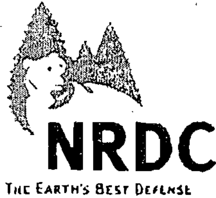

NATURAL RESOURCES DEFENSE COUNCIL

October 14, 2008

Via electronic mail and U.S. mail

Executive Officer and Members of the Board
Central Coast Regional Water Quality Control Board
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401

Re: Comments on Draft Revised Waste Discharges Requirements for the Morro Bay and Cayucos Wastewater Treatment Plant

Dear Mr. Briggs and Members of the Board:

On behalf of the Natural Resources Defense Council, Surfrider Foundation, the Sierra Club, and Defenders of Wildlife, and their thousands of members along the Central Coast we submit these comments on the draft of the Waste Discharges Requirements for the Morro Bay and Cayucos Wastewater Treatment Plant Discharges to the Pacific Ocean, Order No. R3-2008-0065, Transmitted September 4, 2008 ("Draft Permit"). These comments address the following concerns:

1. There is no legal basis to re-issue the 301(h) waiver for the Morro Bay/Cayucos Wastewater Treatment Plant ("Plant"), as the Plant has consistently not met the substantial burden established by the Clean Water Act and its implementing regulations.

2. The Draft Permit is in critical aspects vague and confusing or contradictory, specifically with regards to provisions that specify the conversion schedule and level of compliance to be attained by the Plant, and the provisions of its Cat Litter Outreach Program;

3. The Draft Permit repeatedly references and relies upon a Settlement Agreement between the Regional Water Quality Control Board, Central Coast Region ("Regional Board") and the City of Morro Bay/Cayucos Sanitary District ("Discharger") that is critical for meaningful review of the Draft Permit, but that the Regional Board has not made available to the public.[1] This is particularly alarming considering that the U.S. Environmental Protection Agency ("USEPA") finding of "No Likely Adverse Effect" for the continued discharge

[1] A three-year old draft of a settlement agreement is available on the Regional Board's website, but its terms do not reflect the current circumstances with the Plant, which have changed substantially since 2005.

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from the Plant was predicated on the existence of an enforceable agreement that the Plant upgrade, and;

4. The Draft Permit fails to accurately characterize the findings of scientific studies cited in the Permit, or the explicit concerns of the U.S. Fish and Wildlife Service ("USFWS") in issuing a concurrence with the findings of the USEPA Biological Evaluation.

As a result of these concerns, the Regional Board should not approve the Draft Permit until the issues raised have been resolved and the public given opportunity to provide meaningful comment on the Draft Permit after review of the Settlement Agreement.

There is No Basis for Re-Issuance of the 301(h) Waiver

40 C.F.R. § 125.59(b)(4) requires that, "No section 301(h) modified permit shall be issued . . . Where the discharge of any pollutant enters into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish, and wildlife." However, Estero Bay is a hot-spot for *T. gondii* infection of California sea otters, with 87 percent of sea otters sampled in the Cayucos-Morro Bay area testing seropositive for *T. gondii.*[2] As a result, and as NRDC has commented previously and the administrative record clearly reflects, the Plant has consistently failed to demonstrate that a balanced indigenous population will be supported with the continued discharge of partially treated wastewater. Further, the Plant has failed to meet its burden to show that any of a series of regulatory requirements imposed by the Clean Water Act for issuance of a 301(h) waiver will be met, including:

- The discharge of pollutants in accordance with such modified permits will not interfere, alone or in combination with pollutants from other sources, with the attainment and maintenance of that water quality which assures protection of public water supplies and protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife. (33 U.S.C. § 1311(h); 40 C.F.R. § 125.62(c)(2).)

- Conditions within the zone of initial dilution must not contribute to extreme adverse biological impacts, including, but not limited to, the destruction of distinctive habitats of limited distribution, the presence of disease epicenter, or the stimulation of phytoplankton blooms which have adverse effects beyond the zone of initial dilution. (40 C.F.R. § 125.62(c)(3).)

