"The State WDRs, in their current form, have been developed with extensive stakeholder input that includes large and small collection agencies, consultants, non-governmental organizations, federal agencies, RWQCB staff and SWRCB staff. It was the opinion of the State Sanitary Sewer Overflow Guidance Committee that it was in the best interests of the public to have uniform rules for all collection systems in the State. The State WDRs will provide consistent guidance for all collection system operators in California. Implementation will be uniform and in accordance with reasonable time schedules. It is the opinion of City staff that the State WDRs will achieve the goal of reducing Sanitary Sewer Overflows (SSO) and improving collection system management that is consistent with the collection system requirements presently included in the proposed WDR for MBCSD.

"Given the numerous differences and issues which face each of the two collection systems, and the City and District's record of consistent and appropriate response to preventing and reacting to sewer spills, it makes more sense to hold each system accountable individually under the State WDR that allows for 42 months for implementation of the program as opposed to the 24 months dictated by the WDR for MBCSD. The WDR for MBCSD will be in jeopardy if either one of the systems does not perform to the Regional Boards expectations. Thus, either agency may be punished while having little or no ability to affect needed changes.

"Including collection system management requirements and absolute SSO prohibitions in the WDR for MBCSD will expose the City and its ratepayers to expensive, third party citizen lawsuits for any instance of noncompliance, regardless of circumstances. This is a real threat that must be considered by the RWQCB. The statewide General WDR regulatory process will provide an equivalent level of water quality protection and enhancement, without the same level of exposure to litigation.

"In the event that the Collection System Requirements cited above are not removed from the proposed WDR for MBCSD, then City staff requests that the completion dates for the tasks outlined in the Wastewater Collection System Management Plan Development Schedule (WCSMP) be modified as follows:

Task	Completion Date
Legal Authority (Part III)	February 10, ~~2007~~ 2008
Measures and Activities (Part IV)	February 10, ~~2007~~ 2008
Overflow Emergency Response Plan (Part VII)	February 10, ~~2007~~ 2008
Design and Performance Provisions (Part V)	June 10, ~~2007~~ 2008

Capacity Evaluation (Part IX)	June 10, ~~2007~~ 2008
Source Control Program (Part VIII)	February 10, ~~2008~~ 2009
Final Wastewater Collection System Management Plan	February 10, ~~2008~~ 2009

"The Management Plan Development Schedule should be modified for the following reasons:

1. The City and District are fully committed to responsible management of their respective collection systems. The City and District currently implement comprehensive, proactive collection system management programs.
2. The excellent compliance record for the two collection systems over the past seven years is contained in the Table cited on page F-20 of the Fact Sheet. The Table demonstrates the City and District's commitment to Best Management Practices and proactive operations and maintenance procedures. Page F-20 of the Fact Sheet provides further evidence of the City and District's commitment to responsible management of their respective collection systems. "*In general, the Dischargers responded to each sewage spill appropriately; the spill was quickly contained, the cause of the spill was eliminated, the affected area was cleaned up and disinfected, proper authorities were notified, creeks and/or beaches were posted if necessary, and maintenance/replacement schedules were adjusted if necessary to prevent future problems.*"
3. The City and District are beginning the complicated task of upgrading the treatment plant per the Conversion Schedule negotiated by the City, District, and RWQCB. This is both an expensive and time-consuming process for City and District staff. Implementing the dates outlined in the existing Management Plan Development Schedule will divert staff time from critical tasks and procedures required in the upgrade process.
4. It should be noted that there are two distinct collection systems involved in this permit process. The point at which the two collection systems are starting from in terms of existing programs and practices are quite different based on the operators and managers first hand knowledge of their systems and the individual needs of the respective systems. Therefore, to establish arbitrary completion dates for Management Plan tasks on a "one size fits all" basis is unrealistic and does not provide sufficient flexibility for the City and District to design and implement a Sewer System Management Plan appropriate to their particular circumstances.
5. After careful review and evaluation, City staff does not believe that it has been allowed adequate time to perform the numerous and varied tasks outlined in Parts III, IV, VII, V, in the one year time frame mandated in the MPDS. The detailed tasks outlined in the WCSMP will require the City to: hire at least one additional full time position in the Collections

Division; divert staff time from critical tasks; contract out critical tasks to qualified consultants for implementation in accordance with standard engineering requirements; implement rate fee analysis and increases, and adhere to statutory requirements for public hearing, notice and posting requirements. The tasks cited will be impossible to accomplish in a professional and adequate method in the limited time provided.

6. There is no discussion of the RWQCB review and approval process. Conforming our current collection system management process and its structural elements to satisfy the Attachment G requirements will require significant effort. The City would appreciate some assurance that there will be meaningful review and approval of the WCSMP by the RWQCB in a timely manner.

Additional Comments:
The City has limited ability to control the operation and maintenance activates of some of the satellite collection systems, as they are owned and operated by State agencies. The City has and will continue to take necessary actions to promote Best Management Practices and work with all interested parties to limit SSOs and to protect water quality, however it is unreasonable to hold the City responsible for system failures that occur under the jurisdiction of other agencies.

Page E-20, D. Sewage Spill Reporting, 4:
The requirement to collect "*upstream, at, and downstream*" samples subsequent to a SSO is ambiguous for several reasons. In the opinion of City staff, upstream monitoring should only be required when the discharge is to a creek, stream, or similar open, accessible channel with continuous background flow. If the SSO is to a non-flowing waterbody, such as an estuary, pond or the Pacific Ocean, "*upstream*" sampling is not possible. In the case of a discharge to a storm drain, upstream and downstream sampling may be difficult or impossible. Furthermore, entering a storm drain for the purpose of sample collection could expose City staff to unsafe conditions, particularly during rainfall events. It is recommended that this paragraph be modified to clarify SSO monitoring requirements and to fully define "upstream" and "downstream" sampling locations and protocols.

Staff Response 38: The proposed collection system requirements are consistent with those approved in several previously issued NPDES permits and Waste Discharge Requirements. The proposed requirements are appropriate for the Dischargers. The Draft Fact Sheet (December 5, 2005) for the proposed statewide Waste Discharge Requirements states, "In order to provide a consistent and effective SSO prevention program, as well as to develop reasonable expectations for collection system management, these General [statewide] WDRs should be the primary regulatory mechanism to regulate public collection systems." Staff would prefer to rely on the pending statewide requirements, but there is still considerable uncertainty as to when those requirements will be approved by State Board. At its February 2006, State Board delayed adoption of the requirements. Staff therefore recommends the proposed collection system requirements be retained. However, the requirements should terminate when the Discharger enrolls under the statewide requirements,

therefore staff recommends addition of the following language to the beginning of Permit Section C.3:

"The requirements of this section, including Attachment G, shall terminate when the Discharger obtains coverage under statewide General Waste Discharge Requirements for Sewage Collection System Agencies."

The Discharger's requested changes to the Wastewater Collection System Management Plan development schedule are consistent with the proposed statewide requirements. A revised schedule would allow time for adoption of the statewide General WDRs, and for the Dischargers to enroll under the General WDRs, which should address the Discharger's concerns about duplicating effort. Staff recommends acceptance of these changes.

Staff understands that the Discharger has limited ability to control satellite collection systems, and agrees it is unreasonable to hold the City responsible for system failures that occur under the jurisdiction of other agencies.

Staff agrees the draft requirement to collect "upstream, at, and downstream" samples subsequent to a sewage spill is ambiguous. Staff agrees that upstream monitoring should only be required when the discharge is to a creek, stream, or similar open, accessible channel with continuous background flow, and has made this change to the proposed Permit.

