs is of significant concern to NACWA for several reasons. First, the appropriate treatment standard for PEFTFs has been a subject of extensive national attention, discussion, and deliberation for many years. To date, after several terminated efforts, the U.S. Environmental Protection Agency (EPA or Agency) has not released a final policy governing PEFTFs. However, the approach taken in the proposed order runs counter to several draft polices on PEFTFs contemplated in past years. Second, the proposed order is based on a fundamental misinterpretation of an important federal case for the nation's sewer systems, *Montgomery Environmental Coalition v. Costle*, 646 F.2d 568 (D.C. Cir. 1980). Third, the proposed order will discourage, rather than encourage, the treatment of peak wet weather flows – perversely resulting in a net loss to the environment.

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We urge the State Water Resources Control Board to withdraw its proposed order, and to instead work collaboratively with EBMUD and other California dischargers to achieve environmental progress. We invite the State Water Resources Control Board to engage in a thoughtful, national discussion on the regulatory regime for PEFTFs, rather than unilaterally to impose inappropriately stringent and counter-productive new requirements on one, progressive agency which has taken significant strides to offer better treatment to peak flows in an uncertain regulatory climate.

I. Efforts to Craft a Federal Policy on PEFTFs

The following discussion summarizes the extensive effort that U.S. EPA has put into its still-unfinished attempt to develop an appropriate regulatory framework for PEFTFs. Many of these efforts struggled with whether, and under what circumstances, to apply the secondary treatment standard to PEFTFs. In every instance, EPA recognized it was critical to develop a workable approach for facilities that were not designed to meet such a standard. The State Water Resources Control Board's proposed order fails to take a similar approach that acknowledges the uncertain regulatory regime for these structures, and fails to offer a constructive approach for working with EBMUD to address its concerns.

A. Early FACA

EPA's Federal Advisory Committee Act (FACA) working group on sanitary sewer overflows (SSO FACA) spent many years attempting to develop national policy on PEFTFs. Notably, a September 30, 1999 paper (ATTACHMENT A) on the subject acknowledged the varied approaches that had been used for PEFTF permitting and regulation in the past:

> "To date, the NPDES permits issued for PEFTF discharges have not established consistent requirements and have used different regulatory constructs (e.g. limits based on secondary treatment, approved anticipated bypass, limits based on BAT/BCT plus water quality-based requirements). Some existing permits do not establish any effluent limitations, while others provide effluent limitations based on the 30-day averages provided in the secondary treatment regulations (40 CFR 133 (see attachment A for a summary of the secondary treatment regulations)). Consequently, the type and degree of treatment of facilities that have been authorized in the past varies widely."

The paper proposed two options for future PEFTF regulation. EPA acknowledged that modification and clarification of the NPDES permit regulations might be appropriate to better clarify the best approach for regulating PEFTFs.

B. Withdrawn Proposed SSO Rule

Ultimately, in late 2000, EPA released its proposed SSO regulation and scheduled it for publication in the Federal Register. Although the regulation was pulled back in early 2001, EPA's proposed rule contained a lengthy discussion of PEFTF regulation. Notably, as reflected in this preamble excerpt, EPA requested comment on the continued use of PEFTFs in limited circumstances.

> c. Interim use of Peak Excess Flow Treatment Facilities
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> "EPA has identified a limited number of cases where NPDES permits have been used to authorize or approve infrequent discharges from a peak excess flow treatment facilities (PEFTFs) located in sanitary sewer collection systems. In the past, the NPDES permits issued for PEFTF discharges have used different regulatory constructs. The Agency has identified permits written for facilities in Texas, California, and New York, that authorize discharges from PEFTFs and do not incorporate effluent limitations based on secondary treatment. EPA requests comments on the existence of NPDES permits

> authorizing discharges from PEFTFs in other States, and the framework under which those permits were issued, including articulated expectations for how long the facilities were expected to operate."

Recognizing the challenge that such a policy/regulatory change would have on existing systems, EPA went on to note that:

> "The approach outlined below discusses how EPA would address PEFTFs that are not designed to meet effluent limitations based on secondary treatment or any more stringent water quality-based requirements on an interim basis in enforcement actions."
>
> "Where a permittee's system evaluation and capacity assurance plan and program audit indicate that elimination of avoidable wet weather SSOs will take a long time (e.g., five to twenty years), EPA recognizes that interim use of a PEFTF to reduce adverse health and/or environmental impacts may be appropriate. EPA requests comment on potential health and/or environmental impacts or benefits of long-term PEFTF use, and on the treatment efficiency of various technologies used for PEFTFs, and how such treatment efficiencies compare to biological treatment systems operating under peak flow conditions."