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[2] M.A. Miller et al., *Coastal freshwater runoff is a risk factor for Toxoplasma gondii infection of southern sea otters (Enhydra lutris nereis)*, 32 International Journal for Parasitology 997, 1001 (2002).

- That issuance of the 301(h) waiver will not conflict with applicable provisions of State, local, or other Federal laws or Executive Orders. This includes compliance with the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 et seq.; the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 et seq.; and Title III of the Marine Protection, Research and Sanctuaries Act, as amended, 16 U.S.C. 1431 et seq. (40 C.F.R. § 125.59(b)(3).)

(See, e.g., NRDC letter to Alexis Strauss and Jeffrey Young, March 13, 2006; NRDC letter to the Board of Directors of the Cayucos Sanitary District and City Council of the City of Morro Bay, June 20, 2003.) The USFWS, in its concurrence letter, has explicitly stated that "we are unable to determine the level of significance of adverse effects resulting from continued release of [Plant] wastewater that has been subject to only partial secondary treatment." (Letter from Steve Henry to Alexis Strauss, December 21, 2007.) Given that the Plant cannot demonstrate that its continued discharge will not have an adverse impact to indigenous wildlife, including the threatened California sea otter,[3] the application for a 301(h) waiver should be denied.

<u>The Draft Permit Repeatedly Refers to a Settlement Agreement that is Not Available for Review</u>

The Draft Permit repeatedly references a Settlement Agreement between the Regional Board and the Discharger, but this Settlement Agreement has not been made available for public review or comment. The availability of the Settlement Agreement is critically important given that a number of terms relating to the Draft Permit's requirements for the Plant upgrade are detailed in the Agreement itself. In effect, the Draft Permit's own language establishes the need to review it in light of the Settlement Agreement, as the Permit states that, "The Discharger has agreed to upgrade the Facility to tertiary treatment pursuant to a Settlement Agreement." (Draft Permit, at 12.) The Draft Permit explicitly relies on the Settlement Agreement to clarify provisions of both the conversion schedule and compliance requirements for the Plant, further stating that, "the Settlement Agreement contemplates that the Water Board will concur in the issuance of this modified discharge permit and issue an NPDES Permit in order to effect the Settlement Agreement and the Discharger's obligation to complete the upgrade of its treatment facility to tertiary treatment within a eight-and-one-half-year period." (Draft Permit, at 13.)

The ability to review the Settlement Agreement is further crucial in that the USEPA has issued a Biological Evaluation finding of "No Likely Adverse Effect," that is predicated on there being a legal requirement that the Plant "upgrade to at least full

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[3] For a discussion of the impacts of Plant discharge on the California Sea Otter, see NRDC, *Time is of the Essence: The Legal and Technical Reasons Why EPA and the Regional Board Must Deny the 301(h) Waiver and Require Upgrade of the Morro Bay-Cayucos Sewage Plant "As Fast as Possible"* (2006).

secondary or tertiary treatment." (Letter from Alexis Strauss to Diane Noda, September 6, 2007.) However, it is impossible to determine what will be required of the Plant in the absence of a reviewable Settlement Agreement. The Draft Permit even goes so far as to condition its own, confusing and contradictory, requirements on terms in the Agreement; the Permit states, for example, that the conversion schedule (discussed below) in the Draft Permit is "[s]ubject to the provisions of the Settlement Agreement regarding force majeure," and that the "requirements of the Settlement Agreement are enforceable as set forth in the Settlement Agreement." (Draft Permit, at 12, 13.)