Comment 39: The **Cayucos Sanitary District** submitted written comments on February 2, 2006, regarding the new collection system requirements in the proposed permit. The comments were submitted separately from the City of Morro Bay because Cayucos Sanitary District operates a separate and distinct wastewater collection system. The comments are included verbatim here:

"The Cayucos Sanitary District (District) acknowledges that the Elements of the Wastewater Collection System Management Plan - (Attachment G) (WCSMP) and the Wastewater Collection System Requirements (Pages 21-23) included in the proposed WDR are consistent with other NPDES permits recently adopted in the Central Coast RWQCB Region. The District is also aware that these same provisions have been the subject of much comment, and have been even appealed to the SWRCB. The District hereby restates the comments made by other Agencies, that prescriptive collection system management requirements should not be included as wastewater treatment/disposal NPDES Permit provisions. The City of Morro Bay (City) and the District are entirely separate and distinct public agencies that operate and maintain completely separate and distinct sewer collection systems; and therefore WDR for the two collection systems should likewise be separate, which will be more equitable for the District and City and will likely be more efficient for purposes of regulatory monitoring and enforcement. The District's recommendation is that the Wastewater Collection System Requirements section, as well as Attachment G, and Section E-20: Part D, #'s 4 and 6 be removed from the proposed WDR.

In the event that the Collection System Requirements are not removed from the proposed WDR, then the District requests that the completion dates for the tasks outlined in the Management Plan Development Schedule be modified as follows:

Task	Completion Date
Legal Authority (Part III)	24 months after adoption of the NPDES Permit
Measures and Activities (Part IV)	24 months after adoption of the NPDES Permit
Overflow Emergency Response Plan (Part VII)	15 months after adoption of the NPDES Permit
Design and Performance Provisions (Part V)	36 months after adoption of the NPDES Permit
Capacity Evaluation (Part IX)	36 months after adoption of the NPDES Permit
Source Control Program (Part VIII)	24 months after adoption of the NPDES Permit
Final Wastewater Collection System Management Plan	42 months after adoption of the NPDES Permit

The Management Plan Development Schedule should be modified for the following reasons:

1. The District recommends that the Task Descriptions and Completion Dates comport with the Tasks shown on Page 15 (of 19) of Draft Order No. 2006-? for the Statewide General WDR for Sewage Collection Agencies.
2. The District is fully committed to responsible management of its collection system. The District currently implements comprehensive, proactive collection system management programs.
3. The excellent compliance record for the District's collection system over the past seven years is contained in the Table cited on page F-20 of the Permit Fact Sheet. The Table demonstrates the District's commitment to Best Management Practices and proactive operations and maintenance.
4. The point from which the City and District collection systems are starting are very different in terms of current condition and the status of existing programs and practices from which to address the requirements of the Management Plan. To establish arbitrary completion dates for Management Plan tasks on a "one size fits all" basis is unrealistic and

doesn't address the realities the two agencies face in terms of their ability to comply with the Management Plan Development Schedule.

5. Given the numerous differences and issues which face each of the two collection systems, and the City's and District's records of consistent and appropriate response to preventing and reacting to sewer spills, it makes more sense to hold each system accountable individually under the proposed Draft Statewide WDR Sewer System Management Plan Time Schedule that allows for 42 months as opposed to the proposed 24 months dictated by this permit.
6. The City and District are commencing the complicated task of upgrading their jointly-owned wastewater treatment plant, in accordance with a Conversion Schedule negotiated with the RWQCB staff, pending adoption by the RWQCB of a Settlement Agreement. This is an expensive and time consuming process for a very small District staff. Implementing the activities and tasks by the corresponding completion dates outlined in the existing Management Plan Development Schedule (MPDS) will divert staff time from critical tasks and procedures attendant to the upgrade process.
7. After careful review and evaluation, the District contends that as provided for in the Permit, there will not be adequate time to perform the numerous and varied tasks outlined within the time frame mandated in the MPDS. Depending on the nature of the tasks outlined in the WCSMP, the District will be required to divert staff time from critical collection system operations and maintenance tasks in order to recruit, hire, and train qualified staff. Additionally, the District envisions there will need to be outsourcing of critical tasks areas where professional consultants' services are required such as when standard engineering requirements are involved, and to conduct rate fee analysis and studies, and to adhere to statutory requirements for public hearing, notice and posting requirements. The tasks cited will be virtually impossible to accomplish in a professional and adequate manner within the limited time provided.

While the District understands and supports the concept of a regulatory framework for collection systems that is intended to reduce SSOs and protect water quality, we do not believe that prescriptive collection system management requirements should be included as NPDES Permit provisions. Again, we recommend that this entire section, as well as Attachment G, be removed from the Tentative Order. The basis for this recommendation is outlined below:

1. The SWRCB is in the final stage of adoption of Statewide General Waste Discharge Requirements for Sewage Collection System Agencies (General WDRs).

2. The SWRCB estimates the General WDRs will be adopted in March of 2006. This timing will basically coincide with adoption of MBCSD's final NPDES Permit.

3. The General WDRs, in their current form, have been developed with extensive stakeholder input from large and small collection agencies, consultants, non-governmental organizations, federal agencies, RWQCB staff and SWRCB staff. In sharp contrast, the Wastewater Collection System Requirements set forth in the Tentative Order were developed without any input from the regulated community.

4. Including collection system management requirements and absolute SSO prohibitions in the Tentative Order will expose the District (and City) and its ratepayers to expensive, third party citizen lawsuits for any instance of noncompliance, regardless of circumstances. This is a real threat that must be considered by the RWQCB. The statewide General WDR regulatory process will provide an equivalent level of water quality protection and enhancement, without the same level of exposure to litigation.

5. The General WDRs will provide a level playing field for all collection system operators in California. Implementation will be uniform and in accordance with reasonable time schedules. Again, implementation under the statewide General WDR will allow the District to implement the required tasks in accordance with standard engineering requirements.

6. A key element of the statewide General WDR program is a standardized online (web-based) reporting system. This application will streamline and dramatically reduce costs associated with SSO reporting at all levels. If the collection system provisions of the Tentative Order are retained, the District will be subject to duplicative, expensive, and burdensome reporting requirements. The SWRCB will not exclude the District from the General WDR on the basis that its operations are covered by specific NPDES Permit provisions. Strict compliance with both regulatory programs will result in duplication of effort and poor use of already strained District resources.

Attachment G . – Elements of the Wastewater Collection System Management Plan

The wastewater collection system provisions of the Tentative Order require the City and District to prepare a Wastewater Collection System Management Plan in accordance with Attachment G. The City and District's comments on Attachment G are provided below:

1. The District is in the process of implementing required Wastewater Collection System Management Plan (WCSMP) elements. Redevelopment, repackaging, and related compilation efforts to satisfy the Attachment G requirements will require substantial outlay of resources and funding that could be better used to maintain and/or improve the District's collection system.

2. The District also questions the annual update requirements for many of the plan elements. For example, a very limited number of new connections are made within the District's service area each year. Annual updates of a Capacity Assurance Plan are not appropriate and would be of very little practical value to the District, the public or the RWQCB. This and similar efforts would divert staff time from critical maintenance, rehabilitation and upgrade activities.

3. There is no discussion of the RWQCB review and approval process. Conforming our current collection system management process and its structural elements to satisfy the Attachment G requirements will require significant expenditures of limited District resources. If not removed the District would appreciate some assurance that there will be meaningful review and approval of the WCSMP by the RWQCB in a timely manner.