The Agency also crafted "criteria for wanting, or needing, PEFTFs." Once again, EPA's choice of language acknowledged that some PEFTFs would need to continue in operation in the future. EPA also acknowledged in these criteria that there would be PEFTFs "that will not comply with effluent limits for secondary treatment and any more stringent limits necessary to meet water quality standards" and that such PEFTFs could only do so in the context of the specified procedures. Also relevant to EBMUD's situation, EPA noted that "[e]xisting permitted PEFTFs could remain under permit until expiration of the permit."

C. 2001 Draft Memo

The Agency continued to attempt to develop federal policy on PEFTFs through a later 2001 effort. On December 21, 2001, EPA released for stakeholder comment a draft memorandum entitled *NPDES Requirements for Municipal Wastewater Treatment During Wet Weather Conditions* (ATTACHMENT B). In this memorandum, also not finalized, the Agency noted that "EPA may address a peak excess flow treatment facility that is not designed to meet effluent limitations based on secondary treatment (and any necessary more stringent water quality-based requirements) on an interim basis in an enforcement action which provides a formal commitment and schedule to carry out a plan to correct problems."

D. 2004 Report to Congress on the Impacts and Control of CSOs and SSOs

On August 26, 2004, EPA released its *Report to Congress on the Impacts and Control of Combined and Sanitary Sewer Overflows* (*Report*) (*http://cfpub.epa.gov/npdes/cso/cpolicy_report2004.cfm*), the second and final report that EPA was required to develop in accordance with the Consolidated Appropriations Act for Fiscal Year 2001. The *Report* finds that while there is evidence that "CSOs [combined sewer overflows] and SSOs [sanitary sewer overflows] may cause or contribute to environmental and human health impacts" it is "difficult to establish a cause-and-effect relationship between" human illnesses or water quality impacts/impairments and overflows.

Notably, EBMUD's system is consistent with the technologies explored and outlined by EPA in its *Report* chapter focused on *Technologies Used to Reduce the Impacts of CSOs and SSOs*. This chapter notes that "[t]he development of wet weather treatment systems presents a viable alternative to storing excess flows." *Report* at 8-13. It also states that "treatment technologies are assumed to operate intermittently, with dry weather flows from the CSS or SSS handled by the existing wastewater treatment plant. Treatment technologies considered here include strategies for developing wet weather treatment capacity at remote locations in the sewer system . . ." and "[d]isinfecting

excess wet weather flows." *Id.* at 14. The *Report* also discusses "Disinfection Coupled with Solids Removal" as an effective and beneficial technology pairing. *Id.* at 8-21,8- 22.

E. Recent Federal Consent Decrees

Since 2001, EPA has not released any guidance or drafts focused on PEFTFs. However, in federal consent decrees, EPA has allowed cities to construct new PEFTFs that will not achieve secondary treatment. These facilities are being constructed as part of a comprehensive approach to wet weather resolution in various parts of the country.

II. Interpretation of *Montgomery v. Costle* Decision

NACWA is extremely concerned with the State Water Resources Control Board's interpretation of the *Montgomery v. Costle* court decision in the proposed order (646 F.2d 568 (D.C. Cir. 1980)). The *Montgomery* case determined that EPA ***properly excluded sewage overflow points from the definition of "treatment works"*** and 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). Proper application of the best practicable technology standard would scarcely allow raw sewage to be discharged 'at will.'" 646 F.2d at 592.

The *Montgomery* court recognized that CWA section 212's definition of treatment works including collection systems applied "as used in this subchapter" – the subchapter on "Grants for the Construction of Treatment Works." Accordingly, the *Montgomery* court held the section 212 definition was inapplicable to CWA section 301 (which lays out the secondary treatment requirement):

> "The legislative history also indicates that the broad definition of treatment works in section 212 was viewed as an expansion beyond the common meaning of the word, and expansion justified by the context of the federal grant authorization . . . . Approval of this new definition in the narrow context of construction grants 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 (emphasis added).