Because the Regional Board has not made the Settlement Agreement available for review,[4] the Board has rendered it impossible to provide meaningful comment on the Draft Permit. Curtailing public participation in this manner is prohibited by the Clean Water Act, which requires that the Draft Permit and Fact Sheet be based upon the administrative record (40 C.F.R. §§ 124.6(e), 124.8(b)(4)), and that the administrative record shall include "[a]ll documents cited in the . . . fact sheet," and other supporting documents for the draft permit. (40 C.F.R. §§ 124.9(b)(4)-(5).) Because the Fact Sheet cites to and relies on the Settlement Agreement, as do the findings in the Draft Permit, the Agreement must be included in the record, and public notice of the time and location where review of the record may be conducted given. (40 C.F.R. § 124.10(d)(1)(vi).) Essentially, an "administrative agency must provide a record which shows how it arrived at its decision so that the public . . . may review it." (*Dore v. County of Ventura* (1994) 23 Cal.App.4th 320, 328; *Topanga Ass'n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 516.) Further, the Regional Board's failure to make available the Settlement Agreement violates the intention of the Clean Water Act's public participation requirements, which hold that, "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States." (*Waterkeeper Alliance, Inc. v. EPA* (2nd Cir. 2005) 399 F.3d 486, 503 (citing 33 U.S.C. § 1251(e)).)

The Draft Permit Contains Confusing and Contradictory Language with Respect to the Provisions Requiring Plant Upgrade

The need for full public opportunity to meaningfully review the Draft Permit in light of the Settlement Agreement is all the more evident given that the Draft Permit's

[4] Not only is the Settlement Agreement not currently available for review, but Regional Board staff have indicated that the Agreement is still in the process of being drafted at this time. (David LaCaro, personal communication, October 7, 2008.) As a result, the Draft Permit purports to be based on a document the terms of which are subject to revision or substantial modification after public comment on the Draft Permit has closed on October 14, 2008.

references to the Agreement contain confusing, or in places outright contradictory language regarding provisions for the Plant's upgrade. For example:

- In presenting the details of the conversion schedule for the Plant, the Permit states variously that full compliance will be required in 8.5 years, by March 31, 2014 (Draft Permit, at 13), in 8.5 years, by June 23, 2015 (*Id.* at F-7), or more broadly "in less than 9.5 years." (*Id.* at F-32.)

- The Draft Permit contradicts itself when discussing the level of treatment the Plant will achieve, stating alternately that, "The Discharger has agreed to upgrade the Facility to tertiary treatment" (*Id.* at 12); the Plant will "Achieve Full Compliance with Secondary Treatment Requirements" (*Id.* at 13); it is the Discharger's "obligation to complete the upgrade of its treatment facility to tertiary treatment" (*Id.*); "the 8.5 year timeline requires the Discharger to achieve . . . secondary treatment standards" (*Id.* at F-7), and; the Discharger "plans on converting the existing facility to tertiary treatment." (*Id.* at F-8.)

The problems arising from the Draft Permit's contradicting language with respect to the level of compliance to be achieved and length of time compliance is to be achieved in are compounded by the fact that the Settlement Agreement is not available for review to assess the correct terms of the upgrade. Based on the unanimous vote taken by both the City of Morro Bay and the Cayucos Sanitary District, and on previous representations, the permit applicants have committed to achieving tertiary treatment standards in an 8.5 year timeframe.[5] Any references to an obligation to meet solely secondary standards should be removed from the Draft Permit, and the Permit should unambiguously reflect these commitments.

<u>The Draft Permit Omits Reference to Significant Concerns Articulated by the USFWS and in Scientific Studies Regarding the Continued Discharge of Partially-Treated Wastewater</u>

The Draft Permit fails to accurately represent the considerable concerns articulated by USFWS related both to its concurrence with the findings of the Biological Evaluation for the Plant, and to the effects of the continued discharge of partially-treated wastewater on the threatened California sea otter. The omission of these concerns from the Draft Permit is misleading. The Draft Fact Sheet, presented as Attachment F to the Draft Permit, asserts only that, "The U.S. Fish and Wildlife Service agreed with the biological evaluation that the continued discharge from the Facility will have no likely adverse affects on the southern sea otter." (Draft Permit, at F-74.)

[5] Even still, an 8.5 year conversion schedule would violate provisions of the Clean Water Act requiring that upgrade be completed "as fast as possible." (40 C.F.R. § 122.47(a)(1) (see section on Conversion Schedule, *infra*).)