Page E-20, D. Sewage Spill Reporting, 4:
The requirement to collect "upstream, at, and downstream" samples subsequent to a SSO is ambiguous for several reasons. In the opinion of the District, upstream monitoring should only be required when the discharge is to a creek, stream, or similar open, accessible channel with continuous background flow. If the SSO is to a non-flowing water body, such as an estuary, pond or the Pacific Ocean, "upstream" sampling is not possible. In the case of a discharge to a storm drain, upstream and downstream sampling may be difficult or impossible. Furthermore, entering a storm drain for the purpose of sample collection could expose District staff to unsafe conditions, particularly during rainfall events. It is recommended that this paragraph be modified to clarify SSO monitoring requirements and to fully define "upstream" and "downstream" sampling locations and protocols."

Staff Response 39: Please see staff's response to the previous comments from the City of Morro Bay. The Wastewater Collection System Management Plan development schedule proposed here by Cayucos Sanitary District is reasonable for both entities; therefore staff recommends acceptance of the schedule proposed by Cayucos Sanitary District.

Comment 40: The **Natural Resources Defense Council (NRDC)** submitted a 69-page comment letter on February 3, 2006, entitled *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.* The comments are too lengthy to include verbatim here, so only summary portion of the document is included verbatim here. The entire comment letter is included as an attachment to the Staff Report.

"In the past decade, waivers from basic federal treatment requirements under section 301(h) of the Clean Water Act have become increasingly rare in the United States, and with good reason. The discharge of partially treated waste degrades receiving waters, and poses serious risks to public health and the marine ecosystem. For that reason, sewage treatment plants are not entitled to maintain Clean Water Act section 301(h) waivers from secondary treatment standards

merely for their administrative convenience. But at root, if EPA and the Regional Water Quality Control Board issue another waiver to the Morro Bay-Cayucos Sewage Treatment Plant (the "Sewage Plant" or "Plant"), bureaucratic convenience will be the true basis for such an action. Convenience for a discharger of partially treated sewage will come at the cost of the undeniable water quality improvements that secondary treatment provides, improvements that will both diminish risks to the ecosystem and marine life, including the threatened California sea otter, and to public health. Because an upgrade—including one that would include tertiary treatment—can be accomplished feasibly twice as fast as proposed, and because the Plant is not entitled to a waiver from secondary standards, the only appropriate and lawful action is to deny the waiver and order an upgrade "as fast as possible," the operative standard established under law.

There are numerous reasons why this is true.

First, a balanced, indigenous population of marine life does not exist in and around the zone of initial dilution. The presence of a healthy ecosystem is an indispensable prerequisite for issuance of a waiver—even if a waiver applicant proves it has no role in causing identified problems. But, here, the agencies' rote analysis of the evidence ignores a disease epicenter affecting a "sentinel" species—the California sea otter—nearly on top of the Sewage Plant's discharge pipe. This disease epicenter is the proverbial "elephant in the room" that the agencies inexplicably fail to properly consider in concluding that the Plant has met its heavy burden of proof here. EPA's analysis, and the accompanying assessment by the Regional Board, neither overcomes the mountain of data showing that pathogens have severely degraded the relevant ocean environment nor even persuasively rules out the role of the Plant in causing or contributing to the obvious problem. In fact, the one study relied on by the agencies simply does not rule out the possibility that pathogens—shielded from destruction by the relative inefficiency of the Plant's operation—are causing or contributing to otter morbidity and mortality.

Second, the Sewage Plant has not met its burden to show that it can comply with its existing permit and meet applicable water quality standards consistently. Based on a selective analysis, the Plant asks EPA and the Regional Board to ignore the accumulation of toxic metals around its discharge pipe, acute toxicity caused by chlorine, and the presence of dioxin in plant effluent, as well as other unambiguous violations of applicable standards. Dr. Bruce Bell, one of the leading experts on the operation and upgrade of sewage treatment facilities in the United States, exposes and debunks any contention that the Plant can satisfy section 301(h) requirements in this respect.

Third, recent water quality data, combined with an absence of evidence that the Sewage Plant has employed indispensable and standard tracking and monitoring protocols, preclude the Plant from meeting its burden to show that the discharge supports recreational uses in Estero and Morro Bays. By contrast, a leading expert on pathogenic contamination of recreational ocean waters, Dr. Mark Gold,

demonstrates that the Plant's application creates more questions than it answers—while failing to account for recent data that undercuts the fundamental conclusion that the Plant is not degrading beach water quality.

Fourth, and more generally, the Sewage Plant's failure to present a "complete" application with current data and information precludes issuance of another waiver. EPA and the Regional Board have before them an application submitted in 2003 and which, in many instances, relies on even older information. As a result, EPA's and the Regional Board's analyses, findings, and determinations are based on incomplete and stale information. Moreover, the Plant and the agencies have not complied with various consultation requirements that are legally required and substantively germane to the issues. By contrast, throughout our analysis, NRDC identifies and submits current and material information that has been omitted in the record.

Fifth, contrary to the implicit assumption of the agencies, the Plant is highly likely to process additional volumes of effluent in the next five years, a fact which will exacerbate each of the substantive problems that currently plague its operation—including the rate of effective disinfection and water quality standards compliance. The agencies have improperly failed to consider these issues and improperly have concluded that the anti-degradation requirements of the Clean Water Act are met in this instance. This is a glaring failure in light of the fact that waters of national significance are nearby, which deserve the highest level of protection from degradation. It is also a glaring failure in light of the Plant's record of collection system and other spills, which show that even now untreated effluent is reaching local waters due to the outdated nature of the Plant.

Sixth, the upgrade proposed by the Sewage Plant and the Regional Board to improve Plant performance will occur as much as five years later than it feasibly can be accomplished. By contrast, state law requires that remedial actions like that proposed here take place "as fast as possible." This clear mandate has been ignored so far, paving the way for a 9.5 year upgrade schedule that will assure that water quality degradation continues to occur for nearly a full decade.

Seventh, the Draft Permit the agencies propose in the meantime not only waives secondary treatment standards, it also fails to include effluent limits and monitoring for pollutants which have a reasonable potential to cause or contribute to violations of water quality standards. Chief among them is the particular pathogen scientifically linked to otter mortality and morbidity. Given the stakes for an iconic threatened species, one that scientists call a "sentinel" for coastal water quality conditions generally, this omission is indefensible.

Finally, because of all of these issues and additional ones contained in the draft settlement agreement, the settlement document itself fails to meet the standard courts use to determine whether the government is acting consistent with its discretion and in the best interest of the public. While there can be no doubt the upgrade in general furthers that interest, the document fails to require the work on

an expedited basis, as is required. Moreover, it otherwise creates the conditions for much longer delays beyond 9.5 years by providing insignificant fines—some smaller than a parking ticket—for many violations of its terms as well as broad, unusual interpretations of standard terms. Collectively, these factors indicate that the agreement may not truly reflect "an arm's length negotiation," which is what courts look for in assessing agreements like the one at issue here.

NRDC wishes it were in a position to fully support the Draft Permit and the upgrade agreement. Since 2003, NRDC has been working to forge a collaborative and cooperative resolution to one of the three remaining 301(h) waivers in California, and the only one so closely associated with a known disease epicenter. Towards this end, NRDC has met with local residents, conservation groups, Regional Board staff, Plant staff, and Joint Powers Agency ("JPA") Board members. This process, which was greatly aided by the perspectives of the Regional Board, and many of its staff, resulted in a JPA Board commitment to upgrade the Plant. However, while positive steps have been taken, given the risks and the evidence, additional commitments are both appropriate and necessary. Section 301(h) waivers are not intended to provide cover for bureaucratic wrangling, nor may they be issued to make meeting bedrock Clean Water Act rules convenient. Since this is the evident function of the proposal to grant the waiver here, EPA and the Regional Board should deny the waiver and require that the Plant upgrade so as to improve water quality "as fast as possible."