Dramatically conclusive is the *Montgomery* court's statement that "neither the language of the Act nor its history supports the conclusion that the definition of 'treatment works' in section 212 should be viewed as supplying the meaning of that term in section 301." *Id.*

Consistent with *Montgomery* is the fact that nearly two decades later, EPA's SSO proposed regulation contained a lengthy discussion regarding creating a ***separate permitting program for collection systems***. Notably, if EPA believed collection systems were part of the POTW, the concept of a separate permitting program for them would make no sense at all. EPA acknowledged in its proposed rule that inadequately maintained collection systems that feed into regional systems (like EBMUD's) can cause serious problems for those regional systems. Of particular note from EPA's proposed rule is the following statement:

> "The Agency believes that poorly performing municipal satellite collection systems ***can be major contributors to peak flow problems in regional collection systems***. In addition, the Agency believes that the investment in maintenance, repair and enhanced capacity of municipal satellite collection systems has often historically lagged behind that for regional municipal collection systems. This lag in investment is generally due to institutional issues such as lack of responsibility by municipal satellite collection system operators for problems downstream in the collection system or at a treatment plant, even where

> the municipal satellite collection system may have been a significant source of capacity problems downstream. In addition, direct oversight by EPA and NPDES States has been limited."

EBMUD's PEFTFs provide treatment of wet weather flows from many of these municipal satellite collection systems. In light of the recognized limitations of those systems, EBMUD's efforts should be commended rather than curtailed.

III. Proposed Order will Discourage Treatment of Peak Flows

In 2003, NACWA conducted a wet weather survey of its membership. 75 utilities across the nation responded to the survey. Notably, among the 75 respondents with separate sanitary sewers, peak excess flow treatment facilities are used by 16 percent and 16 percent are considering PEFTFs as new or enhanced controls to improve peak flow control. The proposed order, if finalized, will ultimately discourage community efforts to enhance treatment of peak wet weather flows.

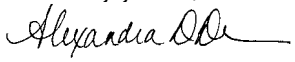
EBMUD's PEFTFs are consistent with concepts outlined in EPA's late 2005 policy on peak flow blending at separate sanitary sewer systems (70 *Fed. Reg.* 76,013 (Dec. 22, 2005)). Recognizing the unpredictability of, and challenges presented by, wet weather events, the peak flow policy expresses a strong preference for the capture and enhanced treatment of flows in wet weather. For example, EPA's proposed policy supports the "use of measures to provide the highest possible treatment to the greatest possible peak wet weather flow" and "maximizing the use of the collection system for storage" – both practices furthered by EBMUD's PEFTFs.

Furthermore, as U.S. EPA recognized in its September 30, 1999 issue paper, PEFTFs can reduce health risks by mitigating uncontrolled discharges (e.g., at manholes or in basement backups) in favor of discharges at a controlled location that receive a significant level of treatment. The infrequent treatment and discharge of extreme peak flows from PEFTFs may provide more effective treatment than stressed biological plants under peak flow conditions, and can protect the efficiency and stability of biological plants. It makes no sense to require PEFTFs to meet the 30-day averages of the secondary treatment regulations, or most 30-day average water quality criteria, since typically PEFTFs discharge very infrequently (2-6 times/year) and for limited duration (less that 24 hours). Finally, existing technologies for PEFTFs are not expected to provide 85% removal of BOD5, and may have difficulty meeting the 85% removal for suspended solids. The 85% removal requirement can be adjusted pursuant to 40 CFR 133.103(d), which authorizes either a lower percent removal requirement or a mass loading limit for facilities with less concentrated influent. Compliance with water quality standards should be addressed through the development of wet-weather criteria that properly take into account the frequency, magnitude and duration of isolated wet weather flows.

IV. Conclusion

Again, NACWA urges the State Water Resources Control Board to withdraw its proposed order, and to instead work collaboratively with EBMUD and other California dischargers to achieve meaningful environmental progress. We invite the State Water Resources Control Board to engage in a thoughtful, national discussion on the regulatory regime for PEFTFs, rather than to act hastily in restricting the use of existing, environmentally beneficial facilities by an agency that has taken significant strides to offer better treatment to peak flows in an uncertain regulatory climate.

Sincerely yours,



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