However, while the USFWS concurred that the proposed project is not likely to adversely affect the sea otter, it did so with the following caveats:

- Principally, the USFWS notes that it has "concern that the Southern sea otter is located in areas in the vicinity of the subject wastewater discharge."
- The USFWS letter states that a "significant degree of scientific uncertainty exists as to the mechanisms for potential impacts to the otter," and that, "the possibility that pollutant loading from sewage treatment plant discharges could have an effect on the otter" is discussed in the scientific literature.
- The USFWS letter explicitly states that the lack of any currently existing analytical method capable of detecting *T. gondii* oocysts in wastewater, or of substantiating the link between wastewater discharges and harmful domoic acid occurrences along the central coast, renders "[a] direct link to mortalities of . . . southern sea otters . . . difficult or impossible to establish."
- As a result of analytical limitations, the USFWS acknowledges it is "unable to determine the level of significance of adverse effects" that the continued release of Plant wastewater undergoing only partial-treatment may have on the sea otter.
- The USFWS letter further states its belief that, despite any uncertainty, upgrade of the wastewater treatment facilities to tertiary treatment "has significant potential to minimize the concerns regarding possible effects on the otter." The need for a clear-cut upgrade requirement in the Permit is made further apparent by the USFWS's statement that, "The applicants' progress towards implementing their present commitment to tertiary treatment will also be a significant factor in any future Endangered Species Act analysis conducted . . . pertaining to this discharge."

(Letter from Steve Henry to Alexis Strauss, December 21, 2007.) The concerns expressed by the USFWS, conspicuously absent from discussion in the Draft Permit, only highlight the Draft Permit's mischaracterization of scientific studies the Permit cites to regarding risks posed to the California sea otter from continued discharge of partially-treated wastewater from the Plant. In selectively citing to a letter by Dr. Patricia Conrad of the UC Davis School of Veterinary Medicine, the Draft Permit States that *Toxoplasma* RNA "was not detected" in mussels located at the Plant's outfall. (Draft Permit, at F-23.) Based on this isolated statement, the Draft Permit claims, multiple times, that, "There is no evidence that the discharge has adversely impacted the California sea otter." (Draft Permit, at F-32, F-51, F-52.) However, as NRDC has previously pointed out in comments to the Regional Board, this claim is countered by

Dr. Conrad's further statements, taken from the same letter cited to in the Draft Permit, that:

> Given the limitation of our currently available test procedure, it is important to recognize that this assay may not detect low levels of *Toxoplasma* in shellfish, as might occur offshore in the open ocean. Thus the initial results from testing of mussels deployed at the sewage outfall buoy must be interpreted in light of these test limitations (e.g. it is possible that low concentrations of *Toxoplasma* could have been present in the shellfish deployed on the buoy, but were not detected at these low levels, resulting in false-negative test results).

(Letter from Patricia Conrad to Bruce Keogh, December 13, 2004.) Dr. Conrad explains that because of test procedure "limitation[s]," there are "false negative" results and that the study is incomplete. As such, Dr. Conrad concludes that the single assay results may not be detecting *T. gondii* even though it may be "present." (*Id.*)

In total, these comments demonstrate a strong concern that the continued discharge of partially-treated water from the Plant may pose a risk to the California sea otter. Studies have shown a statistically significant correlation exists between sites of maximal freshwater flow along the California coast and *T. gondii* infection rates among California sea otters.[6] However, there is significant evidence that makes it difficult, if not impossible, to rule out the Plant as a source of *T. gondii* infection among California sea otters in the Cayucos-Morro Bay area. California sea otters in the area of Morro Bay "are nine times more likely to have toxoplasmosis than sea otters elsewhere in their range,"[7] and even after accounting for runoff and other factors, "otters sampled in this location were nine times more likely to be seropositive for *T. gondii*."[8] Runoff alone simply does not explain the extraordinarily high infection rates of California sea otters in Morro Bay, and the only other obvious source of marine dispersal of *T. gondii* at this location is the Plant.