Staff Response 40: NRDC's conclusions are largely based on a series of speculative and out-of-context statements regarding sea otter health in the vicinity of the discharge, and are not supported by actual data. As discussed previously, the Discharger has monitored its discharge for the pathogen that is contributing to sea otter mortality in Estero Bay and found none. Actual data are entitled to far more evidentiary weight than unproven hypotheses.

Staff has previously considered every argument that NRDC has presented and found that none of the arguments merit denial of the 301(h)-Modified NPDES permit. U.S. EPA's Tentative Decision Document and staff's Evaluation of Compliance with Permit Requirements, which are based on actual monitoring data from the Discharger's approved monitoring program, both support reissuance of the proposed NPDES permit.

Reissuance of the 301(h)-Modified NPDES permit will effectuate a Settlement Agreement that enforces an upgrade of the Discharger's wastewater treatment plant and will improve discharge quality. Most agree that this is good progress. But NRDC asks for the upgrade timeline to be less than five years, such that the Dischargers may forgo their 301(h)-Modified NPDES permit now, rather than in five years. For several reasons explained previously, upgrading the facility within five years is not possible or necessary, so the Dischargers must seek reissuance of this 301(h)-Modified NPDES permit.

Denial of the proposed Permit would likely result in appeals or litigation that would delay any settlement agreement indefinitely, which may cause the opposite of the intended effect, that is, to further delay the upgrade. Discharger representatives have stated that they will challenge any denial of the 301(h) modification. In addition to litigation delays, the proposed permit would have to be rewritten and a new hearing would have to be noticed, so that some delay would occur even before the Water Board could issue any renewed permit. Whether the 301(h)-modification is eliminated now or in five years (as the settlement agreement provides), discharge quality will not improve until the treatment plant upgrade is complete. That is, the form of permit does not improve the environment, and there is no difference between a 301(h)-modified permit and a full secondary permit with a compliance schedule. The only difference is the length of the schedule. The final compliance date in the schedule is June 23, 2015, i.e., just over nine years. The Dischargers are currently a year ahead of schedule. Staff does not believe a three- to four-year acceleration of the schedule will produce lasting water quality benefits, even assuming that denial of the waiver would accelerate the schedule that much. That being said, in order to issue the proposed Permit, both EPA and the Water Board must find that the Discharger satisfies all elements of Section 301(h).

Following are several specific responses to NRDC's comments. Our overarching recommendation is that the Regional Board and USEPA base its decisions more on actual monitoring data than the speculative and dramatic arguments presented by NRDC. Staff recommends reissuance of the proposed NPDES permit. However, following this response is a discussion of the options available to the Water Board.

- NRDC states "Based on a selective analysis, the Plant asks EPA and the Regional Board to ignore the accumulation of toxic metals around its discharge pipe, acute toxicity caused by chlorine, and the presence of dioxin in plant effluent, as well as other unambiguous violations of applicable standards." Staff did not ignore these matters when formulating its recommendation. The Discharger's dioxin and chlorine effluent violations are discussed extensively in this Fact Sheet. The reference to "accumulation of toxic metals around its discharge pipe" must be qualified by the fact that chromium concentrations in seafloor sediments are increasing throughout the Central Coast, likely due to runoff from abandoned chromite mines throughout the Region, and effluent monitoring indicates that the Discharge is not contributing to the problem.

- On Page 2, NRDC suggests that reissuance of the proposed 301(h)-Modified NPDES permit be denied because "of the Plant's record of collection system and other spills, which show that even now untreated effluent is reaching local waters due to the nature of the Plant." First, when compared with other areas in the Central Coast Region and State, the Dischargers have an exemplary record of preventing sewage spills. Secondly, sewage spills originate from the collection system and not the treatment plant, and have nothing to do with the issue at hand, which is whether or not to reissue a modification of secondary treatment standards. Nevertheless, we should point out that the proposed Permit includes

several provisions to improve operation and maintenance of the Discharger's collection system.

- On Page 2, NRDC argues that State law requires that "remedial actions like that proposed here take place "as fast as possible".

  - Neither the Clean Water Act nor the Porter-Cologne Water Quality Control Act require a five-year upgrade, assuming the plant currently satisfies the 301(h) requirements. The five-year time schedule requirement only applies to upgrades necessary to cure existing permit violations. The mandatory minimum penalty provisions of the Water Code include an exception where the discharger is in compliance with a time schedule that is as rapid as possible, but not longer than five years. (Ca. Wat. Code §13385(j)(3).) If the Board and EPA issue another 301(h)-waiver permit, the Discharger will be in compliance with its permit limits. Since the Discharger would not be in violation of its permit, no cease and desist order under Section 13385 would be necessary to avoid MMPs. On the other hand, if the Board were to find that the plant does not meet the 301(h) requirements, the permit would have to include full secondary treatment limits. In order to shield the plant from MMPs, the Board could issue a time schedule for the upgrade, during which MMPs for violating the secondary treatment requirements would not apply. After five years (or any faster schedule the Board determined to be possible), the Board could no longer shield the plant from MMPs.

  - The NPDES compliance schedule provisions do not apply either. (40 CFR §122.47.) The type of compliance schedule described in the NPDES regulations is in the permit itself, and provides for a delayed effective date of permit limits. This type of compliance schedule cannot extend compliance deadlines beyond "the applicable statutory deadline under the CWA." The applicable statutory deadline for secondary treatment requirements has long passed, except for facilities subject to a 301(h) modification. EPA staff has advised Water Board counsel that EPA will not approve NPDES permits that include compliance schedules for secondary treatment requirements. Even if the Board amended the Basin Plan to allow compliance schedules for new water quality standards, that provision would not apply in this case. There is nothing to suggest that the compliance schedule provision in the NPDES regulations requires *every* plant with a 301(h) modification to upgrade as quickly as possible. That interpretation would eliminate the 301(h) exception to secondary treatment requirements.

  - Even where the NPDES compliance schedule provisions apply, both EPA and the State Water Board allow time schedules in excess of the five-year permit term, where appropriate. (*See, e.g., In the Matter of the Review on its Own Motion of Waste Discharge Requirements for the Avon Refinery, et al.* [Tosco] (State Water Board Order No. 2001-0006); Enclosed Bays and Estuaries/Inland Surface Waters Plan §2.1 (compliance schedules may extend up to ten years beyond the Plan's adoption).)

- Other evidence might support a faster time schedule. For example, if the record supports NRDC's argument that the aging treatment plant will become unable even to meet the current effluent limits, this would support requiring a faster upgrade. This is indistinguishable from other failing treatment plants in the Central Coast Region, but it is not related to Section 301(h).

- On Page 2, NRDC states that the Draft permit "fails to include effluent limits and monitoring for pollutants which have a reasonable potential to cause or contribute to violations of water quality standards. Chief among them is the particular pathogen scientifically linked to otter mortality and morbidity." This statement is false. The proposed Permit complies with Clean Water Act requirements (40 CFR §122.44) to include effluent limits for all pollutants with reasonable potential to cause or contribute to water quality standards. The Discharger performed monitoring of its discharge for the presence T. gondii (the only discharger in the State to complete such monitoring), and found none. These monitoring data are the best information available on T. gondii and this discharge. Even if the discharge did have reasonable potential to contain T. gondii, there is no established water quality standard for this specific pathogen. The proposed permit is consistent with the California Ocean Plan in that it already contains effluent limitations for Total Coliform, which is the widely accepted surrogate for pathogens such as T. gondii. Standards are not required where the record contains no evidence from which appropriate standards could be derived, nor does the Ocean Plan require any such standards. (*Petition of Friends of the Sea Otter and Department of Fish and Game,* Order No. WQ 90-1 at 21-22.)

- On Page 12, in summarizing its evidence, NRDC states "Discharge of primary treated sewage is the second most likely factor accounting for the Morro Bay T. gondii hot spot." This statement is taken from a 2002 study that pre-dated the 2003 discharge monitoring study, which demonstrated that the subject discharge does not contain T. gondii. The actual monitoring data relied on by US EPA and Water Board staff clearly outweighs the reports NRDC cites, which pre-date the actual site-specific data. Later in its comments, NRDC argues (incorrectly) that staff bases its recommendation on stale and incomplete information. However, that is what NRDC is doing here.

- On Page 18, NRDC asserts that the proposed settlement agreement should be rejected because it was not "the product of good-faith, arms-length negotiations," or that negotiations were not full of "adversarial vigor." Nothing subjects this type of settlement to the standards governing court approval of consent decrees.[1] The

[1] Even when such standards apply, a court must review the settlement in light of the public policy favoring settlement. (*U.S. v. Chevron U.S.A., Inc.*, 380 F. Supp. 2d 1104, 1111 (N.D. Cal. 2005), citing *United States v. Comunidades Unidas Contra La Contaminacion,* 204 F.3d 275, 280 (1st Cir.2000).) Although the court should not rubber stamp government settlements, its "deference is particularly strong where the decree has been negotiated by the Department of Justice on behalf of an agency like the EPA which is an expert in its field. *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1436 (6th Cir.1991)." (*U.S. v. Chevron* at 1111.) The costs and benefits of the settlement are important. (*Id.* at 1113.) Although the best-case scenario is used as a benchmark to evaluate a settlement, "... it is to be expected that the actual relief secured under the Consent Decree will fall short of the best-case scenario. Such a result may be reasonable result of the compromise inherent

more important question is whether the settlement is consistent with applicable law and adequately protective of the environment. Those issues are addressed above. The Dischargers had refused to upgrade just three years ago, but now, after nearly two years of negotiation with staff and pressure from NRDC and the public, the Dischargers have agreed to a multi-million dollar upgrade. The fact that the Discharger originally proposed a 15-year upgrade timeline, but then ultimately agreed to a 9.5 year timeline is evidence enough that the agreement is fair. Staff communicated and met with NRDC representatives numerous times during and after negotiating the agreement. NRDC representatives attended public and private meetings with the Dischargers. The agreement was circulated for public comment for much longer than the 30 days required by NPDES regulations, assuming these regulations even apply to a settlement related to a permitting decision. (40 CFR 123.27(d)(2)(iii).) We received no comments other than NRDC's February 3 comments. The Executive Officer did not sign the agreement before the close of the comment period and thorough review of all comments.

- NRDC criticizes the Settlement Agreement for other reasons:
  - NRDC correctly points out that the administrative civil liability for missing time schedule deadlines are very low. However, this is justified because the Dischargers have agreed not to apply for a second 301(h) waiver. The administrative civil liability in the settlement agreement applies only to violations of the settlement agreement, and not to other permit violations. (Settlement Agreement, §E.4.) If the Dischargers fail to complete the upgrade within five years of issuance of the second permit, they will be subject to Section 13385 administrative civil liability for violating the effluent limits in the permit.[2]
  - NRDC misconstrues the importance of the "clear and convincing evidence" language in the agreement. According to the agreement, the Dischargers waive their right to challenge any interim BOD^5, TSS or pH requirements, or a faster timeline, that are (i) the same as in the current permit, in the case of the effluent limits; or (ii) more stringent and based on clear and convincing evidence. (Settlement Agreement, §§B.2.b, see also, B.2.a.3 and B.2.b.) If the Water Board imposes more stringent requirements that are based on something less than clear and convincing evidence, the only consequence is that the agreement to which NRDC so strenuously objects has no further effect. The Dischargers can challenge the more stringent requirements or shorter time schedule, and the obligation to complete the upgrade in 9-1/2 years (or ever, if the permit is not upheld) is void. The increased evidentiary standard recognizes the uncertainty that the Dischargers face regarding what the second permit will require, since (as NRDC points out) the Board retains all discretion regarding the terms of the second permit.
  - Staff recognized that a settlement agreement is more difficult to enforce than a consent decree. Breach of the settlement agreement requires the Board to bring a breach of contract action, in which it can request the court to order the

in any settlement." (*Id.* at 1114.) It is reasonable to include a compliance schedule that takes into account how long it would have taken to litigate the matter. (*Id.* at 1118.)

[2] Interim effluent limits will be set forth in a time schedule or cease and desist order, or, if the Basin Plan and EPA regulations change, in the permit itself.

Dischargers to comply with the agreement. Alternatively, the Board can pursue administrative civil liability. Although the amounts are small during the upgrade process, the goal of any schedule is to ensure the discharger meets the final compliance date. If the Dischargers do not, potential adminstrative civil liabilities become significant unless the agreement is amended,[3] and failure to adhere to a schedule that allowed latitude to the Dischargers would be a factor in setting penalty amounts. That provides a sufficient deterrent effect. In addition, even small administrative civil liabilities signal the community that the upgrade is off-track. Water Board staff, the Dischargers and NRDC have all stated that community support for the upgrade is very strong. The Dischargers will have to account to their constituents for failure to adhere to the schedule.

- Staff, the Dischargers and EPA considered a consent decree in lieu of the agreement that was negotiated. EPA indicated that it cannot participate in a consent decree until permit violations are actually occurring, *i.e.,* if the Dischargers give up the waiver and begin incurring violations of the secondary treatment standards. This would preclude a schedule longer than five years, since the consent decree could not shield the Dischargers from mandatory minimum penalties after that. (Water Code §13385(j)(3).) EPA's internal review requirements would cause significant delay in negotiating a consent decree. The California Attorney General would also have to become involved, and a court approval process would be necessary. In addition, a consent decree is not possible absent the Dischargers' agreement, and they refused to consider this option.

- In Part 3, beginning on Page 20, NRDC argues that the Discharger's application and therefore EPA and Regional Board staff's evaluations are based on stale and incomplete information. Staff's recommendation is not based solely on the Discharger's 2003 permit application, but on the most relevant information available—all monitoring data submitted since 2003. The subject discharge remains essentially unchanged since 2003. Staff also considered all of the most recent sea otter studies when formulating its recommendation to reissue the proposed permit. NRDC bases its conclusions on these same studies while at the same time arguing that such information is stale and incomplete. Staff was prepared to bring the proposed permit to the Regional Board in June 2004, but chose to delay to allow for negotiation of the proposed settlement agreement, partly at the insistence of NRDC. So on the one hand, NRDC argues that the settlement agreement was not adequately negotiated, but on the other hand argues that allowance of time for adequate negotiations is not permissible. These arguments are not valid.