Critically, the research cited to in the Draft Permit for the proposition that, "No significant associations with *T. gondii* seropositivity were found in relation to sewage flow," (Draft Permit, at F-23), states as well that the study's "design did not allow for an in-depth evaluation of the potential effect of sewage."[9] The study specifically concludes that further work is needed before one can "exclude sewage as a risk factor

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[6] Miller (2002), at 1004.

[7] David A. Jessup, *Good Medicine for Conservation Biology: Comments, Corrections, and Connections*, 17(3) Conservation Biology 921, 922 (June 2003).

[8] Miller (2002), at 1005.

[9] *Id.* at 1004.

for *T. gondii* exposure."[10] Taking these statements into account, the Draft Permit's claim that, "There is no evidence that the discharge has adversely impacted the California sea otter," (Draft Permit, at F-32, F-51, F-52), mischaracterizes the evidence and findings of the studies it relies on. In light of this information, the Plant has not met its burden for the 301(h) waiver to show that the discharge of partially-treated wastewater from the Plant has not adversely impacted the California sea otter. As a result, the Regional Board should not approve the Draft Permit.

The Provisions of the Cat Litter Public Outreach Program are Vague and Lack Measurable Goals

The USEPA Biological Evaluation requires that the Permit implement a "Public outreach program to minimize the input of cat litter-box wastes into the municipal sewer systems." (Letter from Alexis Strauss to Diane Noda, September 6, 2007.) However, the Cat Litter Public Outreach Program, as written, in the Draft Permit is vague, contains minimal or confusing requirements, and sets no measurable goals for compliance. Instead, the Draft Permit requires only "periodic mailers," or that the Discharger "periodically contact" establishments to ensure that "appropriate" policies or procedures are in place for disposal of cat litter. (Draft Permit, at 27.) The Draft Permit must set out specific requirements for the Discharger to comply with under this program, in order to ensure that the introduction of cat litter waste into the municipal sewer system is reduced to the greatest extent possible.

The Proposed Conversion Schedule for the Plant Violates the Clean Water Act's Requirement that Upgrade be Conducted "as Fast as Possible."

Since issuance of a 301(h) waiver for the Plant is not warranted, the Plant should be required to meet its upgrade requirements within the Permit term. This is possible because, as NRDC has consistently maintained, in comments supported by technical analysis by leading experts, a 4.5 year timeline for the Plant upgrade is possible to implement. Further, this would meet the mandate of the Clean Water Act under 40 C.F.R. § 122.47(a)(1), which requires that the Plant upgrade be completed "as fast as possible." We are particularly concerned with the need for a more advanced schedule in light of the ambiguities identified in the Draft Permit. The Draft Permit currently does not commit to any requirement that the Plant achieve tertiary standards, but still appears to propose a minimum 8.5 year schedule, well beyond the timeline required for the fastest feasible upgrade to be completed. We submit that the Draft Permit must require the upgrade to be completed on a shorter schedule, and the Draft Permit must require the Plant to achieve tertiary treatment in the specified time frame.

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[10] *Id.*

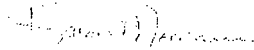
Conclusion

For the foregoing reasons, the Draft Permit, as written, and the Regional Board's failure to provide the referenced Settlement Agreement for public review, in turn fail to ensure that discharge from the Plant will not adversely impact the threatened California sea otter. Because no legal basis exists for a 301(h) waiver to issue for the Plant, and because the Discharger's unanimous agreement to upgrade the Plant to tertiary treatment standards is not clearly reflected in the Draft Permit, the regional Board should reject the Permit as inadequate under the Clean Water Act.

Sincerely,

Michelle Mehta
Attorney, NRDC

Sarah Corbin
Central California
Regional Manager
Surfrider Foundation



Karen Merriam
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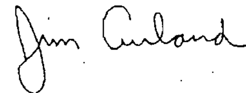

Jim Curland
Marine Program Associate
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cc: Rob Schultz, City of Morro Bay
Tim Carmel, City of Cayucos
Kathi Moore, U.S. EPA