- On page 22, NRDC points out that USFWS has not provided an evaluation of the discharge since 1998. The Discharger fulfilled its obligation and properly pursued such an evaluation in 2003. USFWS has not yet provided an evaluation due to its other priorities. The Discharger has again requested such an evaluation from USFWS, and staff understands that USFWS may provide it before the March 24

[3] Of course, even absent an amendment, whether to assess any administrative civil liability beyond MMPs is within the Board's discretion.

hearing. Regardless of whether USFWS provides its evaluation prior to the hearing of the proposed permit, the absence of a USFWS evaluation does not merit denial of the proposed permit absent evidence of any *substantive* violations, that is, evidence that the discharge may affect sea otters, tidewater goby, steelhead trout, or other listed species in violation of the Endangered Species Act; or that there is a take under the Marine Mammals Protection Act. The outfall area, and the area it impacts, does not include habitat for steelhead or goby. Both species require a freshwater inlet. The closest is Morro Creek, 0.9 mile from the outfall. In addition, the mouth Morro Creek is too dynamic and does not provide the type of protected cove or inlet that goby prefer. The area surrounding the outfall is primarily sandy bottom. Studies of benthic communities are the most appropriate measure of whether any impact is occurring. The USFWS letter can also be obtained after the Board acts, as is the case with Coastal Commission certification of consistency with the Coastal Zone Management Act.

- Throughout Part 3B, beginning on page 22, NRDC suggests that it is the Discharger's burden to prove that the population of every species in Estero Bay is healthy. On page 26, NRDC states that the Discharger should have considered steelhead trout and tidewater goby, species whose critical habitats are fresh or estuarine waters, which clearly could not be affected by the discharge. Any toxic pollutants present in the discharge are most likely bound up in sediments that sink to the seafloor in the vicinity of discharge. Benthic organisms (i.e. those living on or in the seafloor) are the most sensitive receptors to these pollutants. Demersal fish and other higher order organisms move in and out of the discharge area freely and are not practical to monitor for a discharge of this size. This is why benthic monitoring has always been required and not demersal fish monitoring in this case. As discussed extensively previously in this report, twenty years of benthic monitoring data indicate that populations of benthic organisms in the vicinity of the discharge are balanced and healthy.

  This Facility is factually different from the Oxnard 301(h) application discussed in *Rimmon C. Fay,* Order No. WQ 86-17 (regarding the City of Oxnard's treatment plant), for these reasons. In the Oxnard case, EPA concluded that the discharge was likely to have an adverse impact on plankton, and TetraTech concluded it was impossible to tell. EPA concluded that there was insufficient data to determine whether the discharge was adversely affecting demersal fishes and epibenthic macroinvertibrates, and that available data on bioaccumulation of pesticides and toxics was inconclusive. In the TDD for this Facility, on the other hand, EPA concluded that adequate evidence of a BIP is present. It should also be noted that the Oxnard facility, which had a design capacity of 25 mgd, did eventually obtain a 301(h)-modified permit.

- On page 35, NRDC challenges the validity of the Discharger's efforts with UC Davis scientists to monitor its discharge for T. gondii. Staff recognizes that all sampling methodologies have limitations; however, the method used by the Discharger is the best available.

- On page 38, NRDC argues that the reissuance of the 301(h)-modified permit is prohibited under 40 CFR 125.59(b)(4) because the discharge of pollutants "enters into saline estuarine waters." This section of law prohibits issuance of 301(h)-modified permits for direct discharges to saline estuarine waters, not this discharge to the open ocean. NRDC bases this argument on a 1986 dye study, which suggested that the discharge may enter the mouth of Morro Bay under certain infrequent oceanographic conditions. NRDC omits that this study found that the discharge was diluted from 16,700:1 to 91,000:1 (seawater:effluent) before entering the mouth of the Bay, and that was during flood tide conditions when the mouth of the Bay was hardly estuarine. This extremely high level of dilution before reaching the mouth of the Bay is verified by the Discharger's current offshore monitoring program, which is superior to the 1986 dye study in tracking the fate and transport of the discharge plume, and which indicates that the discharge is diluted by hundreds of parts of seawater within several meters of the outfall, and that the discharge plume is imperceptible at the mouth of Morro Bay. The stated prohibition clearly does not apply in this case.

- On page 40, NRDC disagrees with language common to all ocean discharge permits in California. The "shall not cause" language in the Receiving Water Limitations section of the proposed permit is taken directly from the California Ocean Plan, and complies with Clean Water Act Section 122.44. The proposed permit contains effluent limitations for all pollutants with reasonable potential to cause or contribute to a violation of a State water quality standard, including all priority pollutants with Water Quality Objectives. Thus, the "have a reasonable potential to cause, or contribute to" language that NRDC believes is necessary is already inherent in the effluent limitations, and is not necessary in the Receiving Water Limitations section of the permit.

- On page 41, NRDC argues that Discharger cannot show compliance with water recreation standards. This is false. As discussed above under "Bacteria", the Discharger's extensive beach monitoring program demonstrates there is no impact to beach water quality from the subject discharge. Staff analyzed all surf zone total coliform monitoring data collected since 1993...over ten years of data. The data set consisted of 385 to 390 samples at each monitoring station. With exception to the monitoring station at the mouth of Morro Creek, the annual median at each monitoring station was well below 70 MPN/100 mL. Staff's inclusion of the exemplary Heal the Bay Beach Report Card results for this beach was only to reinforce that the subject discharge is not impacting beach water quality. The Discharger's comprehensive beach monitoring program is the basis of staff's evaluations, not Heal the Bay's Beach Report Card (which is based on a far more limited data set). NRDC points out that Atascadero (i.e. Morro Strand State) Beach received an "F" grade for wet weather in the 2005 Report Card, but fails to qualify this statement by pointing out that winter 2004-2005 was an exceptionally wet year, and that the same beach received good grades for the dry season. If the discharge were impacting beach water quality, then one would expect the same beach to receive poor grades during the dry season as well. NRDC points out that it is unable to determine if the discharge plume comes back to shore. However,

the Discharger's annual reports of its intensive offshore monitoring program all clearly illustrate that the discharge plume is rapidly diluted within a short distance from the outfall and not coming back to shore.

- On page 42, NRDC points out that the current beach monitoring program does not include enterococcus monitoring. Enterococcus monitoring was not required by the California Ocean Plan when the existing monitoring program was approved, and the proposed monitoring program includes enterococcus monitoring.

- On Page 47, NRDC states, "For trace metals, the Plant's data also shows a series of violations." This is patently false. The existing and proposed permit includes effluent limitations for these metals, which are protective of water quality. The Discharger has occasionally detected low levels of copper and chromium in effluent, but has never exceeded its effluent limitations.

- On page 50 and 51, NRDC argues that Anti-Degradation policies do not allow any new or increased discharges. The proposed permit does not allow any new or increased discharges. In fact, as discussed previously, effluent limitations for several constituents are more stringent than the existing permit. In addition, the Permit does not permit any degradation of receiving waters, whether this is a Tier III or Tier II discharge. The fact that Morro Bay is within Estero Bay does not make Estero Bay a Tier III water. In addition, NRDC argues that the discharge will so degrade receiving waters that accelerating the schedule by three to four years is critical, but that receiving waters are Tier III waters. The 301(h) modified discharge has existed for over twenty years, making it difficult to reconcile these two positions.

- On page 55, NRDC argues that the Discharger requires an "incidental take permit" from U.S. Fish and Wildlife for the take of sea otters in Morro Bay. This is incorrect. There is no evidence that the subject discharge is killing or harming sea otters, goby or steelhead.

- <u>Alternatives to issuance of the Permit and upgrade according to the settlement agreement:</u>

  - If the Board concludes that the Dischargers have not met the standards for a 301(h) modification, the Board must deny concurrence with EPA's Permit. For example, the Board might consider the evidence and conclude that the Discharger has not shown that a balanced, indigenous population exists outside the zone of initial dilution or in areas likely to be impacted by the discharge; *and* that the Discharger has not shown that the absence of BIP is caused by other pollutant sources and that the discharge is not causing or contributing to the absence of BIP. If the Board denies concurrence, the Clean Water Act would prohibit EPA from issuing the Permit. The Board would then either require a revision of the Discharger's report of waste discharge, if necessary; if not, Water Board staff would redraft the permit to include full secondary standards, notice another public comment period, and then notice

another hearing. In the meantime, the Dischargers have advised that they will petition the denial to the State Water Board. If the State Water Board takes up the petition and issues an order, that will take approximately one year. Either NRDC or the Dischargers are likely to challenge the State Water Board order (or the Central Coast Water Board decision, if the petition is dismissed). Water Board counsel has concluded that there is a substantial exposure to litigation on these issues.

- The upgrade schedule was negotiated, and is not a requirement of the Permit. The Board cannot impose a shorter schedule. A second alternative, with the concurrence of the Discharger, would be to revise the settlement agreement to provide for a shorter schedule. A continuance for this purpose is not recommended unless the Discharger requests it, since a continuance would add additional delay to final resolution of this matter. If a new settlement is feasible, it can be negotiated while any State Water Board petition is pending. However, if the Water Board concludes that the Dischargers have satisfied Section 301(h), the Water Board may not deny concurrence merely to negotiate a new schedule, since that would constitute an abuse of the Board's discretion. Denial of the Permit must be based on failure to satisfy an applicable legal requirement.

Comment 41: Dr. Mark Gold of Heal the Bay, Santa Monica, California, submitted extensive written comments on February 3, 2006, at the request of **NRDC**. The comments include Dr. Gold's background and qualifications, an evaluation of beach monitoring data, an evaluation of monitoring design and information relied upon by USEPA and the Regional Board, as well as Dr. Gold's curriculum vitae. The comment letter is too voluminous to include verbatim here, therefore is included in entirety as an attachment to the Staff Report.

In short, Dr. Gold believes that recent variations in San Luis Obispo County Environmental Health Department monitoring results for this beach suggests influences beyond seasonal storm water discharge, and that such influences could include the subject discharge. Dr. Gold criticizes the Discharger's surf-zone and receiving water monitoring program. Dr. Gold recommends denial of the Permit.

Staff Response 41: Dr. Gold's suggestions that the beach may be influenced by the subject discharge are based on a very limited set of recent beach monitoring by San Luis Obispo County Environmental Health Department. His conclusions are largely based on monthly monitoring during wet season 2004-2005, which includes less than 25 data for that period for this beach. By contrast, staff's evaluation of beach water quality extends back over ten years and includes nearly 400 data points for this beach. This difference exemplifies the superiority of the Discharger's surf-zone monitoring program.

Dr. Gold compares the depth of the subject discharge to those in Southern California, which discharge orders of magnitude more wastewater to the ocean. This is inappropriate comparison.

Dr. Gold states that "EPA and the Regional Board do not refer to monitoring information that would allow them to determine" if discharge plume comes back to shore. The Discharger's offshore monitoring program clearly illustrates that the discharge plume is rapidly diluted within a short distance from the outfall and is not coming back to shore.

Dr. Gold correctly points out that the current beach monitoring program does not include enterococcus monitoring. Enterococcus monitoring was not required by the California Ocean Plan when the existing monitoring program was approved. The proposed monitoring program includes enterococcus monitoring. Such monitoring will not be required until the proposed permit is reissued.

Even if valid, these reasons do not merit denial of the proposed Permit. Such reasons would normally only justify simple modifications to the Discharger's monitoring program, not denial of the Permit. Interestingly, if the Permit was denied and a permit with full-secondary requirements were issued instead, the entire surf-zone monitoring requirement could be eliminated, to be commensurate with other similar Central Coast discharges.

Comment 42: Dr. Bruce Bell of **Carpenter Environmental Associates**, Monroe, New York, submitted extensive written comments on behalf of NRDC on February 3, 2006. The comments include Dr. Bell's background and qualifications, evaluation of water quality impacts, evaluation of the upgrade schedule, and Dr. Bell's curriculum vitae. Dr. Bell is a leading expert of environmental engineering. The comment letter is too voluminous to include verbatim here, therefore is included in entirety as an attachment to the Staff Report.

Dr. Bell provides an evaluation of water quality impacts and the secondary treatment upgrade schedule. Dr. Bell estimates that the upgrade to secondary treatment may be completed in 4.7 to 6.6 years, plus time for Water Board review of the facilities plan. He states, "In summary, the City and District's reasons for recommending the proposed 9.5 year schedule are based on political issues and not technical/construction issues."

Staff Response 42: Staff finds most of Dr. Bell's comments factually correct, although staff has concluded 7 years is a more realistic timeline.

Comment 43: **The Otter Project**, local chapters of the **Sierra Club** and **Surfrider Foundation**, **California Coastkeeper Alliance**, and **Defenders of Wildlife** all submitted written comments letter. Those comment letters are included in entirety as attachments to the Staff Report. The comment letters either urge denial of the proposed Permit or urge adoption of a shorter upgrade timeline.

Staff Response 43: These comment letters essentially reiterate NRDC's comments and do not necessitate further treatment here. Please refer to staff's response to NRDC's comments above (Comment 40).

Note: The Dischargers submitted a rebuttal to NRDC's comments on March 3, 2006. The Water Board Chairman approved this submittal. Due to timing of the rebuttal, staff is not able to provide a response here.

C. Notification of Hearing Continuance

As discussed in Section II.D of the Fact Sheet, the Central Coast Water Board continued the hearing to provide time for USEPA develop an Endangered Species Act Biological Evaluation on the potential effect to the southern sea otter and the brown pelican. As a result of USEPA's recommendations, the Order incorporates conservation measures proposed by the biological evaluation. 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 and the brown pelican.

The Central Coast Water Board and USEPA have notified the Discharger and interested agencies and persons of their intent to reissue this NPDES Permit and have provided them with an opportunity to submit their written comments specific to the revisions based on the USEPA's Biological Evaluation and concurrence from the U.S. Fish and Wildlife Service. Notification was provided to interested parties through mail, through the publication in the San Luis Obispo Tribune on September 12, 2008, and through the Central Coast Water Board website at:

http://www.swrcb.ca.gov/centralcoast/Permits/Index.htm

D. Notification of Interested Parties for Comment on Revised Permit with New Information

The Central Coast Water Board notified the Discharger and interested parties of its intent to prescribe waste discharge requirements for the discharger and provided them with the opportunity to submit their written comments and recommendations.

Interested parties were invited to submit written comments focused specifically on permit revisions based on the USEPA's Biological Evaluation and concurrence by the U.S. Fish and Wildlife Service. According to the May 11, 2006 Water Board meeting transcripts, the Central Coast Water Board continued this matter pending USEPA's Biological Evaluation and consultation from USFWS. Further discussion of the Water Board's decision can be found in Section II.D of the Fact Sheet. Written comments not pertaining to new information (the basis for the continued hearing) were considered, but may not be discussed in the following section (Section VI.E of the Fact Sheet).

Notification was provided through internet posting, publishing in the San Luis Obispo Tribune on September 12, 2008, and through direct mailing to the following known interested parties as well as other interested parties. Written comments were due no later than October 14, 2008.

- Mr. Bruce Keogh and Mr. Bruce Ambo, City of Morro Bay
- Mr. Bill Callahan and Ms. Bonnie Connelly, Cayucos Sanitary District
- Dr. Doug Coats, Marine Research Specialists
- Ms. Anjali Jaiswal, Natural Resources Defense Council
- Mr. Babak Naficy, Coastal Alliance
- Mr. Mark Delaplane, California Coastal Commission
- Mr. Joshua Borger, Environmental Law Foundation
- Ms. Hillary Hauser, Heal The Ocean
- Mr. Gary Sheth and Kathi Moore, U.S. Environmental Protection Agency, Region IX
- Mr. Peter Hernandez
- Ms. Rebecca Barclay
- ECOSLO

E. Written Comments on New Information

Written comments were received by Water Board staff on or before October 14, 2008. According to the September 4, 2008 public notice, written comment were to address relevant revisions incorporating new information, specifically, the USEPA's Biological Evaluation and the USFWS concurrence letter. Some written comments submitted by the public addressed issues other than revisions based on new information. These comments have been reviewed and considered. All written comments are included as attachments to the staff report.

Settlement Agreement

Many commenters objected to not having the opportunity to review the revised settlement agreement, stating that meaningful public comments were impossible without a draft copy of the settlement agreement.

The December 4-5, 2008 hearing will be a continuation of a hearing held on May 11, 2006. Prior to the May 11, 2006 hearing, the Executive Officer of the Water Board, the City of Morro Bay, and the Cayucos Sanitary District had entered into a settlement agreement that set forth an expidited conversion schedule of 8.5 years. The expedited conversion schedule was discussed at the May 11, 2006 hearing. The settlement agreement is consistent with Finding AA of this Order and all terms and conditions to upgrade the facility will be enforceable through the settlement agreement. Changes to this Order regarding facility upgrades will be consistent with the settlement agreement.

Given the time that has passed since the hearing began on May 11, 2006, the parties to the settlement agreement are negotiating revisions to the settlement agreement to acknowledge factual changes since the May 11, 2006 version and to revise dates, but the settlement agreement remains essentially as the May 11, 2006 version. The purpose of the settlement agreement is to enforce the schedule for the facility upgrades since they extend beyond the term of the permit and is not intended to drive

the enforcement of this Order. Furthermore, the settlement agreement format as well as some language will remain consistent with the 2006 version of the settlement agreement. The 2006 settlement agreement is located on the Water Board website and available for review. A copy of the revised settlement agreement will be made available prior to the December 4-5, 2008 Water Board meeting and will be proposed to the Central Coast Water Board for consideration and approval. Any significant comment to the settlement will be considered by the involved parties.

It is important to note that the Clean Water Act requires publicly owned treatment works to achieve at secondary treatment prior to discharge to ocean waters of the United States, unless the facility obtains a variance from USEPA pursuant to Clean Water Act section 301(h) to implement modified secondary treatment (301(h) waiver). The facility will not complete the upgrade to at least secondary treatment until after the five-year term of this permit, and, therefore a 301(h) waiver continues to be necessary for the discharge subject to this permit. The next permit will contain the final enforceable compliance dates to achieve at least secondary treatment. The Clean Water Act establishes secondary treatment as the technology based standard for discharges to surface water, but tertiary treatment that meets Title 22 California Code of Regulations requirements is required for certain reclaimed water uses. The Discharger intends to upgrade to tertiary treatment for purposes of reclaimed water use during the eight and one-half year conversion schedule set forth in the settlement agreement. The Central Coast Water Board may require the discharger to comply with more stringent water quality based standards beyond secondary treatment for discharges to surface water if necessary to protect the beneficial uses of waters of the state and the United States. With respect to the discharge to the ocean, the USFWS has concurred with USEPA's Biological Evaluation supporting the continued 301(h) waiver, which concluded that the continued discharge from the facility will have no likely adverse affects on the southern sea otter and the brown pelican. If the Central Coast Water Board receives new information to support the need to impose more stringent water quality based requirements beyond secondary, it may consider imposing such requirements only after required public notice and comment and hearing, but such information is not available at this time. Since tertiary treatment is not required by federal law, the settlement agreement requires at least secondary treatment.

Written Comments

Mr. Bruce Keogh, Morro Bay/Cayucos Wastewater Treatment Plant, submitted comment on October 14, 2008. The Discharger's written comments are included in their entirety as an attachment to the staff report. The written comments include general comments to the overall permit template and other more specific comments. The discharger also included corrections to typographical errors, inaccuracies, and discrepancies. Typographical errors and minor revisions that do not alter the intent or substance of the Order are not discussed below. Further, comments not pertaining to new information, as specified in the public notice, have been reviewed and considered for permit clarity and consistency. Mr. Keogh's comments are addressed below.

Comment 1: References to Tertiary Upgrades

"MBCSD staff insists that any reference to the upgrade project for the WWTP should be modified to read "*at least full secondary or tertiary treatment*". This modification would be consistent with the third Conservation Measure contained in the Biological Evaluation (BE) from USEPA, which states, "*Facility upgrade to at least full secondary or tertiary treatment by 2014.*" As correctly noted in the BE, "*These measures have been agreed to by both the applicant and RB3...* ". (Page 6 of the BE) While the City and District have elected to upgrade the facility to tertiary treatment for the protection of the environment, this policy decision from the City Council and District Board exceeds the full secondary treatment requirements set forth in 40 C.F.R. Part 133. The Regional Board has no findings or basis to include the requirement to upgrade to tertiary treatment in the Draft Order."

"In addition, modification of the language to read "*at least full secondary or tertiary treatment*" would be consistent with the Settlement Agreement agreed to by the City and District and Regional Board staff, which states, "*The Discharger agrees to undertake a program to install and operate equipment at its treatment plant capable of achieving, and that will achieve, full secondary treatment requirements set forth in 40 C.F.R. Part 133, other than 40 C.F.R. section 133.105.*" (Page 4 of the 8.5 Year Settlement Agreement) On page 12, II.AA. of the Draft Order, it states that, "*The Discharger has agreed to upgrade the Facility to tertiary treatment pursuant to a settlement agreement with the Central Coast Water Board.*" This statement is misleading, is not consistent with the record to date, and does not accurately reflect the language in the settlement agreement cited above."

Staff Response 1: Water Board staff has carefully reviewed the Discharger's comment regarding the discussion of upgrading the facility to provide tertiary treatment. We agree that the Central Coast Water Board has no authority to require Disinfected Tertiary Treated Recycled Water[4], due to the fact that the Discharger is not currently recycling its treated wastewater. Furthermore, the Water Board only has the legal authority to require at least secondary standards in accordance with 40 CFR Part 133 without new information.

We understand that the Morro Bay City Council unanimously agreed to upgrade the Morro Bay/Cayucos Sanitary District Wastewater Treatment Plant to "meet tertiary standards with the intention to move towards reclamation" at its May 29, 2007 meeting. Further, the USFWS December 21, 2007 concurrence letter states, "our [USFWS] office believes this decision [to upgrade the plant to provide tertiary treatment] has significant potential to minimize the concern regarding possible effects on the otter. Proceeding to tertiary treatment would result in reduced loadings of a wide range of pollutants to the environment....The applicants' progress toward implementing their present commitment to tertiary treatment will also be a significant

[4] As defined by the California Health Laws Related to Recycled Water "The Purple Book," or Section 60301.230 of the California Water Code.